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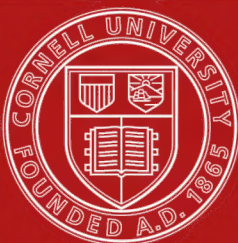
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CYCLOPEDIA

OF THE LAW OF

PRIVATE CORPORATIONS

By WILLIAM MEADE FLETCHER

Author of "Corporation Forms," "Illinois Corporations," "Equity
Pleading and Practice," etc.

IN EIGHT VOLUMES

VOLUME III

CHICAGO
CALLAGHAN AND COMPANY
1917

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PRIVATE CORPORATIONS

VOLUME III

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PRIVATE CORPORATIONS

VOLUME III

CHAPTER 34

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I. GENERAL CONSIDERATIONS

§ 1265. Scope of chapter. This chapter is intended to include a statement and discussion of the rules more or less peculiar to mortgages by corporations and their enforcement, as distinguished from mortgages by individuals or others. Many of the rules governing both real estate and chattel mortgages, and their enforcement, are precisely the same, regardless of whether the mortgagor is a corporation or not. Such rules will not be noticed in this chapter, or at least only incidentally, except where the application of the rule to corporate mortgages is worthy of consideration, but reference should be made to statutes governing mortgages and trust deeds in general and to standard textbooks on the subjects of mortgages and foreclosures.

In subsequent volumes are considered the effect of mortgages and bonds executed and issued while the company is contemplating insolvency, as a preference of creditors;¹ the appointment of receivers and the effect thereof;² the reorganization of corporations as a part of and following the foreclosure of corporate mortgages;³ and other matters where corporate mortgages are incidentally involved.

II. POWER TO MORTGAGE

§ 1266. Implied power—Corporations other than quasi public corporations. Mortgaging is an alienation for the reason that such an instrument may culminate in the absolute alienation of the property.⁴ It follows that if a corporation has power to alienate its property,⁵ it has power to mortgage it, subject to exceptions herein-after noted, where there is no charter provision to the contrary; and, vice versa, if there is no power to alienate there is ordinarily no power to mortgage.⁶

In the absence of charter or statutory restrictions,⁷ and provided no

¹ Chapter on Insolvency, *infra*.

² Chapter on Receivers, *infra*.

³ Chapter on Reorganization, *infra*.

⁴ *Kavanaugh v. St. Louis*, 220 Mo. 496, 509, 119 S. W. 552.

⁵ See Chap. 32.

⁶ As to the latter proposition, however, there is some conflict of opinion. See § 1270, *infra*.

⁷ See § 1276, *infra*.

rule of public policy is violated,⁸ a corporation other than a quasi public corporation has the same power as a natural person to mortgage its property, real or personal, as security for any debt which it may lawfully contract.⁹

⁸ See § 1276, *infra*.

⁹ **United States.** *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Leo v. Union Pac. Ry. Co.*, 17 Fed. 273.

Alabama. *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229; *State v. Rice*, 65 Ala. 83; *Allen v. Montgomery R. Co.*, 11 Ala. 437.

Connecticut. *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597.

Illinois. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *West v. Madison County Agricultural Board*, 82 Ill. 205; *Aurora Agricultural & Horticultural Soc. of Aurora v. Paddock*, 80 Ill. 264.

Indiana. *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

Iowa. *Warfield v. Marshal County Canning Co.*, 72 Iowa 666, 2 Am. St. Rep. 263, 34 N. W. 467; *Thompson v. Lambert*, 44 Iowa 244.

Kentucky. *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, modifying 48 S. W. 440; *Bardstown & L. R. Co. v. Metcalf*, 4 Metc. 199, 206, 81 Am. Dec. 541.

Maryland. *Howeth v. Colbourne Bros. Co.*, 115 Md. 107, 80 Atl. 916; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; *Susquehanna Bridge & Bank Co. v. General Ins. Co.*, 3 Md. 305, 56 Am. Dec. 740.

Massachusetts. *Hendee v. Pinkerton*, 14 Allen 381; *Burrill v. Nahant Bank*, 2 Metc. 163, 35 Am. Dec. 395.

Michigan. *Eureka Iron & Steel Works v. Bresnahan*, 60 Mich. 332, 27 N. W. 524; *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039; *Joy*

v. Jackson & M. Plank Road Co., 11 Mich. 155.

New Hampshire. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. *Ammerman v. Wiles*, 24 N. J. Eq. 13; *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York. *New Britain Nat. Bank v. A. B. Cleveland Co.*, 158 N. Y. 722, 53 N. E. 1128, aff'g 91 Hun 447, 36 N. Y. Supp. 387; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190; *Nelson v. Eaton*, 26 N. Y. 410; *King v. Merchants' Exch. Co.*, 5 N. Y. 547; *Beebe v. Richmond Light, Heat & Power Co.*, 13 Misc. 737, 35 N. Y. Supp. 1; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280; *Jackson v. Brown*, 5 Wend. 590.

North Carolina. *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453; *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143, 20 S. E. 366.

Ohio. *Burt v. Rattle*, 31 Ohio St. 116.

Pennsylvania. *Union Trust Co. of Pittsburgh v. Mercantile Library Hall Co.*, 189 Pa. St. 263, 42 Atl. 129; *Gordon v. Preston*, 1 Watts 385, 26 Am. Dec. 75.

Virginia. *Burr's Ex'r v. McDonald*, 3 Gratt. 215.

Wisconsin. *Lehigh Valley Coal Co. v. West Depere Agricultural Works*, 63 Wis. 45, 22 N. W. 831.

England. *In re Patent File Co.*, 6 Ch. App. 83.

"Generally speaking, a corporation, as to persons dealing with it in good faith, may give its obligations and secure the same by a mortgage as freely as a natural person." *Eastman*

This power to mortgage property is implied in the absence of restrictions, and need not be expressly conferred, as has sometimes been contended.¹⁰ "The power to mortgage, when not expressly given or denied, must be regarded as an incident to the power to acquire and hold real estate and make contracts."¹¹

The corporation may mortgage its property by giving an absolute conveyance or bill of sale as security,¹² and may give security on its property in the form of a trust deed.¹³

This power to mortgage is also often held to result as an incident to or to be implied from the existence of certain other implied powers. Thus, the power to borrow money carries with it by implication the power to secure the loan by mortgage.¹⁴ And if a corporation is given the power generally to sell or dispose of its property, this gives it the power to mortgage it.¹⁵

§ 1267. — Quasi public corporations. As a general rule, quasi public or public service corporations cannot transfer property necessary for the conducting of their business, unless authorized so to do by their charter or some statute,¹⁶ and this includes a transfer of their franchises.¹⁷

v. Parkinson, 133 Wis. 375, 13 L. R. A. (N. S.) 921, 113 N. W. 649.

A mining company has implied power to mortgage. *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94.

An educational corporation has implied power to mortgage its buildings to pay for the construction thereof. *Collier v. Myers*, 14 Tex. Civ. App. 312, 37 S. W. 183.

¹⁰ *In re Patent Fire Co.*, 6 Ch. App. 83.

¹¹ *Aurora Agricultural & Horticultural Soc. of Aurora v. Paddock*, 80 Ill. 264.

¹² *Deffell v. White*, L. R. 2 C. P. 144; *Shears v. Jacob*, L. R. 1 C. P. 513.

¹³ *United States. Old Colony Trust Co. v. Wichita*, 123 Fed. 762.

Colorado. Lamar Land & Canal Co. v. Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210.

Illinois. Unity Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. 654.

Kentucky. Fidelity Trust Co. v. National Coal & Iron Co., 28 Ky. L. Rep. 578, 89 S. W. 718.

Missouri. Riesterer v. Horton Land & Lumber Co., 160 Mo. 141, 61 S. W. 238; *Hasbrouck v. Rich*, 113 Mo. App. 389, 88 S. W. 131.

Texas. Clark v. Elmendorf (Tex. Civ. App.), 78 S. W. 538.

¹⁴ *Alabama. Kelly v. Alabama & C. R. Co.*, 58 Ala. 489.

Maryland. Susquehanna Bridge & Bank Co. v. General Ins. Co., 3 Md. 305, 56 Am. Dec. 740.

New Hampshire. Richards v. Merri-mack & C. R. R. R., 44 N. H. 127.

New York. Nelson v. Eaton, 26 N. Y. 410.

North Carolina. Wall v. Rothrock, 171 N. C. 388, 88 S. E. 633.

¹⁵ See § 1270, *infra*.

¹⁶ See §§ 1216-1220, *supra*. See also chapter on Public Utility Regulations, *infra*.

¹⁷ See Chap. 32.

The same rules have been held to apply to mortgages of their tangible property¹⁸ and of their franchises,¹⁹ since, as was said by Judge Hoar in a Massachusetts case, "the power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure."²⁰

This rule has been applied, for the most part, to railroad companies; and it is generally held that, unless authorized by charter or statute, railroad companies have no power to mortgage their tangible property²¹ or franchises.²²

However, this rule does not apply where a corporation purchases its franchises under legislative authority, and mortgages them to secure payment of the purchase price, since the power to give such a mortgage is implied from the power to purchase.²³ Nor does the rule apply to a mortgage of property not connected with or used in the business of the company,²⁴ such as property not necessary to the operation of a railroad.²⁵

On the other hand, there is considerable authority to the contrary

¹⁸ *Richards v. Merrimack & C. R. R.*, 44 N. H. 127, 136.

¹⁹ *New Orleans, S. F. & L. R. Co. v. Delamore*, 34 La. Ann. 1225; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Richards v. Merrimack & C. R. R.*, 44 N. H. 127, 136; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315.

"A corporation, without some statute allowing it, can neither sell nor mortgage its franchises." *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43.

²⁰ *Com. v. Smith*, 10 Allen (Mass.) 448, 455, 87 Am. Dec. 672.

²¹ *State v. Mexican Gulf R. Co.*, 3 Rob. (La.) 513; *State v. Morgan*, 28 La. Ann. 482; *Daniels v. Hart*, 118 Mass. 543; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

²² *Daniels v. Hart*, 118 Mass. 543; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Pierce v. Emery*, 32 N. H. 484, 508.

"The power of a railway corporation to execute a mortgage of its fran-

chises, or of corporate property essential to its operations, must, by the great weight of authority, be expressly conferred. Such a power is generally implied when the corporation is one strictly private, as a factory or mill. The reason for the distinction is found in the nature of the obligations and duties imposed upon a corporation in many respects a public corporation. Such a corporation cannot, without express authority, abdicate the functions and duties imposed for public purpose, by either a sale or a lease. For the same reason, it may not make a mortgage, for a foreclosure would bring about a sale and abandonment of its powers and responsibilities." *Frazier v. East Tennessee, V. & G. Ry. Co.*, 88 Tenn. 138, 12 S. W. 537.

²³ *Memphis & L. R. R. Co. v. Dow*, 19 Fed. 388.

²⁴ General rule as to power to alienate such property, see § 1216, *supra*.

²⁵ *Platt v. Union Pac. R. R. Co.*, 99 U. S. 48, 25 L. Ed. 424; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381.

which holds that quasi public corporations have implied power to mortgage as well as other corporations,²⁶ except perhaps in the case of railroad companies. Thus, it has been held that a gas company has implied power to mortgage its property;²⁷ that a water company may mortgage its street franchises;²⁸ and that an irrigation company may mortgage its property.²⁹ And in New Hampshire, it is held that electric light and power companies have implied power to mortgage both their tangible property and their secondary franchises; and in so holding, the court said: "Whether the secondary franchises of a quasi public corporation—the franchises other than that of being a corporation—and the property required for the fulfillment of the public purposes of the corporation may be mortgaged, depends upon the terms upon which the franchises are granted, 'or, in the absence of anything special in the grant itself, upon the intention of the legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the state.'"³⁰ It was held by two judges in a Michigan decision that a plank road company has implied power to mortgage its property and secondary franchises.³¹ Moreover, even in case of railroad companies, the rule against implied power to mortgage has not been followed or has expressly been rejected as unsound in several jurisdictions.³²

²⁶ See *Enders v. Board of Public Works*, 1 Gratt. (Va.) 364, holding, in effect, but without specific mention thereof, that a public dock company may mortgage its property.

²⁷ *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039, property and franchises; *Hays v. Galion Gas Light & Coal Oil Co.*, 29 Ohio St. 330, 337, in which case, however, nothing is said about quasi public corporations and the gas company was treated in the same manner as any other strictly private business corporation; *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006.

²⁸ *Farmers' Loan & Trust Co. v. Meridian Waterworks Co.*, 139 Fed. 661.

²⁹ *Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 133 Pac. 899.

³⁰ *American Loan & Trust Co. v.*

General Elec. Co., 71 N. H. 192, 51 Atl. 660.

³¹ *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155, decision of Justice Christiancy.

³² *United States*. See *New Orleans, S. F. & L. R. R. v. Delamore*, 114 U. S. 501, 29 L. Ed. 244, decided under Louisiana law but under statute expressly conferring power to mortgage.

Alabama. *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 So. 751; *Kelly v. Alabama & C. R. Co.*, 58 Ala. 489. See also *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555, sometimes cited as so holding but which clearly cannot be so construed.

Kentucky. *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. 199, 206, 81 Am. Dec. 541.

Maine. See dicta in *Kennebec & P. R. R. Co. v. Portland & K. R. Co.*, 59

In Massachusetts, it was held that a corporation organized to supply heat by the circulation of hot water through pipes to be laid in the streets of a city was not a quasi public corporation, and hence had power to mortgage its property.³³

If the mortgage is authorized as to the tangible property of the railroad company but is unauthorized so far as it covers its franchises, it is valid as to the former.³⁴

It has also been held that a cemetery company cannot mortgage land dedicated to burial purposes.³⁵

In connection with the power of public service corporations to mortgage their property attention should be paid to the specific and stringent regulations which have been adopted by recent legislation in most of the states with regard to the ownership, use, alienation and encumbrance of property by corporations of this class which will be considered in a subsequent chapter.^{35a}

§ 1268. — Franchise to exist as a corporation. The authorities agree that the franchise to exist as a corporation, as defined in another chapter,³⁶ cannot be mortgaged,³⁷ at least in the absence of express statutory authority therefor.³⁸ This is so, even where a statute expressly authorizes a mortgage of the property of the corporation.³⁹

§ 1269. — As dependent on purpose. A corporation can mortgage its property only for a purpose within the scope of its charter powers. But it has been held that where a corporate mortgage is

Me. 9, and *Shepley v. Atlantic & St. L. R. Co.*, 55 Me. 395, 407.

Vermont. See *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 491-494.

"We see nothing in the nature of their business [railroads], or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it." *Pierce v. Emery*, 32 N. H. 484, 504.

³³ *Evans v. Boston Heating Co.*, 157 Mass. 37, 31 N. E. 698.

³⁴ *Gloninger v. Pittsburg & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211.

³⁵ *Wolford v. Crystal Lake Cemetery Ass'n*, 54 Minn. 440, 56 N. W. 56.

^{35a} See chapter on Governmental Regulations, *infra*.

³⁶ See Chap. 31.

³⁷ *State v. Topeka Water Co.*, 61 Kan. 547, 558, 60 Pac. 337; *Chadwick v. Old Colony R. Co.*, 171 Mass. 239, 50 N. E. 629; *City Water Co. v. Texas*, 88 Tex. 600, 32 S. W. 1033.

³⁸ *City Water Co. v. State*, 88 Tex. 600, 32 S. W. 1033.

"Such a power could hardly be implied in any case, and to authorize such a construction the language ought to be very plain and express; and it would at least be natural to expect, if such were the intention, some legislative provision for the mode of carrying it into effect." *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155, 156, 173.

³⁹ *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 389, 75 Am. Dec. 518.

executed to raise funds for another corporation, it is nevertheless valid where the mortgagee did not know that the money loaned was to be used for other than legitimate corporate purposes.⁴⁰

A mortgage may be a valid lien so far as given to secure a valid contract although void so far as it secures an ultra vires loan.⁴¹

§ 1270. Power as implied from express grant of other powers.

In the case of corporations other than quasi public corporations, it has been noticed that the power to mortgage is implied from the power to borrow or contract, and that inasmuch as both the powers to borrow and to make contracts generally need not be expressly conferred, it is not necessary to look to the charter or statutes to find authority for a strictly private corporation to execute a mortgage. At the same time, the courts, in some instances, have, instead of boldly stating this implied power, deduced its existence from other express charter or statutory powers.⁴²

However, the question whether the power to mortgage may be implied from an express grant of other powers generally arises in connection with some quasi public corporation, where the implied power to mortgage, independently of other charter or statutory powers, is not recognized.

Certain rules seem to be quite fully settled. For instance, if the corporation is expressly authorized to sell, transfer or dispose of its property, the power to mortgage it is implied, on the theory that the greater includes the less.⁴³ Thus, power to "transfer all its property,

⁴⁰ Union Trust Co. of Pittsburgh v. Pittsburgh-Buffalo Co., 251 Pa. 1, 95 Atl. 855.

⁴¹ Calumet & C. Canal & Dock Co. v. Conkling, 273 Ill. 318, 112 N. E. 982.

⁴² Under a charter granting to a manufacturing company "all the powers incident, necessary and useful to corporations," it may execute a purchase price chattel mortgage. Badger v. Batavia Paper Mfg. Co., 70 Ill. 302.

⁴³ United States. Willamette Mfg. Co. v. Bank of British Columbia, 119 U. S. 191, 30 L. Ed. 348; Platt v. Union Pac. R. Co., 99 U. S. 48, 25 L. Ed. 424; Gaytes v. Lewis, 2 Biss. 136, Fed. Cas. No. 5,288; Branch v. Atlantic & G. R. Co., 3 Woods 481, Fed. Cas. No. 1,807.

Indiana. Taber v. Cincinnati, L. & C. Ry. Co., 15 Ind. 459.

Maryland. Booth v. Robinson, 55 Md. 419.

Massachusetts. East Boston Freight R. Co. v. Eastern R. Co., 13 Allen 422.

Mississippi. McAllister v. Plant, 54 Miss. 106.

Pennsylvania. In re Watt's Appeal, 78 Pa. St. 370, 391; Gordon v. Preston, 1 Watts 388, 26 Am. Dec. 75.

For the application of the rule to railroad companies, see Branch v. Atlantic & G. R. Co., 3 Woods (U. S.) 481, Fed. Cas. No. 1,807.

Where a statute conferred power to "use, rent or sell," the court said: "It is hardly necessary to say that this right to sell in these general and

rights, privileges and franchises" includes power to mortgage railroad property and franchises.⁴⁴ And where public lands are granted a railway company, and certain provisions are made as to parts thereof "not sold or disposed of" within a certain time after the completion of the road, the term "disposed of" authorizes a mortgage.⁴⁵

Corporate power conferred on a mining company to subscribe for stock in transportation companies, so far as necessary to procure proper transportation facilities, authorizes a mortgage to guaranty the bonds of a railroad company to enable the latter to provide such transportation.⁴⁶

Power to purchase real estate includes power to assume a mortgage on real estate bought.⁴⁷

§ 1271. Statutory authority—In general. The question whether a corporation has power to execute a mortgage has seldom arisen in recent years, for the reason that statutes in most of the states now expressly authorize the execution of corporate mortgages, at least under certain conditions. Thus, statutes in some states expressly authorize "all" corporations to mortgage their property and franchises,⁴⁸ and it is held in such cases that this includes corporations created for a public purpose, such as railroad corporations⁴⁹ and gas companies.⁵⁰ Other statutes apply only to corporations that may be formed under the general incorporation law.⁵¹

Still other statutes expressly authorize railroad companies to mortgage their tangible property or property and franchises,⁵² while other

strong terms, or to rent or to use it, must include the power to mortgage it. A mortgage is in effect a sale with a power of defeasance, which may ultimately end in an absolute transfer of the title. This language is in its nature inconsistent with a limitation upon the power of the company to transfer its rights and privileges." *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. 191, 30 L. Ed. 384.

⁴⁴ *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422, 426.

⁴⁵ *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 25 L. Ed. 424.

⁴⁶ *Central Trust Co. of New York v. Columbus, H. V. & T. Ry. Co.*, 87 Fed. 815.

⁴⁷ *Woods Inv. Co. v. Palmer*, 8 Colo. App. 132, 45 Pac. 237.

⁴⁸ *Baker v. Guarantee Trust & Safe Deposit Co.* (N. J. Ch.), 31 Atl. 174.

⁴⁹ *Baker v. Guarantee Trust & Safe Deposit Co.* (N. J. Ch.), 31 Atl. 174.

⁵⁰ *Threadgill v. Pumphrey*, 87 Tex. 573, 30 S. W. 356.

⁵¹ *American Waterworks Co. of Illinois v. Farmers' Loan & Trust Co.*, 73 Fed. 956, Illinois statute.

⁵² *United States*. *New Orleans, S. F. & L. R. R. Co. v. Delamore*, 114 U. S. 501, 29 L. Ed. 244, quoting Louisiana statute; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124, construing Iowa statutes.

California. *McLane v. Placerville & S. Val. R. Co.*, 66 Cal. 606, 6 Pac. 758.

statutes expressly authorize street railroad companies to mortgage their property and franchises.⁵³

By some statutes corporations may execute a bond which shall be a mortgage by virtue of the statute and without any independent mortgage.⁵⁴ These statutes are generally so worded that there can be no question as to their meaning, except, in some instances, as to whether the power to mortgage franchises is included.⁵⁵

Power conferred on a railroad company to borrow money, etc., and to execute "such securities in amount and kind," as it might deem expedient, includes power to mortgage all the railroad property.⁵⁶ And power conferred on railroad companies to issue bonds to be "secured in such manner as they deem expedient," includes power to mortgage.⁵⁷

Furthermore, unless so required by statute, the statutory power to mortgage is not lost or restricted by a failure to claim it in the articles of incorporation.⁵⁸

A heating company has been held to have power to mortgage its real property where the governing statute, although not expressly authorizing it, provides that no real estate mortgage shall be made unless authorized by a vote of the stockholders.⁵⁹

In determining the power to make a mortgage, the federal courts are bound by the decisions of the state courts in so far as they construe state statutes in regard thereto.⁶⁰

Indiana. *Taber v. Cincinnati, L. & C. Ry. Co.*, 15 Ind. 459.

Iowa. *Beach v. Wakefield*, 107 Iowa 567, 78 N. W. 197, 76 N. W. 688.

Louisiana. *State v. Morgan*, 28 La. Ann. 482.

Maine. *Bath v. Miller*, 51 Me. 341.

Massachusetts. *Chadwick v. Old Colony R. Co.*, 171 Mass. 239, 50 N. E. 629.

Ohio. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

Texas. *Houston & T. C. R. Co. v. Shirley*, 54 Tex. 125.

For special statutes, see *Pennock v. Coe*, 23 How. (U. S.) 117, 16 L. Ed. 436; *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 69 Fed. 658.

Where there is express power to mortgage, there need be no express power to borrow money and issue

bonds. *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211, 27 Wkly. Notes Cas. (Pa.) 497.

⁵³ *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469, 93 N. W. 766.

⁵⁴ *State v. Florida Cent. R. Co.*, 15 Fla. 690.

⁵⁵ See § 1272, *infra*.

⁵⁶ *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551, 1 Am. Rep. 203.

⁵⁷ *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 476.

⁵⁸ *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124. To the same effect, as to after-acquired property, see *Central Trust Co. of New York v. Chattanooga, R. & C. R. Co.*, 94 Fed. 275.

⁵⁹ *Evans v. Boston Heating Co.*, 157 Mass. 37, 31 N. E. 698.

⁶⁰ *Sioux City Terminal Railroad &*

§ 1272. — **Mortgage of franchises.** Although there is some authority to the contrary,⁶¹ it is generally held that express statutory authority conferred upon corporations to mortgage their "property" includes power to mortgage their secondary franchises, including the franchise to use the streets of a municipality.⁶²

In other words, it is generally held that when the power to mortgage is conferred in broad and general terms, without any express restriction or limitation, it is to be construed as authorizing the mortgage of the corporation's franchises and special privileges, as well as of its other property.⁶³

This rule has been applied to mortgages of street franchises by a water company. For instance, a water company, under statutory power to mortgage "such real and personal estate as the purposes of the corporation shall require," may mortgage its franchise granted by the municipality, including the right to use streets and to supply the municipality with water.⁶⁴

A street car company has power to mortgage its franchise to use streets, granted by a municipality, where a statute provides that "every corporation" has power to "mortgage such real and personal estate as the purposes of the corporation shall require."⁶⁵

The franchise of a railroad company to do an intrastate business may be mortgaged.⁶⁶ Likewise, a statute giving power to mortgage

Warehouse Co. v. Trust Co. of North America, 82 Fed. 124.

⁶¹ Missouri Pac. R. Co. v. Owens, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 385.

Power conferred on railroad companies to mortgage their "road, income and other property" does not include power to mortgage their franchises. Pullan v. Cincinnati & C. Air-Line R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11,461.

Power to mortgage its real estate does not include power to mortgage its franchises. Randolph v. Wilmington & R. R. Co., Fed. Cas. No. 11,563, 11 Phila. (Pa.) 502.

⁶² Blackman v. Selma, M. & M. R. Co., 2 Flip. (U. S.) 525, Fed. Cas. No. 1,467; State v. Topeka Water Co., 61 Kan. 547, 558, 60 Pac. 337; Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W.

552, following Hovelman v. Railroad Co., 79 Mo. 643; Threadgill v. Pumphrey, 87 Tex. 573, 30 S. W. 356.

⁶³ Thus it has been held that a railroad company is authorized to mortgage its franchises as well as its other property under a grant of power to borrow money and secure payment thereof by "such securities in amount and kind" as may be deemed expedient. Pierce v. Milwaukee & St. P. R. Co., 24 Wis. 551, 1 Am. Rep. 203. See also Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 82 Fed. 124.

⁶⁴ State v. Topeka Water Co., 61 Kan. 547, 60 Pac. 337.

⁶⁵ Kavanaugh v. St. Louis, 220 Mo. 496, 510, 119 S. W. 552, following Hovelman v. Railroad, 79 Mo. 643.

⁶⁶ State v. Roach, 267 Mo. 300, 184 S. W. 969.

“the road or other property” of a railroad company includes its secondary franchises.⁶⁷ And power conferred upon a railroad company to mortgage its “entire road, fixtures and equipments, with all the appurtenances” and also the “income and resources” includes power to mortgage its secondary franchises.⁶⁸

Power to mortgage franchises embraces all the franchises of the company necessary to make the security available, i. e., so far as necessary to make the other property and effects conveyed, productive and profitable.⁶⁹ Thus, in the case of a railroad, it undoubtedly includes power to mortgage the franchises of occupying with the railroad the lands of other persons over which it is constructed, of operating engines and cars thereon over such lands, and of taking tolls, fares and freights for transportation of persons and chattels.⁷⁰

On the other hand, such power does not include authority to mortgage the franchise to exist as a corporation.⁷¹

Statutory power conferred on a street railway company to mortgage its secondary franchises is not abrogated by an ordinance providing that a consent to use the streets shall never authorize any other railroad company to use the franchise therein granted.⁷²

The fact that a municipality makes its street franchises personal to the grantee does not preclude the state, through its legislature, from authorizing street railway companies to mortgage their property and franchises.⁷³

Statutes authorizing the mortgaging of franchises are generally held to be retroactive.⁷⁴

§ 1273. — Extent of power. Express power conferred on a corporation to mortgage its property includes power to mortgage all its property as well as a part,⁷⁵ or, it would seem, a part of its property

⁶⁷ *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155.

⁶⁸ *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 390, 75 Am. Dec. 518.

⁶⁹ *Meyer v. Johnston*, 53 Ala. 237.

⁷⁰ *Meyer v. Johnston*, 53 Ala. 237.

⁷¹ *Meyer v. Johnston*, 53 Ala. 237. See also § 1224, *supra*.

⁷² “If such mortgage should thereafter have to be foreclosed, the purchaser at such sale would run the risk of getting the city’s consent to operate the purchased property.” *Wells v. Northern Trust Co.*, 195 Ill. 288, 63 N. E. 136, *aff’d* 90 Ill. App. 460.

⁷³ *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469, 480, 93 N. W. 766.

⁷⁴ *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199, construing Texas statute.

⁷⁵ *Pumphrey v. Threadgill*, 9 Tex. Civ. App. 184, 28 S. W. 450; *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551, 1 Am. Rep. 203.

But a statute authorizing a mortgage of “the original road” and “of the extension” does not authorize a railroad mortgage of the whole road as a unit. *Bath v. Miller*, 51 Me. 341.

as well as all.⁷⁶ So general power to mortgage the property includes both real and personal property,⁷⁷ and future earnings and acquisitions, as well as those of property already acquired.⁷⁸ But if the statute authorizes a mortgage upon "real estate and machinery" or on "real estate alone," an apartment house company cannot mortgage its personal property other than machinery.⁷⁹

In Pennsylvania, however, there can be no chattel mortgage unless possession is transferred; and hence a manufacturing company cannot mortgage raw materials and finished product to be made in the future.⁸⁰

Statutory authority to mortgage the "railroad, its property and franchises" includes authority to mortgage unpaid stock subscriptions.⁸¹ A grant of power to mortgage or pledge gives the power to give a deed of trust as security,⁸² and to give a mortgage with a power of sale.⁸³ The power granted to a corporation to mortgage its franchise necessarily embraces power to authorize sale thereof and to provide for the passing of title to the purchaser.⁸⁴

§ 1274. — As dependent on purpose. Power conferred upon a corporation to mortgage its property to secure the payment of any debt which may be contracted by it in its legitimate business is not limited to debts contracted before the mortgage is given, but authorizes a mortgage to secure a debt simultaneously contracted,⁸⁵ or to secure future advances,⁸⁶ such as a mortgage to secure the payment of bonds to be afterwards issued.⁸⁷ And it authorizes a mortgage to secure

⁷⁶ Pullan v. Cincinnati & C. Air-Line R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11,461; East Boston Freight R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422; Joy v. Jackson & M. Plank Road Co., 11 Mich. 155. And see Upson County R. Co. v. Sharman, 37 Ga. 644; Greensburgh, M. & H. Turnpike Co. v. McCormick, 45 Ind. 239.

⁷⁷ Pierce v. Milwaukee & St. P. R. Co., 24 Wis. 551, 1 Am. Rep. 203. Contra, in Pennsylvania, In re Roberts' Appeal, 60 Pa. St. 400.

⁷⁸ See § 1279, *infra*.

⁷⁹ Klaus v. Majestic Apartment House Co., 250 Pa. 194, 212, 219, 95 Atl. 451.

⁸⁰ In re R. G. Wunderly Co., 192 Fed. 417, holding that the 1905 statute does not change rule.

⁸¹ Eckstein, Norton & Co. v. Meyer & Hay, 2 Ky. L. Rep. 124.

⁸² Pullan v. Cincinnati & C. Air-Line R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11,461.

⁸³ Joy v. Jackson & M. Plank Road Co., 11 Mich. 155; Willink v. Morris Canal & Banking Co., 4 N. J. Eq. 377.

⁸⁴ Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253, the court pointing out that the sale of the franchise would not necessarily affect the existence of the corporation.

⁸⁵ Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909.

⁸⁶ Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 25 L. Ed. 1030.

⁸⁷ Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909, in effect over-

a loan of money to pay debts of the corporation, where the money is so applied.⁸⁸

A mortgage issued to refund a purchase money debt is in effect the same as executing a mortgage to borrow money to pay the outstanding debt, and is authorized by a statute authorizing corporations to borrow money and secure the debt by a mortgage.⁸⁹

However, statutory power conferred on corporations to mortgage their real and personal property does not authorize corporations to mortgage their property for all conceivable purposes and under all circumstances.⁹⁰

In determining whether the purpose for which a mortgage is given by a corporation is within the power conferred upon it by its charter, the general object of the grant of power is to be regarded, rather than the strict letter of the charter.⁹¹ Thus, it has been held that a grant to a corporation of power to mortgage its property for the purpose of securing the purchase money and erecting a certain building authorizes a mortgage to secure payment of claims for work done and materials furnished in erecting the building;⁹² and that a turnpike company, authorized to borrow money for use in constructing its road, and to mortgage its road to secure payment thereof, may mortgage its road to secure payment of money due to a contractor for construction of the road.⁹³ Power conferred on a railroad company to mortgage its property "for the purpose of carrying out the privileges granted by" the charter, is not limited to a mortgage to aid in constructing the road.⁹⁴

If the statute gives a railroad company power to mortgage for only one purpose, such as that of completing and equipping its lines, then,

ruling to this extent, *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43.

⁸⁸ *Rochester Sav. Bank v. Averell*, 96 N. Y. 467.

⁸⁹ *Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co.*, 127 Fed. 625.

⁹⁰ *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067. Compare *Brown v. State*, 62 Md. 439.

A mortgage by a business corporation of all its property to secure its creditors does not violate a statute prohibiting such a corporation from mortgaging its property for any other

than the legitimate purposes of its business. *New Britain Nat. Bank v. A. B. Cleveland Co.*, 158 N. Y. 722, 53 N. E. 1128, aff'g 91 Hun (N. Y.) 447, 36 N. Y. Supp. 387.

⁹¹ *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Miller v. Chance*, 3 Edw. Ch. (N. Y.) 399.

⁹² *Miller v. Chance*, 3 Edw. Ch. (N. Y.) 399.

⁹³ *Greensburgh, M. & H. Turnpike Co. v. McCormick*, 45 Ind. 39.

⁹⁴ *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 26, 21 Atl. 211, 27 Wkly. Notes Cas. 497.

of course, it cannot mortgage for other purposes, if it be conceded that a railroad company has no implied power to mortgage.⁹⁵

Where a statute expressly forbidding mortgages of corporate property is repealed in part by a statute authorizing mortgages of real estate to secure the payment of debts, a mortgage cannot be made merely to carry on the operations of the company.⁹⁶ However, general power given by statute to execute corporate mortgages is not restricted as to the purposes for which they may be executed by a charter provision limiting the purpose for which bonds may be executed.⁹⁷

§ 1275. — Power as exhausted by executing one mortgage.

Where a special right to mortgage was given by statute, as where the right was to increase the capital by the issuance of bonds secured by mortgage in a sum sufficient to complete the railroad, and stock it with everything to give it full operation, executing a mortgage thereunder exhausts such power.⁹⁸

§ 1276. Statutory prohibition or restriction—In general.

Of course statutory prohibitions or restrictions may affect the implied or statutory power to execute mortgages. Thus, a statute broadly conferring power on all corporations to mortgage their property and franchises is limited by a statute applicable to a certain class of corporations and confining the right to mortgages to borrow money for certain specified purposes.⁹⁹

It is held in Illinois that charter limitations upon any alienation of the real property of the corporation apply as well to an alienation by mortgage as by absolute conveyance,¹ but in Iowa it is held that a prohibition against a sale of its property by a corporation does not prohibit a mortgage to secure a bona fide debt.²

In Massachusetts, it is held that where a statute prohibits leases or

⁹⁵ *Frazier v. East Tennessee, V. & G. Ry. Co.*, 4 Pickle (Tenn.) 138, 12 S. W. 537.

⁹⁶ *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43.

⁹⁷ *Brown v. Citizens' Ice & Cold Storage Co.*, 72 N. J. Eq. 437, 66 Atl. 181.

⁹⁸ *East Tennessee, V. & G. R. Co. v. Frazier*, 139 U. S. 288, 35 L. Ed. 196. Compare, however, *Du Pont v. Northern Pac. R. Co.*, 18 Fed. 467, where an act of congress giving the

Northern Pacific road a general power to mortgage "to aid in the construction and equipment of its road" was held to authorize more than one mortgage.

⁹⁹ *Baker v. Guarantee Trust & Safe Deposit Co.* (N. J. Ch.), 31 Atl. 174.

¹ *Mannhardt v. Illinois Staats Zeitung Co.*, 90 Ill. App. 315.

² *Krider v. Western College*, 31 Iowa 547; *Middleton Sav. Bank v. Dubuque*, 15 Iowa 394.

sales by street railroad corporations of "its road or property," such prohibition extends to a mortgage not only of the franchises but also of the tangible property of the corporation.³

A special grant to a corporation of power to mortgage its property for a particular purpose does not impliedly take away its general power to execute a mortgage to secure its debts.⁴ And a prohibition against the mortgaging of its property by a corporation applies only to property which it owns, and does not prohibit the corporation from purchasing property and giving a mortgage thereon to secure the price.⁵

While a street railway remains solvent, the execution by it of a mortgage on its property, in due course of business, does not violate a constitutional provision prohibiting a corporation from alienating its franchises in such manner as to release the franchises or property held under the franchises, from liabilities of the corporation incurred in the operation or enjoyment of the franchises.⁶

§ 1277. — Limitations as to amount. The power to mortgage may be limited as to amount by statute or the charter. For instance, it is sometimes provided that mortgages shall not be in excess of the amount of the capital stock; and the fact that part of the bonds are to be issued in the future, and that it may be that when they are issued the capital stock of the company or the value of its property may have been so increased as to authorize a mortgage for even a greater amount than the amount of the mortgage, is immaterial where the mortgage authorizes the issue of bonds on the assent of two-thirds in amount of the stockholders, without reference to the capital stock of the company or the value of its property.⁷

Whether a mortgage above the debt limit is void depends largely on the wording of the particular statute.⁸ Generally, it is held that such a mortgage is binding on the corporation,⁹ and that neither the cor-

³ *Richardson v. Sibley*, 11 Allen (Mass.) 65, 70, 87 Am. Dec. 700.

⁴ *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472; *Allen v. Montgomery R. Co.*, 11 Ala. 437.

⁵ *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377.

⁶ *Central Trust Co. of New York v. Warren*, 121 Fed. 323, construing Montana statute.

⁷ *Flynn v. Coney Island & B. R. Co.*,

26 N. Y. App. Div. 416, 50 N. Y. Supp. 74.

⁸ See generally § 1271, *supra*.

⁹ *Underhill v. Santa Barbara Land, Building & Improvement Co.*, 93 Cal. 300, 28 Pac. 1049. See also *Beach v. Wakefield*, 107 Iowa 567, 585-590, 78 N. W. 197, 76 N. W. 688. But see *East Boston Freight R. Co. v. Hubbard*, 10 Allen (Mass.) 459.

poration nor subsequent creditors or incumbrancers can question the validity of the mortgage on this ground.¹⁰

In Iowa it is held that a mortgage given to secure a debt in excess of the amount of indebtedness fixed by the articles of incorporation, which is forbidden by statute, is voidable but not void,¹¹ and the Supreme Court of the United States has held that it was bound by the construction of that statute by the state court.¹²

In any event, a mortgage in excess of its capital stock, forbidden by statute, is valid as against a subsequent mortgagee with notice.¹³

§ 1278. Mortgages to secure debts of officers or stockholders.

Generally, a corporation cannot lawfully mortgage its property for the individual debt of an officer or stockholder for which it is not in any way liable.¹⁴ Thus, a corporation cannot mortgage its property to secure individual debts of its stockholders incurred in the purchase of their stock, as against creditors becoming such after the mortgage was recorded.¹⁵

¹⁰ *Beach v. Wakefield*, 107 Iowa 567, 78 N. W. 197, 76 N. W. 688.

¹¹ *Garrett v. Burlington Plow Co.*, 70 Iowa 697, 59 Am. Rep. 461, 29 N. W. 395.

¹² *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 173 U. S. 99, 43 L. Ed. 628, aff'g 82 Fed. 124.

¹³ *Central Trust Co. of New York v. Columbus, H. V. & T. Ry. Co.*, 87 Fed. 815, holding that the state alone can complain, where the corporation and every stockholder consented thereto.

¹⁴ *Wheeler v. Home Savings & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28; *Minneapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127, 103 N. W. 1017, where the court declined to admit the validity of a mortgage on the corporate property for the benefit of an officer; *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067, where the court said: "It was no part of its business to become surety for the accommodation of others." But see *Osborn v. Montelac*

Park, 89 Hun (N. Y.) 167, 35 N. Y. Supp. 610, holding otherwise where rights of creditors do not intervene and stockholders do not object.

It is otherwise, however, where the corporation is itself indebted to the officer in a like amount. *Merchants' Nat. Bank v. Pomeroy Flour Co.*, 41 Ohio St. 552.

¹⁵ "But it is said that the creditors represented by the trustee in this case had knowledge of the existence of the mortgage, and must therefore have extended their credit with notice of the facts. The contention clearly embodies a non sequitur. Knowledge of the presence on the records of the mortgage does not imply notice that out of the capital or assets of the corporation the shareholders were paying their individual debts. The mortgage on file, so far as the creditors knew, may have been executed for corporate purposes, its avails remaining somewhere among the corporate assets." In re *Haas Co.*, 131 Fed. 232.

If money is borrowed for the private use of the officer to whom it is paid, and the lender has notice of that fact, the mortgage may be set aside by the corporation.¹⁶

The power of directors or other officers of a corporation which is verging on insolvency to take a mortgage to secure themselves against pre-existing liabilities is treated of in another chapter.¹⁷

A mortgage executed to secure directors or other officers is not necessarily invalid.¹⁸ Thus, a corporation may execute a mortgage to secure a director against liability which may accrue from his then indorsement of corporate notes.¹⁹

However, a mortgage cannot be made to secure to stockholders the repayment of the price of their shares.²⁰

§ 1279. After-acquired property—General rules. At common law a valid mortgage could not be made to cover after-acquired property,²¹ but in equity the rule is otherwise because what is in form a conveyance operates in equity by way of present contract merely, to take effect and attach as soon as the property comes into being.²²

In equity, the rule is too well settled to admit of controversy that if a corporation has power to execute a mortgage it has power to mortgage not only property then owned by it, but also all or any part of the property which may be subsequently acquired by the corpora-

¹⁶ Gross Iron Ore Co. v. Paulte, 132 Minn. 160, 156 N. W. 268.

¹⁷ Chapter on Insolvency, infra.

¹⁸ Singer v. Salt Lake Copper Mfg. Co., 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024. See generally Chap. 42.

¹⁹ Wall v. Rothrock, 171 N. C. 388, 88 S. E. 633.

²⁰ Reed v. Helois Carbide Specialty Co., 64 N. J. Eq. 231, 53 Atl. 1057.

²¹ "At common law it is not possible for such a rule to prevail. The common-law maxim is conclusive upon this point. *Nemo dat quod non habet.*" Emerson v. European & N. A. Ry. Co., 67 Me. 387, 391, 24 Am. Rep. 39.

"There are many instances in the decided cases where there may be some appearance of a departure from,

or a modification of this general principle of the common law, but where the results are produced by other principles not inconsistent with it. As where property has been added to property by way of accession natural or artificial, the greater taking to itself the lesser thing after the connection becomes inseparable without much injury. As where a house is built upon mortgaged land; or a fixture is added to a house; or rolling stock is put upon a railroad, and becoming a necessary part and parcel thereof." Emerson v. European & N. A. R. Co., 67 Me. 387, 391, 24 Am. Rep. 39.

²² Murray v. Farmville & P. R. Co., 101 Va. 262, 43 S. E. 553.

tion;²³ and this rule applies both to real and to personal property²⁴ and to equitable interests or titles as well as legal titles.²⁵

This rule has been applied to railroad companies,²⁶ street railway

²³ **United States.** *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124.

Illinois. *Quincy v. Chicago, B. & Q. R. Co.*, 94 Ill. 537.

Ohio. *Ludlow v. Hurd*, 1 Disney 552.

Pennsylvania. *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am. Rep. 596.

Wisconsin. *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551, 1 Am. Rep. 203.

"Where the power to mortgage exists, the right to incumber after-acquired property is necessarily included." *Beach v. Wakefield*, 107 Iowa 567, 583, 78 N. W. 197, 76 N. W. 688.

²⁴ *Stratton v. Natural Carbonic Gas Co.*, 189 Fed. 928; *Harris v. Youngstown Bridge Co.*, 90 Fed. 322; *Welch v. Pittsburgh, Ft. W. & C. R. Co.*, 2 Ohio Dec. 5.

In Massachusetts, however, after-acquired "personal" property does not become subject to the mortgage either at law or in equity. *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 45, 109 N. E. 880.

In New York, the rule does not, it seems, apply to personal property, so far as to create any lien against unsecured creditors. *MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co.*, 193 N. Y. 92, 85 N. E. 801; *Zartman v. First Nat. Bank of Waterloo*, 189 N. Y. 267, 12 L. R. A. (N. S.) 1083, 82 N. E. 127, aff'd 109 N. Y. App. Div. 406, 96 N. Y. Supp. 633.

²⁵ *Harris v. Youngstown Bridge Co.*, 90 Fed. 322.

²⁶ **United States.** *Pennock v. Coe*, 23 How. 117, 16 L. Ed. 436; *Lang v.*

Choctaw, O. & G. R. Co., 198 Fed. 38; *Compton v. Jesup*, 68 Fed. 263; *Parker v. New Orleans, B. R. & V. R. Co.*, 33 Fed. 693, under Louisiana law; *Dunham v. Earl*, Fed. Cas. No. 4,149.

Alabama. *Meyer v. Johnston*, 53 Ala. 237.

Connecticut. *Buck v. Seymour*, 46 Conn. 156.

Georgia. *McTighe v. Macon Coast Co.*, 94 Ga. 306, 32 L. R. A. 208, 47 Am. St. Rep. 153, 21 S. E. 701.

Illinois. *Quincy v. Chicago, B. & Q. R. Co.*, 94 Ill. 537.

Kentucky. *Phillips v. Winslow*, 18 B. Mon. 431, 68 Am. Dec. 729.

Michigan. *Pere Marquette R. Co. v. Graham*, 136 Mich. 444, 11 Det. L. N. 69, 99 N. W. 408.

New Jersey. *Williamson v. New Jersey S. R. Co.*, 26 N. J. Eq. 398; *Baker v. Guarantee Trust & Safe Deposit Co. (N. J. Ch.)*, 31 Atl. 174.

New York. *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. 284, 14 How. Pr. 531.

Ohio. *Coopers & Clark v. Wolf*, 15 Ohio St. 523; *Ludlow v. Hurd*, 1 Disney 552, 12 Cine. Super. Ct. 791. But see *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 390, 75 Am. Dec. 518.

Tennessee. *Clay v. East Tennessee & V. R. Co.*, 6 Heisk. 421.

A railroad mortgage covering the entire line of the road, from one end to the other, is valid although a portion of the road was not built at the time the mortgage was executed. *Central Trust Co. of New York v. Chattanooga, R. & C. R. Co.*, 89 Fed. 388, aff'd 94 Fed. 275.

In any event, charter authority to mortgage railroads "whether the road has been completed or not" has been held sufficient to permit a railroad mortgage of after-acquired property.

companies,²⁷ electric light and power companies,²⁸ gas companies,²⁹ water companies,³⁰ telephone and telegraph companies,³¹ etc. Moreover, it is difficult to understand any good reason for limiting this rule to quasi public corporations, although a federal court has held that only quasi public corporations can mortgage after-acquired personal property.³² Notwithstanding this decision, the rule has been applied to manufacturing companies,³³ quarry companies,³⁴ and other corporations not quasi public corporations.

Bell v. Chicago, St. L. & N. O. R. Co., 34 La. Ann. 785, 791.

²⁷Federal Trust Co. v. Bristol County St. R. Co., 222 Mass. 35, 43, 109 N. E. 880; Metropolitan Trust Co. City of New York v. Dolgeville Elec. Light & Power Co., 35 N. Y. Misc. 467, 71 N. Y. Supp. 1055; Haynes v. Kenosha Elec. R. Co., 139 Wis. 227, 121 N. W. 124, 119 N. W. 568.

A street car company's mortgage may include after-acquired property such as rails, although at the time the mortgage was executed the corporation possessed only a franchise and two acres of land for station purposes. "It is not necessary that the corporation should be actually possessed of tangible property approximating in value the amount of the bonds which the mortgage is given to secure in order that an express provision therefor in the mortgage may be legally operative to include subsequently acquired property." Chalmers v. Littlefield, 103 Me. 271, 278, 69 Atl. 100.

²⁸Metropolitan Trust Co. City of New York v. Dolgeville Elec. Light & Power Co., 35 N. Y. Misc. 467, 71 N. Y. Supp. 1055.

²⁹New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 88 Hun (N. Y.) 569, 34 N. Y. Supp. 890.

³⁰In re Frederica Water, Light & Power Co., — Del. Ch. —, 93 Atl. 376; Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 117 Ky. 325,

78 S. W. 113; New York Water Co. v. Crow, 110 N. Y. App. Div. 32, 96 N. Y. Supp. 899; Cummings v. Consolidated Mineral Water Co., 27 R. I. 195, 61 Atl. 353.

³¹Boston Safe-Deposit & Trust Co. v. Bankers' & Merchants' Tel. Co., 36 Fed. 288.

³²In re Adamant Plaster Co., 137 Fed. 251, where the court said "there is no more reason for extending the rule to general manufacturing and mercantile companies doing a general business than for extending it to individuals engaged in the same kind of business."

³³Old Colony Trust Co. v. Standard Beet Sugar Co., 150 Fed. 677, where no attack was made on validity of such a clause in a mortgage by a beet sugar company; Washington Trust Co. City of New York v. Morse Iron Works, 106 N. Y. App. Div. 195, 94 N. Y. Supp. 495, where, however, question as to nature of mortgagor corporation was not raised.

"I can see no reason why the rule applicable to railroad corporations is not equally applicable, under the statute as it now exists, to corporations similar to the iron company." United States Mortgage & Trust Co. v. Eastern Iron Co., 120 N. Y. App. Div. 679, 105 N. Y. Supp. 291.

³⁴In re Medina Quarry Co., 179 Fed. 929, in which the rule was applied to a quarry company without question.

The fact that a mortgage contains a covenant for further assurance by which the mortgagor becomes bound upon demand to execute such other supplementary mortgages as may be necessary to carry into effect the objects of the mortgage, does not defeat the effect of an after-acquired property clause though no demand was ever made for a supplementary mortgage.³⁵

But where the charter of a railroad company expressly defines and limits its power to mortgage, a general provision in a preceding section of its charter giving it the same rights, etc., granted to another named railroad company which has power to mortgage subsequently acquired property does not confer the power to mortgage such property, where the power is not included in the specific grant of power to mortgage.³⁶

§ 1280. — Future earnings or income. A corporation may mortgage future earnings, as well as property already acquired,³⁷ except where otherwise provided by statute. Thus the future net earnings of a railroad company may be mortgaged.³⁸

However, power conferred on a company to mortgage its franchises does not include power to mortgage its income, where a statute limits mortgages to "property in possession, or to which the mortgagor has the right of possession at the time."³⁹

A general statute giving railroad companies power to mortgage a number of enumerated kinds of property "then belonging to the company, or which shall thereafter belong to it," does not authorize a mortgage of income, where income is not included among the specific kinds of property either owned or to be acquired which the company could mortgage.⁴⁰

³⁵ *Venner v. Farmers' Loan & Trust Co. of New York*, 90 Fed. 348.

³⁶ *Georgia, S. & F. Ry. Co. v. Barton*, 101 Ga. 466, 469, 28 S. E. 842.

³⁷ *Atlantic Trust Co. v. Dana*, 128 Fed. 209; *Boykin v. Shaffer*, 13 La. Ann. 129; *Welch v. Pittsburgh, Ft. W. & C. R. Co.*, 2 Ohio Dec. 5.

³⁸ *Jessup v. Bridge*, 11 Iowa 572, 79 Am. Dec. 513; *Carey v. Pittsburgh, Ft. W. & C. R. Co.*, 2 Ohio Dec. 85; *Welch v. Pittsburgh, Ft. W. & C. R. Co.*, 2 Ohio Dec. 5.

³⁹ *Georgia, S. & F. Ry. Co. v. Bar-*

ton, 101 Ga. 466, 469, 28 S. E. 842.

Where a statute provides that a mortgage can embrace "only property in possession or to which the mortgagor has the right of possession at the time," express legislative authority is necessary to enable a corporation to make a valid mortgage upon its income. *Lubroline Oil Co. v. Athens Sav. Bank*, 104 Ga. 376, 30 S. E. 409.

⁴⁰ *Georgia, S. & F. Ry. Co. v. Barton*, 101 Ga. 466, 471, 28 S. E. 842.

§ 1281. Ratification by legislature. A mortgage executed by a corporation which had no authority to execute mortgages may be validated by a subsequent act of the legislature.⁴¹ And if a railroad mortgage of its franchises is recognized as valid by the legislature, it is valid as between the parties.⁴²

III. PROPERTY COVERED BY MORTGAGE

§ 1282. General considerations. In determining what property of a corporation is covered by a mortgage thereon, it is necessary of course to examine all the provisions in the mortgage in regard thereto, in the light of the probable intent of the parties as evidenced by such provisions.⁴³ If the terms of the mortgage conflict with the terms of the bonds which it secures, the terms of the mortgage control.⁴⁴

⁴¹ **United States.** *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199.

Maine. *Shepley v. Atlantic & St. L. R. Co.*, 55 Me. 395.

Massachusetts. *Shaw v. Norfolk County R. Co.*, 5 Gray 162.

New Hampshire. *Richards v. Merrimack & C. R. R. R.*, 44 N. H. 127, 136.

Ohio. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

A statute authorizing the trustees under a railroad mortgage to sell the road is a ratification of the mortgage. *Richards v. Merrimack & C. R. R. R.*, 44 N. H. 127.

⁴² *Hall v. Sullivan R. Co.*, Fed. Cas. No. 5,948.

⁴³ See *Farmers' Loan & Trust Co. v. Metropolitan St. Ry. Co.*, 181 Fed. 575, holding that a mortgage covered a debt due from a constituent company for betterments made on the leased property; *Millard v. Burley*, 13 Neb. 259, 13 N. W. 278.

A railroad mortgage has been construed to include wood provided for the use of the road. *Coe v. McBrown*, 22 Ind. 252.

A steam tug at the terminal of a railroad has been held not to be in-

cluded. *Hatey v. Painesville & Y. Ry. Co.*, 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

Land outside of the state is not included where the mortgage shows that it was the intention to include only land within the state. *Chapman v. Pittsburg, C. & St. L. R. Co.*, 26 W. Va. 299, 328.

Property acquired by a railroad for the purposes of a station, and on which a depot is built, although outside the line of the railway, was included. *Coe v. New Jersey M. Ry. Co.*, 31 N. J. Eq. 105, 128, modified 34 N. J. Eq. 266.

If a deed is executed to a director, the property becomes that of the corporation so as to be within the mortgage. *Buffalo, N. Y. & E. R. Co. v. Lampson*, 47 Barb. (N. Y.) 533.

Fixtures of a street railway company are included. *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 44, 109 N. E. 880.

But furniture, household furnishings, etc., used in a hotel or apartment house are not fixtures so as to be bound by the lien of a mortgage on the real estate. *Klaus v. Majestic Apartment House Co.*, 250 Pa. 194, 219, 95 Atl. 451.

⁴⁴ *Shafer v. Spruks*, 226 Fed. 922.

Undoubtedly the general rules governing the construction of all mortgages, without regard to whether the mortgagor is a corporation, an individual, a partnership or what not, are applicable to corporate as well as other mortgages.⁴⁵

The mortgage should be strictly construed so as not to include any property not clearly within its terms.⁴⁶ Equitable titles ordinarily are included as well as legal titles.⁴⁷

Personal property held by the corporation under contracts for conditional sale at the time the mortgage is executed is embraced therein.⁴⁸

Shares of stock may be included within the terms of the mortgage;⁴⁹ but stock in another company owned by the mortgagor railroad company is not included in a mortgage where it specifically covers a leasehold of the property of the company in which the stock was owned but no reference was made to the stock, especially where, as a matter of fact, the stock was regarded as of no intrinsic value.⁵⁰

"Corporate franchises," as used in a mortgage, does not cover land not subjected to the franchise.⁵¹

Furniture of a manufacturing company is not included within the term "appliances" nor can it be considered as "appertaining to and connected with the plants upon said premises," nor as property "necessary or convenient for the use and enjoyment thereof," nor as "additions or betterments thereto."⁵²

Cast-off articles, fragments and old materials, once forming a part of the road, or used in its operation, continue subject to the lien of a railroad mortgage.⁵³

A mortgage on property "known as the town property of" the corporate mortgagor "at" a certain town, includes property of the

⁴⁵ See standard textbooks on the law of mortgages.

⁴⁶ *Washington County R. Co. v. Canadian Colored Cotton Mills Co.*, 104 Me. 527, 543, 72 Atl. 491.

⁴⁷ *Boston & N. Y. Air Line R. Co. v. Coffin*, 50 Conn. 150.

⁴⁸ "The vendee of property in possession under such a conditional contract of sale has a property interest which can be mortgaged. * * * Upon performance of the condition the title came unqualifiedly under the mortgage." *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 47, 48, 109 N. E. 880.

⁴⁹ *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050.

⁵⁰ *Central Trust Co. of New York v. Denver & R. G. R. Co.*, 219 Fed. 110.

⁵¹ *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552.

⁵² *In re Adamant Plaster Co.*, 137 Fed. 251.

⁵³ *Coopers & Clark v. Wolf*, 15 Ohio St. 523.

A railroad mortgage covering "rails," "materials," etc., includes old iron rails taken up from the road as unfit for further use. *First Nat. Bank v. Anderson*, 75 Va. 250.

mortgagor in or near such town, since the meaning of "at" is not necessarily limited to "in" but also includes "near."⁵⁴

Municipal bonds held by the mortgagor are not included in the general term "property," where not embraced in the specific description of what is covered by the mortgage.⁵⁵

It has been held that an unpaid balance due on a stock subscription does not pass.⁵⁶

Telegraph wires do not pass as real estate where they can be removed without material injury to the structure and it was the intention of the parties at the time they were affixed to the poles that they should remain personalty.⁵⁷

A mortgage by a manufacturing company on certain described land, together with the buildings, improvements, machinery, etc., "thereon or elsewhere erected or located, the whole constituting the plant of the said mortgagor" does not include property which is not a part of the "plant" but is an independent enterprise in another city.⁵⁸

Where a company is incorporated to construct a railroad between two cities named as its termini, "a mortgage given by it which, as expressed, is upon its line of railroad constructed or to be constructed between the named termini, together with all the stations, depot grounds, engine houses, machine shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, creates a lien upon its terminal facilities in those cities, and is not limited to so much of the road as is found between the city limits of those places."⁵⁹

Where a railroad second mortgage covered all the property mentioned, specified, described or "referred" to in the first mortgage, which covered after-acquired property, engines and cars not owned when the first mortgage was executed but purchased before the second was executed, are included.⁶⁰

Where a new instrument was executed to make a valid mortgage of a former security on account of its doubtful validity, and the new instrument covered the same property as the old except certain lands,

⁵⁴ O'Connor v. Nodel, 117 Ala. 595, 23 So. 532.

⁵⁵ Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637.

⁵⁶ Dean v. Biggs, 25 Hun (N. Y.) 122, aff'd 93 N. Y. 662.

⁵⁷ Boston Safe-Deposit & Trust Co. v. Bankers' & Merchants' Tel. Co., 36

Fed. 288, 296; Western U. Tel. Co. v. Burlington & S. W. R. Co., 11 Fed. 1.

⁵⁸ Maxwell v. Wilmington Dental Mfg. Co., 77 Fed. 938.

⁵⁹ Central Trust Co. v. Kneeland, 138 U. S. 414, 34 L. Ed. 1014.

⁶⁰ Henshaw v. Bank of Bellows Falls, 10 Gray (Mass.) 568, 571.

the description in the new instrument cannot be enlarged by the terms of the old one.⁶¹

The question as to what is real estate and what is personalty, so far as corporate mortgages is concerned, is sometimes difficult to determine.⁶² Thus in Illinois, it is held that rolling stock, rails, ties, spikes and all other property designed to be attached to the realty are real estate,⁶³ while fuel, oil and the like, which are designed for consumption in the use and which may be sold and carried away and used for other purposes, are personal property.⁶⁴ In other states, rolling stock is sometimes held to be personalty.⁶⁵

Where a railroad mortgage is on property situated partly in two other states, and it does not appear where the mortgage was executed, the construction given by the courts of one of such states as to the property covered by similar mortgages need not be adopted under the rule of comity.⁶⁶

A purchaser at a receiver's sale which, by the decree, is made expressly subject to a mortgage, is estopped to deny that the property purchased was subject to the mortgage.⁶⁷

§ 1283. Appurtenances. A thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter.⁶⁸

Under the term "appurtenances," as used in a corporate mortgage, it is held that "only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business."⁶⁹

⁶¹ *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655.

⁶² See *Hunt v. Bullock*, 23 Ill. 320, stating what is personal property of a railway company.

⁶³ *Palmer v. Forbes*, 23 Ill. 301.

⁶⁴ *Palmer v. Forbes*, 23 Ill. 301.

⁶⁵ See § 1287, *infra*.

⁶⁶ *Mississippi Valley & W. R. Co. v. United States Exp. Co.*, 81 Ill. 534.

⁶⁷ *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 44, 46, 109 N. E. 880.

"Whatever would be the effect of the mortgage apart from that decree, its scope and comprehensiveness is settled by the terms of the decree.

Any dispute as to its including within the lien of the mortgage property acquired by the mortgagor after the date of the mortgage and before the decree of sale, is as matter of law foreclosed by the express words of the decree." *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 47, 109 N. E. 880.

⁶⁸ *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473.

As to what are deemed appurtenances, as far as after-acquired property is concerned, see § 1288, *infra*.

⁶⁹ *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473.

"Property, however, not connected

Land does not pass as an appurtenance.⁷⁰ And railroad chairs (holding rails) are not "appurtenant" to the road, where lying on the ground, in stacks, before being placed.⁷¹

Shares of stock in an elevator company, owned by the mortgagor railroad company, are not an appurtenance to a railroad, the elevator being constructed by several railroad companies joining together, especially where the elevator is situated at some distance from the road of the mortgagor and on land not belonging to the mortgagor.⁷²

A mortgage covering lands and a water ditch, "with all the water rights and privileges appurtenant to said ditch, or by means of which said ditch is supplied with water," does not include shares of stock owned by the mortgagor in a water company, where the latter did not own the ditch or the water flowing therein or the means by which the ditch was supplied with water.⁷³

§ 1284. Franchises. A mortgage of the franchises of a company does not include its franchise to exist as a corporation.⁷⁴

On the other hand, the mortgage of the property of a public service company carries with it the franchises essential to the operation of the property.⁷⁵ Thus, a mortgage of a railroad includes the franchise to use the property for the purposes for which it is held by the corporation.⁷⁶ And a mortgage of the property of a plank road company includes the franchise of taking toll.⁷⁷ In like manner a mortgage by a telephone company of all its tangible property includes its

with what is ordinarily termed the plant, or not forming a part of the organic structure of the road, is never treated as appurtenant to it." *New Orleans Pac. R. R. v. Parker*, 143 U. S. 42, 36 L. Ed. 66.

⁷⁰ *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552.

However, the exclusive right of a railroad company, as owner of uplands, where the state was the owner of the adjoining land under water, to acquire the land under water by a grant, is an appurtenance to the upland. *People's Trust Co. v. Schenck*, 195 N. Y. 398, 133 Am. St. Rep. 807, 88 N. E. 647, aff'g 121 N. Y. App. Div. 604, 106 N. Y. Supp. 782.

⁷¹ *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207, 210.

⁷² *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473.

⁷³ *Bank of Visalia v. Smith*, 146 Cal. 398, 81 Pac. 542.

⁷⁴ *Meyer v. Johnston*, 53 Ala. 237; *Eldridge v. Smith*, 34 Vt. 484.

But where such franchise is mortgageable, a contrary view is taken in *First Division of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, and *Pierce v. Emery*, 32 N. H. 484.

⁷⁵ *Pumphrey v. Threadgill*, 9 Tex. Civ. App. 184, 28 S. W. 450.

⁷⁶ "A mortgage of property necessarily implies the right in the mortgagee to make the property valuable." *Chadwick v. Old Colony R. Co.*, 171 Mass. 239, 243, 50 N. E. 629.

⁷⁷ *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155, 156.

municipal franchises, although not expressly mentioned therein.⁷⁸ Furthermore, a franchise to use streets is an "appurtenance" which passes under a mortgage conveying all the property of a gas company, "with all the rights, privileges and appurtenances thereunto belonging."⁷⁹

Where a mortgage executed by a water company covered all the franchises "granted in and by" a certain ordinance, it includes all franchises enumerated in said ordinance and owned by the company, without regard to whether granted by the city or by the state.⁸⁰

The word "franchise," as used in a mortgage, is sometimes construed as sufficiently broad to cover the plant.⁸¹

§ 1285. General words as covering all the property. Of course, a corporate mortgage may be so worded as to cover all the property of the corporation, provided the corporation has power to mortgage all of such property.⁸²

The difficulty arises where there are general words covering all the property and also special words applicable to only part of the property. It does not necessarily follow that the use of general words, in connection with a more or less specific enumeration, will cover all the property, but in such case it must be apparent that the intent was to include all that could be embraced within the more general terms.⁸³

The words "all other property" in a railroad mortgage have been construed as intended to include only the property connected with the specific property enumerated, where the words are not found in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end as a summary of what had preceded.⁸⁴

⁷⁸ "It would be a violent construction to hold that the grantor intended simply to convey the tangible property without at the same time transferring the right which alone would make the property of any use." *Wichita v. Old Colony Trust Co.*, 132 Fed. 641, modifying 123 Fed. 762.

⁷⁹ *Lawrence v. Hennessy*, 165 Mo. 659, 669, 65 S. W. 717.

⁸⁰ *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782.

⁸¹ *Andrews v. National Foundry & Pipe Works*, 76 Fed. 166, 36 L. R. A. 139.

⁸² Office furniture used in one of

the offices of the company was held covered by a general clause. *Raymond v. Clark*, 46 Conn. 129.

⁸³ *Alabama v. Montague*, 117 U. S. 602, 29 L. Ed. 1000; *Boston & N. Y. Air Line R. Co. v. Coffin*, 50 Conn. 150.

⁸⁴ In this case the mortgage described the several classes of land conveyed as all lands granted by the United States, and then covered "the telegraph line and telegraph offices along the line of said road and belonging to said company; also the machine shops and 'all other property' in said states of * * * belonging to said company." Land not

The word "property," where used in connection with a specific description of the different kinds of property, has been held not to include certain municipal bonds issued to aid in building the road.⁸⁵

A railroad mortgage of engines, cars, etc., "and all other personal property," "in any way belonging or appertaining" to the railroad of said company, has been held not to include canal boats, purchased by the corporation, and run by it in connection with the railroad but beyond its terminus.⁸⁶

Where a mortgage covers "all the present and future to be acquired property of the company and all its estate and franchises, that is to say," and then follows an enumeration of the property and rights intended to be mortgaged, the specific enumeration limits and explains the previous words.⁸⁷

Undoubtedly, the rule of *ejusdem generis* applies, and where particular things are named, general words following cannot include anything of a different class not named.⁸⁸ Thus, where the property mortgaged is elaborately described as mineral lands, furnaces, buildings, etc., enumerating in detail many kinds of property, and "all property and estate wherever situate," the latter clause means all property of a similar nature, and does not include cash on hand; commissary stock, iron ore, coke, limestone, pig iron or accounts receivable, not specifically described in the mortgage.⁸⁹

It has been held that where the statute authorizing a railroad mortgage contemplates a mortgage of all the estate of the company, the court will intend, in the absence of any evidence of a contrary design, that the estate mortgaged was not less than was contemplated by the statute.⁹⁰

granted by the United States and located in another state was held not included. The court said that the phrase "all other property" is "among its kind, *ejusdem generis*, and its purpose is answered when its use is limited to explain the other words in this immediate connection." *Alabama v. Montague*, 117 U. S. 602, 29 L. Ed. 1000.

⁸⁵ *Smith v. McCullough*, 104 U. S. 25, 26 L. Ed. 637.

⁸⁶ "The canal boats did not belong to or appertain to the railroad, although they were considered as belonging to the company." *Parish v. Wheeler*, 22 N. Y. 494.

⁸⁷ *Butler v. Rahm*, 46 Md. 541, 547.

⁸⁸ So a mortgage of a street railway company was construed not to cover a lease made by the mortgagor of its lines, nor all of the property leased, and therefore not to be a mortgage of the reversion, although using such general words as "contracts," "and other rights and interests," etc., the rule of *ejusdem generis* being applicable. *Farmers' Loan & Trust Co. v. Waterbury*, 193 Fed. 44.

⁸⁹ *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019.

⁹⁰ *Coe v. New Jersey M. Ry. Co.*,

“Where the language used so clearly manifests a purpose to include all assets of mortgagor of every character, present and prospective, an over technical measurement of the specific words used should not be indulged in to defeat the general and manifest intention.”⁹¹

If a railroad mortgage covers “locomotives and all other personal property,” it includes the locomotives even if too uncertain to cover the other property.⁹²

§ 1286. Property not used for corporate purposes. In case of mortgages by other than quasi public corporations, they are generally construed as not limited to property used in connection with the business. Thus, where a mining company mortgages all its property, without restriction, property never used in connection with mining operations is included.⁹³

It is somewhat different, however, in the case of mortgages executed by quasi public corporations. For instance, ordinarily, the terms of railroad mortgages cover only property used in the construction or operation of the road, or in connection therewith.⁹⁴

However, the words “necessary or convenient,” as used in a railroad mortgage, should be liberally construed and “should include all that has been found to be reasonably necessary or convenient for the successful operation of the road since its construction.”⁹⁵

Where a railroad mortgage covered lands “intended for the use and accommodation of said road,” it was held that only such land

31 N. J. Eq. 105, 123, modified 34 N. J. Eq. 266.

⁹¹ *Buvinger v. Evening Union Printing Co.*, 72 N. J. Eq. 321, 324, 65 Atl. 482.

⁹² *Pennock v. Coe*, 23 How. (U. S.) 117, 16 L. Ed. 436.

⁹³ *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87.

⁹⁴ *Alabama*. *Morgan & Raynor v. Donovan*, 58 Ala. 241.

California. *California Title Insurance & Trust Co. v. Pauly*, 111 Cal. 122, 43 Pac. 586, holding lands used as a pleasure resort at the end of a street car line to be included as property acquired “for use, or adapted to use, on or about its said lines of railway.”

Connecticut. *Boston & N. Y. Air*

Line R. Co. v. Coffin, 50 Conn. 150; *Buck v. Seymour*, 46 Conn. 156.

Ohio. *Walsh v. Barton*, 24 Ohio St. 28; *Hatry v. Painesville & Y. Ry. Co.*, 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

Pennsylvania. *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

“Buying off an opposition line of steamers, with a view, not of employing, but of withdrawing them from the field of competition,” not being within the charter powers, does not bring such steamers within the terms of a mortgage covering only property used in connection with the road. *Morgan & Raynor v. Donovan*, 58 Ala. 241.

⁹⁵ *Boston & N. Y. Air Line R. Co. v. Coffin*, 50 Conn. 150.

was included as was so connected with, and used by the company for, the railroad, that it would have been authorized to take it compulsorily under the provisions of its charter; that if it was so connected and used, it was immaterial whether it actually was taken by proceedings in invitum or purchased by the company, and that the quoted clause applied to the intention of the company in respect to the use of the land at the time the mortgage was executed, and not to the original design of the company when it purchased the land.⁹⁶

Rails, fish-plates and bolts, although they had not been actually used and were stacked outside the right of way, are, where purchased to be used in the extension of the road, covered by a street railway mortgage of all its property "used or intended to be used in connection with or for the purposes of said railroad."⁹⁷

This subject is further illustrated in subsequent sections relating to after-acquired property.⁹⁸

§ 1287. Rolling stock. Independently of statute, rolling stock of a railroad is considered by some courts as personal property,⁹⁹ while other courts hold it to be real estate and a fixture, so as to pass under a mortgage of the realty.¹

At the present time, this question is settled in many states by express statutory provisions. Thus, in some states, by statute, rolling stock is classified as personal property,² while in other states the statutes regard it as real property.³

⁹⁶ *Eldridge v. Smith*, 34 Vt. 484.

⁹⁷ *Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, 49 Fed. 188.

⁹⁸ See §§ 1288-1292, *infra*.

⁹⁹ *Iowa*. *Neilson, Benton & O'Donnell v. Iowa Eastern R. Co.*, 51 Iowa 184, 33 Am. Rep. 124, 1 N. W. 434.

New Hampshire. *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336.

New Jersey. *Williamson v. New Jersey S. R. Co.*, 29 N. J. Eq. 311, 327, rev'g 28 N. J. Eq. 277.

New York. *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Bement v. Plattsburgh & M. R. Co.*, 47 Barb. 104, *aff'd* 51 Barb. 45; *Beardsley & Kirkland v. Ontario Bank*, 31 Barb. 619. *Contra*,

Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484.

Ohio. *Coe v. Columbus & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

¹ See *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609, and note on page 645, 17 L. Ed. 886; *Booth v. Central Sav. Bank*, 58 Colo. 519, 146 Pac. 240; *Titus v. Mabee*, 25 Ill. 257; *Hunt v. Bullock*, 23 Ill. 320; *Palmer v. Forbes*, 23 Ill. 301; *Michigan Cent. R. Co. v. Chicago & M. L. S. R. Co.*, 1 Ill. App. 399. See also *Strickland v. Parker*, 54 Me. 263.

² *Radebaugh v. Tacoma & P. R. Co.*, 8 Wash. 570, 36 Pac. 460.

³ *Booth v. Central Sav. Bank*, 58 Colo. 519, 146 Pac. 240.

A statute providing that railroad mortgage shall include rolling stock

The question is usually important only in determining whether the statutory provisions as to executing, filing, etc., of chattel mortgages, as distinguished from real estate mortgages,⁴ must be observed.

Rolling stock should be held to be included within the terms of a mortgage where such intent clearly appears.⁵ It need not be expressly named, in order to be included.⁶ Thus, a mortgage of "tolls and income" has been held, it seems, broad enough to include rolling stock.⁷

The lien of a railroad mortgage upon rolling stock is not lost by the taking off of the stock from the road to be changed to fit a new narrow gauge; expected to be made.⁸

A railroad company may assign certain of its rolling stock to one division of its road, and certain other rolling stock to the other division, where the roads are divided for the purpose of making separate mortgages on particular mileage.⁹

If the mortgage on the rolling stock of a certain division of a railroad covenants to designate in a certain mode the proportion of the rolling stock belonging to said division, according to the mileage, it covers only the rolling stock thereafter designated although less than the amount covenanted for, as against a second mortgage of the entire railway; but rolling stock designated for the division mortgaged is within the mortgage notwithstanding subsequent obliteration of the designations.¹⁰

Rolling stock is subject to a railroad mortgage where placed on the road by a construction company which had the cars marked with the name of the railroad company, and which aided in the sale of the railroad bonds, although it is claimed that there was merely a loan of the rolling stock, since the construction company is estopped to claim title.¹¹

held retrospective. *Dunham v. Isett*, 15 Iowa 284.

⁴ See § 1308, *infra*.

⁵ *Hoyle v. Plattsburgh & M. R. Co.*, 51 Barb. (N. Y.) 45, rev'd 54 N. Y. 314, 13 Am. Rep. 595.

⁶ *Hoyle v. Plattsburgh & M. R. Co.*, 51 Barb. (N. Y.) 45, rev'd 54 N. Y. 314, 13 Am. Rep. 595.

⁷ *Pullan v. Cincinnati & C. Air-Line R. Co.*, 4 Biss. (U. S.) 35, Fed. Cas. No. 11,461, which certainly goes to the extreme limit; *State v. Northern Cent. Ry. Co.*, 18 Md. 193.

⁸ *Hamlin v. Jerrard*, 72 Me. 62, 73.

⁹ *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609, 635, 17 L. Ed. 886.

¹⁰ *United States Trust Co. v. Wash Western Ry. Co.*, 38 Fed. 891.

¹¹ *Central Trust Co. of New York v. Marietta & N. G. Ry. Co.*, 48 Fed. 850, holding, however, that such estoppel does not extend to the original vendor of the construction company who reserved title until payment and had no notice of subsequent equities.

§ 1288. After-acquired property—General rules. It has been held that after-acquired property, where appurtenant, passes by a mortgage of a railroad and its business, although there is no provision in the mortgage as to future property.¹² This is true as far as subsequently acquired property which becomes a fixture of the existing property which is mortgaged is concerned.¹³

However, this rule is strictly limited to fixtures. In other cases, the true rule is that there must be express words, or an unmistakable intention to be derived from the face of the mortgage, in order to include after-acquired property;¹⁴ and it is held that property will not be construed to be after-acquired property, within the terms of a mortgage covering after-acquired property, unless clearly within the meaning of the words of the mortgage,¹⁵ although in case of railroad mortgages the tendency of the courts is to be liberal in holding property to come within an after-acquired clause.

However, where it would be impossible to operate a street railway if an extension made after the mortgage should be severed from that part of it which was constructed and in use prior to the date of the mortgage, it has been held subject to the lien of the mortgage although not covered by the after-acquired property clause.¹⁶

A mortgage covers after-acquired property not used in connection with the business of the company where there is no restriction in the mortgage as to the after-acquired property included.¹⁷

¹² *Pierce v. Emery*, 32 N. H. 484.

This rule cannot be applied where several mortgages are given on separate divisions of the road. *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207.

¹³ *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558, 2 N. E. 892.

"It is indubitable that a mortgage of land will pass all structures or fixtures that may afterwards be erected upon it by the mortgagor." *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366, 372, 3 Am. Rep. 596.

¹⁴ *In re Adamant Plaster Co.*, 137 Fed. 251; *Louisville Trust Co. v. Cincinnati Inclined-Plane Ry. Co.*, 91 Fed. 699; *Maxwell v. Wilmington Dental Mfg. Co.*, 77 Fed. 938; *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 58 Miss. 896, 905, 38 Am. Rep. 348, dicta.

A mortgage may be held to cover after-acquired property although it does not expressly so state, where it is clear that it was so intended. *In re Medina Quarry Co.*, 179 Fed. 929.

¹⁵ *In re Adamant Plaster Co.*, 137 Fed. 251. See also *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255.

As to what property is included in street railway mortgage, see *Guaranty Trust Co. of New York v. Atlantic Coast Elec. R. Co.*, 138 Fed. 517, aff'g 132 Fed. 68; *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 867.

¹⁶ *Front St. Cable Ry. Co. v. Drake*, 84 Fed. 257.

¹⁷ *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87. But see §§ 1290-1292, *infra*.

If the mortgage covers after-acquired property "necessary for the construction or operation of the road," it includes property which the mortgagor may thereafter deem it best to acquire for the most profitable use of the franchise and the greatest benefit to the public, although the road could be operated without such property.¹⁸

In construing mortgages, in order to determine whether they include after-acquired property, the same rules govern as in case of like instruments executed by an individual.¹⁹

The construction put upon the after-acquired property clause by the parties to the mortgage at the time of the execution of the mortgage, and the subsequent acts of the parties, may be considered.²⁰

If the mortgage is antedated, the after-acquired clause will cover property acquired after the date of the mortgage but before its execution.²¹

The legal effect and scope of a mortgage of after-acquired property is a local question, and the decisions of the state courts will be followed in such matters by the federal courts.²²

§ 1289. — Sufficiency of description. There need not be a description so specific as to identify the property, in order for the mortgage to include after-acquired property.²³ The mortgage attaches just as if the after-acquired property had been specifically described.²⁴

Contrary to the general rule, however, it has been held that the words "intending hereby to include all its present real and personal estate and franchises, now owned or hereafter to be acquired, without any exception or reservation," in a railroad mortgage, are too indefinite to pass after-acquired property, not otherwise described and not appurtenant to the railroad, as against third persons.²⁵

A mortgage of "all and singular, its franchises and property, both real and personal," is not sufficient to pass after-acquired property,²⁶ nor is a clause extending the mortgage to "all the rights, easements,

¹⁸ *Buck v. Seymour*, 46 Conn. 156.

¹⁹ *Murray v. Farmville & P. R. Co.*, 101 Va. 262, 43 S. E. 553.

²⁰ *Guaranty Trust Co. of New York v. Atlantic Coast Elec. R. Co.*, 132 Fed. 68, aff'd 138 Fed. 517.

²¹ *Guaranty Trust Co. of New York v. Atlantic Coast Elec. R. Co.*, 138 Fed. 517.

²² *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577; *Federal Trust*

Co. v. Bristol County St. R. Co., 222 Mass. 35, 47, 109 N. E. 880.

²³ *Medford v. Myrick*, — Tex. Civ. App. —, 147 S. W. 876.

²⁴ *Parker v. New Orleans, B. R. & V. R. Co.*, 33 Fed. 693.

²⁵ *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 58 Miss. 896, 38 Am. Rep. 348.

²⁶ *Louisville Trust Co. v. Cincinnati Inclined-Plane Ry. Co.*, 91 Fed. 699.

incidents, and appurtenances unto the hereby-granted premises belonging or in any wise appertaining.”²⁷

However, even though there was no express after-acquired property clause, a mortgage of the “income, tolls and profits” has been held to include subsequently acquired rolling stock and machinery used in connection with the railroad to earn the income, profits and tolls accruing therefrom.²⁸

§ 1290. — Real property in general. Ordinarily, an after-acquired property clause covers real as well as personal property.²⁹ So it covers subsequently acquired equitable interests as well as legal titles.³⁰ Of course, the property included all depends upon the terms of the mortgage.³¹

Sometimes, the terms of the mortgage are so broad as to include all the real property, wherever located or of whatever kind,³² but ordinarily the after-acquired property subjected to the mortgage is more or less restricted by the terms of the mortgage.

The phraseology of a railroad mortgage may be such, as far as after-acquired property is concerned, that it will include only after-acquired land pertaining to the “railroad” itself, as distinguished from the railroad “company,” and not include after-acquired land lying outside the railroad location and not used, nor available for use, in the operation of the railroad.³³

If the words “belonging or appertaining to said railroad” are used, the mortgage does not cover land afterwards acquired and laid off

²⁷ Louisville Trust Co. v. Cincinnati Inclined-Plane Ry. Co., 91 Fed. 699.

²⁸ Louisville Trust Co. v. Cincinnati Inclined-Plane Ry. Co., 91 Fed. 699.

²⁹ Pierce v. Milwaukee & St. P. R. Co., 24 Wis. 551, 1 Am. Rep. 203.

³⁰ Hamlin v. European & N. A. Ry. Co., 72 Me. 83, 89, contract for land; Farmers' Loan & Trust Co. v. Fisher, 17 Wis. 114, 127, contract for land.

“And this is true, not only as to property to which it acquires the legal title, but also as to that to which it acquires only a full equitable title.” Central Trust Co. v. Kneeland, 138 U. S. 414, 34 L. Ed. 1014.

A mortgage of after-acquired property covers real estate, the equitable

title to which is afterwards acquired by an oral purchase coupled with possession. Monmouth County Elec. Co. v. McKenna, 68 N. J. Eq. 160, 60 Atl. 32.

³¹ Trust deed of telephone company held to cover leased property. Old Colony Trust Co. v. Wichita, 123 Fed. 762.

³² See § 1288, supra, as to general rule.

³³ Washington County R. Co. v. Canadian Colored Cotton Mills Co., 104 Me. 527, 543, 72 Atl. 491, where mortgage spoke of two classes of real estate, one appertaining to the “railroad,” and the other belonging to the company.

into town lots, in consideration of the location of a station near the grantor.³⁴

Where the clause is "connected with or appertaining to," property adjacent to a depot, but never used for railroad purposes, and, in fact, leased to others for a grocery, barber shop, etc., is not included.³⁵

A storehouse, some vacant town lots and a farm of several hundred acres are not "appurtenant" to the business of a railroad, where rented out for the several purposes for which they are adapted.³⁶

A railroad mortgage including property afterwards to be acquired for the purposes of the railroad does not cover an undivided one-half interest in farm land not acquired for railroad purposes.³⁷

Where the mortgage covers after-acquired property "used for and pertaining to the operation of said railroad," it does not include land near the right of way bought with the intention of subdividing it into lots to be sold to its employees.³⁸

After-acquired lands, located several miles from the mortgagor railroad, and not necessary for its proper use and operation, are not covered by the usual after-acquired clause, although the land was purchased and used by the company for the purpose of supplying the road with timber and fuel.³⁹

On the other hand, if the land is required to be connected with the operation of the railroad, it is sufficient that it was bought in good faith for terminal facilities and space for car and engine houses, although not so used and notwithstanding the right to use the land in direct connection with the road, without further legislative authority, has expired, where the land is necessary for the future development of the road.⁴⁰ And if the mortgage covers all property designed for use for or in connection with the road, it includes after-acquired lots purchased with the intent of using them for railroad purposes, although afterwards sold because found unsuitable for such purposes.⁴¹

If a railroad mortgage covers future acquired property "necessary

³⁴ Calhoun v. Memphis & P. R. Co., 2 Flap. (U. S.) 442, Fed. Cas. No. 2,309.

³⁵ Chicago, I. & L. Ry. Co. v. McGuire, 31 Ind. App. 110, 99 Am. St. Rep. 249, 66 N. E. 932.

³⁶ Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co., 58 Miss. 896, 905, 38 Am. Rep. 348.

³⁷ Chicago, P. & St. L. R. Co. v.

Tice, 232 Ill. 232, 83 N. E. 848.

³⁸ Pardee v. Aldridge, 189 U. S. 429, 47 L. Ed. 883, aff'g 24 Tex. Civ. App. 254, 60 S. W. 789.

³⁹ Dinsmore v. Racine & M. R. Co., 12 Wis. 649.

⁴⁰ Hamlin v. European & N. A. Ry. Co., 72 Me. 83.

⁴¹ Hawkins v. Mercantile Trust & Deposit Co., 96 Ga. 580, 23 S. E. 498.

or convenient for the use, occupation, operation and enjoyment of said railroad," it is sufficient to bring property within such clause, that it be "prospectively necessary or convenient for the uses or purposes of the railroad, and to the enjoyment of the corporate rights and franchises," and "it is not necessary that there should be an immediate connection with the operation of the road. It is sufficient if, for the promotion of travel and the increase of the business sought to be created, the land acquired is legitimately convenient or necessary."⁴² For instance, under such a clause in a mortgage, an after-acquired grant by the state of lands under water in front of and adjacent to the upland of the company, is included where the railroad, in order to attract travel on its road, had erected on the upland hotels and places of amusement, and the land under water was to be used for the same purpose to which the upland was put.⁴³

Where the after-acquired clause is sufficiently broad, land subsequently acquired for a right of way and railroad stockyards and grounds is included.⁴⁴

In case of a railroad mortgage, the use of the word "real estate," it has been held, cannot be confined to such real estate as may be used for right of way, depot grounds, side tracks and tanks, but means any real estate acquired for use in the operation of the railroad proper.⁴⁵

Lands which the company had no power to accept at the time the mortgage was executed, and the acquisition of which was not in contemplation, do not pass.⁴⁶

A land grant from the state for the purpose of aiding in the construction of a railroad does not pass as an appurtenant, where the language of the mortgage does not describe or include any such grant.⁴⁷

A hotel built by a railway company to afford accommodation for its passengers and employees passes as appurtenant to the railway.⁴⁸

⁴² *People's Trust Co. v. Schenck*, 195 N. Y. 398, 133 Am. St. Rep. 807, 88 N. E. 647, aff'g 121 N. Y. App. Div. 604, 106 N. Y. Supp. 782.

⁴³ *People's Trust Co. v. Schenck*, 195 N. Y. 398, 133 Am. St. Rep. 807, 88 N. E. 647, aff'g 121 N. Y. App. Div. 604, 106 N. Y. Supp. 782.

⁴⁴ *St. Joseph, St. L. & S. F. R. Co. v. Smith*, 170 Mo. 327, 70 S. W. 700.

⁴⁵ *Omaha & St. L. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 108 Mo. 298, 302, 18 S. W. 1101.

⁴⁶ *Meyer v. Johnston*, 53 Ala. 237.

⁴⁷ *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 36 L. Ed. 66, 41 Fed. 717.

⁴⁸ *United States Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 480.

or as "real estate,"⁴⁹ but it is otherwise in case of a hotel used solely for the entertainment of guests in general.⁵⁰

§ 1291. — Portions of line of railroad afterwards constructed or acquired. Subsequent extensions of the mortgaged railroad are covered by the ordinary after-acquired clause.⁵¹ Thus, a railroad mortgage, with an after-acquired clause, includes another railroad purchased by the mortgagor,⁵² or a subsequently acquired lease of a railway.⁵³ It is immaterial that the addition is on another route than the one surveyed and located at the time the mortgage was executed, where it is in the same general direction.⁵⁴

However, extensions are not included unless the mortgage contains an after-acquired clause.⁵⁵ Moreover, it has been held that an extension of a railroad, built some years after the mortgage was executed, is not included because of an after-acquired clause, where the only authority to build such extension was by virtue of an amendment of the charter after the mortgage was executed.⁵⁶

A branch railroad has been held subsequently acquired property, regardless of how acquired.⁵⁷

The after-acquired clause does not include a line of road afterwards constructed by the mortgagor without authority, nor one purchased without the required assent of stockholders.⁵⁸ Nor does it include a lease of its road by the mortgagor to another company

⁴⁹ *Omaha & St. L. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 108 Mo. 298, 302, 18 S. W. 1101.

⁵⁰ *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 58 Miss. 896, 905, 38 Am. Rep. 348. To the same effect, see *Guaranty Trust Co. of New York v. Atlantic Coast Elec. R. Co.*, 132 Fed. 68.

⁵¹ *Elwell v. Grand St. & N. H. R. Co.*, 67 Barb. (N. Y.) 83; *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. (N. Y.) 284, 14 How. Pr. (N. Y.) 531; *Hatry v. Painesville & Y. Ry. Co.*, 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238.

⁵² *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279; *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813.

⁵³ *Guaranty Trust Co. of New York v. Atlantic Coast Elec. R. Co.*, 132 Fed. 68, modified 138 Fed. 517; *Columbia Finance & Trust Co. v. Kentucky Union Ry. Co.*, 60 Fed. 794; *Barnard v. Norwich & W. R. Co.*, 4 Cliff. (U. S.) 351, Fed. Cas. No. 1,007.

⁵⁴ *Meyer v. Johnston*, 53 Ala. 237.

⁵⁵ *Louisville Trust Co. v. Cincinnati Inclined-Plane Ry. Co.*, 91 Fed. 699, where several different clauses in mortgage were held not sufficient to pass any after-acquired property.

⁵⁶ *Alexandria & F. Ry. Co.'s Trustees v. Graham*, 31 Gratt. (Va.) 769.

⁵⁷ *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813.

⁵⁸ *Hodder v. Kentucky & Great Eastern Ry. Co.*, 7 Fed. 793.

which agreed to pay the coupons at maturity if the net earnings of the road should not be sufficient to pay the interest on the bonds.⁵⁹

A special branch not contemplated at the time the mortgage was executed, but constructed under a special charter with a chance for different stockholders, is not included,⁶⁰ although if the mortgage expressly covers roads to be thereafter built, it includes a branch road subsequently built, even though not contemplated when the mortgage was executed.⁶¹

If the mortgage is of the main line from the eastern terminus to the western terminus, it does not include lands and franchises subsequently acquired under a statute authorizing an extension of the road easterly from the eastern terminus.⁶²

Where a mortgage covers after-acquired property "connected with or issuing from or relating to the said railroad, or the construction, maintenance, use and enjoyment of the same," it does not cover another railroad thereafter purchased, and not connected at the time of the purchase with the mortgagor road.⁶³

§ 1292. — Personal property in general. After-acquired personal property does not pass, ordinarily, unless the instrument so provides.⁶⁴ However, a mortgage covering after-acquired property ordinarily includes personal as well as real property.⁶⁵

Ordinarily, a railroad mortgage with an after-acquired clause includes not only rolling stock subsequently acquired,⁶⁶ but also

⁵⁹ *Moran v. Pittsburgh, C. & St. L. Ry. Co.*, 32 Fed. 878.

⁶⁰ *Meyer v. Johnston*, 53 Ala. 237.

⁶¹ *Coe v. Delaware, L. & W. R. Co.*, 34 N. J. Eq. 266.

⁶² *Randolph v. New Jersey West Line R. Co.*, 28 N. J. Eq. 49.

⁶³ *Murray v. Farmville & P. R. Co.*, 101 Va. 262, 43 S. E. 553, holding also that it was immaterial that the resolution of the directors authorizing the mortgage stated that it was to cover "all other property hereafter acquired."

⁶⁴ *Louisville Trust Co. v. Cincinnati Inclined-Plane Ry. Co.*, 91 Fed. 699; *Farmers' Loan & Trust Co. v. Commercial Bank*, 15 Wis. 424, 438, 82 Am. Dec. 689, where the court said that it is not the "business of construc-

tion to look outside of the instrument to get at the intention of the parties, and then carry out that intention whether the instrument contains language sufficient to express it or not."

⁶⁵ *Stratton v. Natural Carbonic Gas Co.*, 189 Fed. 928, where a gas company mortgage was held to cover certain gas tubes; *Platt v. New York & S. B. Ry. Co.*, 9 N. Y. App. Div. 87, 41 N. Y. Supp. 42.

⁶⁶ *Pennock v. Coe*, 23 How. (U. S.) 117, 16 L. Ed. 436; *Scott v. Clinton & S. R. Co.*, 6 Biss. (U. S.) 529, Fed. Cas. No. 12,527; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am. Rep. 596.

Of course, where a railroad mortgage covers "all the following, pres-

cars,⁶⁷ rails,⁶⁸ fuel,⁶⁹ office furniture⁷⁰ and other personal property.⁷¹

Capital stock of another corporation acquired by the mortgagor passes.⁷²

If the mortgagor acquires property after the execution of the mortgage but has the title conveyed to a new corporation, all the stock of which is held by the mortgagor, such stock is included in the mortgage of after-acquired property so as to be superior to the rights of the trustee as a pledgee of all of said stock.⁷³

A mortgage covering the personal property in use "or as the same may be hereafter changed or renewed" does not include new machinery not substituted for other machinery.⁷⁴

Where the mortgage covers all the property "of said extension subsequently to be acquired," it does not include wood subsequently purchased with the earnings of the whole road and for the use of the whole road, since the wood was not the exclusive property of the extension.⁷⁵

ent, and in future to be acquired property," and then specifies cars, engines, etc., rolling stock afterwards acquired is included. *New Orleans Canal & Banking Co. v. Montgomery*, 95 U. S. 16, 24 L. Ed. 346; *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

However, rolling stock of a third person subsequently placed on the road temporarily under a contract with the company then operating it is not included. *Hardesty v. Pyle*, 15 Fed. 778.

⁶⁷ *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; *Howe v. Freeman*, 14 Gray (Mass.) 566.

Where a street railway mortgage covered new equipment purchased to replace that worn out and unfit for use, it includes a car purchased to take the place of an old freight car, on the petition of the receiver alleging that the old car was worn out, although the old car was afterwards repaired and used. *National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry. Co.*, 9 Del. Ch. 258, 81 Atl. 70.

⁶⁸ *Chalmers v. Littlefield*, 103 Me.

271, 69 Atl. 100; *Weetjen v. St. Paul & P. R. Co.*, 4 Hun (N. Y.) 529.

The rule applies where the mortgagor furnished ties and rails for a spur track which it laid upon a road-bed owned by another under an agreement, the track not becoming a part of the realty. *Mercantile Trust & Deposit Co. of Baltimore v. Roanoke & S. Ry. Co.*, 109 Fed. 3.

⁶⁹ *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729.

⁷⁰ *Ludlow v. Hurd*, 1 Disney (Ohio) 552, 12 Ohio Dec. 791.

⁷¹ *Pierce v. Emery*, 32 N. H. 484 (cargo of railroad iron); *Platt v. New York & S. B. Ry. Co.*, 17 N. Y. Misc. 22, 39 N. Y. Supp. 871.

⁷² *Guaranty Trust Co. v. Atlantic Coast Elec. R. Co.*, 138 Fed. 517, aff'g 132 Fed. 68.

⁷³ *Guaranty Trust Co. of New York v. Atlantic Coast Elec. R. Co.*, 138 Fed. 517, rev'g on this point 132 Fed. 68.

⁷⁴ *Brainerd v. Peck & Colby*, 34 Vt. 496.

⁷⁵ *Bath v. Miller*, 53 Me. 308, 319, 51 Me. 341.

Where the mortgage covers only such after-acquired property as shall be "used in operating the road," it does not include irons used to fasten down the rails, lying on the ground in stacks, but unused.⁷⁶

Ordinarily a mortgage executed by a manufacturing company will not be construed as covering either the manufactured product or the raw materials to be manufactured, unless they are clearly within the meaning of the terms of the mortgage.⁷⁷

Where a mortgage by a company organized to quarry and sell granite covered certain land and all "its real and personal property (except quarried granite in process of preparation for market), apparatus, fixtures, machinery, engines, boilers, * * * and equipments of every kind and description whatsoever and wherever situated which are now held or may be hereafter acquired," it does not cover bonds of another company thereafter obtained by the mortgagor, so as to affect the title of a subsequent bona fide holder.⁷⁸

A street railway mortgage covering after-acquired machinery includes machinery subsequently acquired and placed in buildings not subject to the mortgage.⁷⁹

A street railway mortgage covering after-acquired equipment on lines owned or leased by it includes rolling stock and all other personal property afterwards acquired, including that used on after-acquired lines not covered by the mortgage.⁸⁰

A mortgage including after-acquired property of a water company covers a new pumping station, with the connecting mains, where the old pumping station had become insufficient to furnish pure water and it was necessary to remove further up the river where healthful water could be obtained.⁸¹

If specific articles of personal property are described, general words are to be construed as referring to articles of the same nature and kind as those specifically named.⁸²

The after-acquired clause covers locomotives delivered on so-called

⁷⁶ Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207.

⁷⁷ In re Adamant Plaster Co., 137 Fed. 251.

⁷⁸ Georgia Granite R. Co. v. Miller, 144 Ga. 665, 87 S. E. 897.

⁷⁹ Guaranty Trust Co. of New York v. Metropolitan St. Ry. Co., 166 Fed. 569.

⁸⁰ Guaranty Trust Co. of New York

v. Metropolitan St. Ry. Co., 166 Fed. 569.

⁸¹ New England Water Works Co. v. Farmers' Loan & Trust Co., 136 Fed. 521, holding it immaterial whether the new station was actually built out of the proceeds of bonds issued under the mortgage.

⁸² Brainerd v. Peck & Colby, 34 Vt. 496.

“lease warrants,” where the real transaction was a bargain and sale with the title retained as security for the purchase money.⁸³

However, it has been held that an after-acquired clause does not protect, as against unsecured creditors, the shifting stock of a manufacturing corporation, where the mortgage authorizes the corporation to dispose of such stock for its own benefit, notwithstanding the mortgagee takes possession before the unsecured creditors obtain a lien.⁸⁴

§ 1293. — Contracts. It has been held that personal contracts or covenants entered into by third persons with the corporate mortgagor, and under which no new estate is acquired by the mortgagor, are not after-acquired property.⁸⁵ However, it is submitted, there is no good reason why contract rights acquired by the mortgagor, where adding to the value of the mortgaged property or otherwise enhancing the security, should not, in a proper case, pass as after-acquired property.

§ 1294. — Book accounts. Outstanding book accounts arising after the execution of the mortgage are included where the intention of the parties to include in the lien of the mortgage all of the assets of the corporation then existing and thereafter to be acquired in the progress of the business is clearly manifest from the terms of the mortgage.⁸⁶

§ 1295. — Subsequent franchises. Where the mortgage is so worded, it may cover subsequent franchises acquired from a municipality or the state. Thus, a mortgage covering all the property and franchises of a gas company, together with “all improvements and additions, of every name and nature,” includes a new municipal franchise obtained in the place of the one belonging to the mortgagor at the time of the execution of the mortgage.⁸⁷

A street railway mortgage covering “any and all other franchises, rights and privileges which may be granted hereafter, by said city,”

⁸³ Contracting & Building Co. of Kentucky v. Continental Trust Co. of New York, 108 Fed. 1.

⁸⁴ Zartman v. First Nat. Bank of Waterloo, 189 N. Y. 267, 12 L. R. A. (N. S.) 1083, 82 N. E. 127, aff'g 109 N. Y. App. Div. 406, 96 N. Y. Supp. 633.

⁸⁵ Moran v. Pittsburgh, C. & St. L. Ry. Co., 32 Fed. 878, 887, holding a

lease of its road by the railroad mortgagor and the covenants therein to make advances to pay the interest on the bonds not after-acquired property.

⁸⁶ Buringer v. Evening Union Printing Co., 72 N. J. Eq. 321, 324, 65 Atl. 482.

⁸⁷ Lewis v. Weidenfeld, 114 Mich. 581, 72 N. W. 604.

includes a subsequent franchise to sell electricity for power, and is not limited to franchises for the operation of street cars, at least so far as the municipality is concerned.⁸⁸

§ 1296. — Property acquired by successor in interest. An after-acquired clause covers property acquired by the mortgagor either under its old name or its new name after reorganization.⁸⁹ However, an after-acquired property clause covers only property subsequently acquired by the mortgagor and does not include property acquired by a new company into which the mortgagor is merged by consolidation.⁹⁰

A mortgage by a company which had built part of its road and then abandoned it does not cover the portion of the road completed by another company;⁹¹ and where the mortgagor corporation never acquired title to any of the land on which the road was constructed, or the right of way over any part thereof, and never obtained a consummated right or equity to any of the railroad, the mortgage cannot be enforced against a new company which built the road.⁹² But if there is an estoppel or other equitable reason therefor, an after-acquired clause in a mortgage may include property acquired by the vendee of the mortgagor.⁹³

A mortgage of after-acquired property, strictly speaking, includes only property afterwards acquired by the mortgagor; and property acquired by its successor in interest "can never come within the mortgage by the force of such a contract alone, unaided by the rule of accession, estoppel or some other equitable consideration."⁹⁴

The lien of a street railway mortgage does not extend to property purchased by a subsequent company which had bought the mortgaged

⁸⁸ *Old Colony Trust Co. v. Tacoma*, 219 Fed. 775.

⁸⁹ *Meyer v. Johnston*, 53 Ala. 237.

⁹⁰ *New York Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co.*, 102 Fed. 382.

⁹¹ *Smythe v. Chicago & S. R. Co.*, Fed. Cas. No. 13,135.

⁹² *Chicago, D. & V. R. Co. v. Loewenthal*, 93 Ill. 433.

⁹³ *Trust Co. of America v. Rhineland*, 182 Fed. 64, stating rule in Wisconsin.

Where a water company turns over its plant to the city, pipes, hydrants

and other extensions and improvements of the water plant put in by the city are within an after-acquired clause in a mortgage by the water company on the ground of accession, on the theory that the franchise no longer exists or is destroyed by merger and that the easement of the city in the streets for maintaining the mains, hydrants and service pipes is real estate. *Trust Co. of America v. Rhineland*, 182 Fed. 64.

⁹⁴ *Trust Co. of America v. Rhineland*, 182 Fed. 64.

property and operated it in connection with another railway line, when such after-acquired property was not within the contemplation of the mortgage and was not purchased until after the mortgagor had parted with the ownership of its portion of the road.⁹⁵

§ 1297. — When lien commences. A mortgage on after-acquired property creates an equitable lien in favor of the bondholders.⁹⁶ This lien, at least in equity, attaches to after-acquired property the moment the property is acquired,⁹⁷ and, as to third persons, dates from the recording of the mortgage.⁹⁸

If only an equitable title is acquired, the lien attaches as soon as such title is acquired.⁹⁹

However, it has been held that as far as personal property is concerned, there is no lien on after-acquired property, as against the rights of other creditors, until some further act by the parties to the instrument, such as taking possession of the after-acquired property by the mortgagee.¹

§ 1298. Revenues and income. The revenues or income as to which a question arises in regard to whether it is covered by the mortgage may be either revenue or income in the hands of the mortgagor at the time the mortgage is executed or may be such as were acquired after the execution of the mortgage. As to the former, it is held that a mortgage not in terms covering the income or earnings of a railroad does not pass a claim for money previously earned and afterwards assigned to a third person;² that a railroad mortgage of "income, earnings," etc., which also uses the word "moneys,"

⁹⁵ *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349, 44 Pac. 867. To same effect, where a mortgage was executed by a ditch company, see *Farm Inv. Co. v. Alta Land & Water Co.*, 28 Colo. 408.

⁹⁶ *Coe v. Pennock*, Fed. Cas. No. 2,942, aff'd 23 How. (U. S.) 117, 16 L. Ed. 436.

⁹⁷ *Meyer v. Johnston*, 53 Ala. 237; *Williamson & Upton v. New Jersey S. R. Co.*, 25 N. J. Eq. 13.

⁹⁸ *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. (N. Y.) 284, 14 How. Pr. 531.

⁹⁹ *Hamlin v. European & N. A. Ry.*

Co., 72 Me. 83, 88, where the mortgage was held to include an inchoate right of the mortgagor to a conveyance of lots of land under a contract as soon as the contract is executed and the mortgagor goes into possession; *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114, 127.

¹ *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635, 37 N. E. 632; *Medina Gas & Electric Light Co. v. Buffalo Loan, Trust & Safe Deposit Co.*, 119 N. Y. App. Div. 245, 104 N. Y. Supp. 625.

² *Farmers' Loan & Trust Co. v. Cary*, 13 Wis. 110.

does not cover moneys which represent past income and earnings;³ and of course the question in each case depends on the terms of the particular mortgage.

Generally, it is only as to the subsequent income that the question arises, and it is well settled in regard thereto that, whether or not expressly covered by the mortgage,⁴ the mortgage is not effective so long as the mortgagor is permitted to remain in possession of the property and to receive and disburse the earnings.⁵ In other words, the mortgagee obtains no rights to the revenues and income until he goes into possession himself or takes possession through a receiver, or demands possession.⁶

³ *Dow v. Memphis & L. R. R. Co.*, 20 Fed. 768.

⁴ *Central Trust Co. of New York v. Chattanooga, R. & C. R. Co.*, 94 Fed. 275; *Smith v. Eastern R. Co.*, 124 Mass. 154.

It is immaterial whether or not the mortgage expressly covers the income of the property after its execution, since in any case the trustee, mortgagee or bondholders have no interest therein until default, and on default, even though the mortgage does not cover income, a receiver may be appointed, if the corporation is insolvent, to preserve not only the corpus but the rents and profits. *Central Trust Co. of New York v. Chattanooga, R. & C. R. Co.*, 94 Fed. 275.

⁵ *Dana v. Atlantic Trust Co.*, 128 Fed. 209.

⁶ *United States. American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. Ed. 144; *Central Trust Co. of New York v. Mobile, J. & K. C. R. Co.*, 173 Fed. 330; *Farmers' Loan & Trust Co. v. American Waterworks Co.*, 107 Fed. 23; *Young v. Northern Illinois Coal & Iron Co.*, 13 Fed. 806; *Gilman v. Illinois Tel. Co.*, 1 McCrary 170, Fed. Cas. No. 5,443, aff'd 91 U. S. 603, 23 L. Ed. 405.

Alabama. Johnston & Stewart v. Riddle, 70 Ala. 219.

Kentucky. Newport & C. Bridge Co. v. Douglass, 12 Bush (Ky.) 673,

704; *Chesapeake, O. & S. W. R. Co. v. Houseman*, 9 Ky. L. Rep. 969.

Massachusetts. Ellis v. Boston, H. & E. R. Co., 107 Mass. 1.

Missouri. To the same effect, see Van Frank v. Missouri Pac. Ry. Co., 89 Mo. App. 460.

New York. New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 159 N. Y. 137, 45 L. R. A. 132, 53 N. E. 758, rev'g 30 App. Div. 89, 51 N. Y. Supp. 749.

"It is a well-settled and familiar rule that the income clause in a mortgage or trust deed of this character does not become effective until the trustee either actually or constructively reduces the property to its possession. The usual method of acquiring such possession is through the institution of a foreclosure suit and the appointment of a receiver therein." *Westinghouse Elec. & Mfg. Co. v. Idaho Railway, Light & Power Co.*, 228 Fed. 972.

A mortgage of income does not cover income earned while the mortgagor is in possession. *De Graff v. Thompson*, 24 Minn. 452; *Rumsey v. People's Ry. Co.*, 91 Mo. App. 202; *Coe v. Beckwith*, 31 Barb. (N. Y.) 339.

"In the case of a mortgage by a going concern e. g., a mining or manufacturing plant, of its real estate and equipment, together with its income,

If the mortgage provides that the mortgagor shall remain in possession until default, the mortgagee can secure the earnings of the mortgaged property only by taking or demanding possession.⁷ Especially is this rule applicable in regard to cash not only earned but actually paid over to the mortgagor corporation.⁸

Furthermore, the mortgage is a prior lien only upon the net earnings of the road, after the payment of all the operating expenses.⁹

The filing of a suit to foreclose a mortgage covering the income of a railroad company impounds the revenues of the company for

issues and profits, choses in action, etc., where there is a right of user and enjoyment reserved the grantor until default, and where the mortgagee has the right to enter and take charge of the plant and operate it for the purpose of discharging the mortgage debt the income, issues, profit, etc., do not pass under the lien of the mortgage until default and possession thereunder by the trustee, and then the lien only attaches to such income issues, etc., as arise after default and possession thus taken." *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019.

Where a railroad mortgage says nothing as to income, the earnings of the road are not subject to the mortgage while the road is in the possession of the mortgagor. *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603, 23 L. Ed. 405.

Moneys earned by a railroad company under a contract, before possession taken by the mortgagee, are not covered by a general after-acquired clause. *Emerson v. European & N. A. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39.

The right to income accrues, where a receiver is appointed, at the date of entry on the premises by the receiver appointed on the petition of the trustee. *Central Trust Co. of New York v. Chattanooga, R. & C. R. Co.*, 94 Fed. 275.

Where the trustee has taken possession, income cannot be diverted by the court to the payment of the floating debt, without the consent of the bondholders. *Duncan v. Mobile & O. R. Co.*, 2 Woods (U. S.) 542, Fed. Cas. No. 4,137.

While the mortgagor may use the income until foreclosure, minority bondholders may compel an accounting from a company which had acquired a majority of the bonds and of the stock of the mortgagor, for profits from the diversion of the earnings of the mortgagor while such company was in possession. *Linder v. Hartwell R. Co.*, 73 Fed. 320.

⁷ *United States Trust Co. v. Wabash W. Ry.*, 150 U. S. 287, 37 L. Ed. 1085; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. Ed. 144; *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603, 23 L. Ed. 405.

⁸ *Platt v. New York & S. B. Ry. Co.*, 63 N. Y. App. Div. 401, 71 N. Y. Supp. 913, rev'd on other grounds in 170 N. Y. 451, 63 N. E. 532.

⁹ *Hale v. Frost*, 99 U. S. 389, 25 L. Ed. 419; *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Parkhurst v. Northern Cent. R. Co.*, 19 Md. 472, 81 Am. Dec. 648; *Darst v. Pittsburgh, Ft. W. & C. R. Co.*, 3 Ohio Dec. 199; *McCormack v. Central Ohio R. R. Co.*, 3 Ohio Dec. 103. See also chapter on Receivers, *infra*.

the benefit of its bondholders.¹⁰ It does not, however, impound its gross revenue, but only the net revenues that remain after the payment of the operating expenses of the railroad and such preferential claims as may be allowed under the settled rules of the law.¹¹

On the other hand, the right to earnings, where the trustee obtains a decree entitling it to possession of the road, dates back to the commencement of the suit, where there are no debts for current expenses.¹²

If a receiver of the mortgagor is in possession, where the receiver was not appointed in a suit to foreclose the mortgage, the mortgage has no effect on the income where the mortgagee has taken no steps to impound the income;¹³ but if the mortgagor, by leave of court, intervenes in the receivership proceedings, and files a petition setting forth the facts showing its right to the income, it charges with the lien of the mortgage all of the income subsequently earned,¹⁴ and it is not necessary to appoint a new receiver or to extend formally the existing receivership.¹⁵

If a street railway mortgage gives the mortgagor the right to the income until default, it has the right to interest on the note of a subsidiary company although made payable to the mortgage trustee, where it was in fact executed for an indebtedness to the mortgagor.¹⁶

These matters will be considered more in detail, as affecting the

¹⁰ *Ames v. Union Pac. Ry. Co.*, 73 Fed. 49, 57.

¹¹ *Ames v. Union Pac. Ry. Co.*, 73 Fed. 49.

¹² "The payment to connecting lines of railroad of their just and equitable share of the earnings from interchanged business is one of the necessary expenses of operating a railroad." *Ames v. Union Pac. Ry. Co.*, 73 Fed. 49.

¹³ *Dow v. Memphis & L. R. R. Co.*, 124 U. S. 652, 31 L. Ed. 565.

¹⁴ *Atlantic Trust Co. v. Dana*, 128 Fed. 209.

¹⁵ "Where the mortgaged property of a railroad company is placed in the hands of a receiver before the commencement of a suit to foreclose the mortgage, and a subsequent suit for that purpose is commenced, the proceedings do not impound the income for the benefit of the mortgage bond-

holders until either a demand has been made of the receivers to surrender the income and the administration of the property, which has been refused, or an intervention has been made in the earlier suit, or an application for an order to impound the income for the benefit of the bondholders has been made to the court, or the receivership has been extended to the later suit, or receivers have been appointed therein." Per Justice Sanborn in *Chicago & A. R. Co. v. United States & M. Trust Co.*, 225 Fed. 940.

¹⁶ *Atlantic Trust Co. v. Dana*, 128 Fed. 209.

¹⁷ *Atlantic Trust Co. v. Dana*, 128 Fed. 209.

¹⁸ *Barber Asphalt Paving Co. v. Forty-Second St. M. & St. N. Ave. Ry. Co.*, 180 Fed. 648.

rights, duties and liabilities of receivers, in a subsequent chapter on Receivers.

The rights of holders of bonds, the interest on which is payable only from the net income, commonly called income bonds, has already been considered.¹⁷

A mortgage of income means, of course, net income.¹⁸

IV. WHO MAY EXECUTE OR AUTHORIZE

§ 1299. Board of directors and other officers. Independent of statute, the board of directors not only may,¹⁹ but must,²⁰ authorize the execution of a corporate mortgage. Particular officers cannot, ordinarily, execute a mortgage, without being authorized so to do by the board of directors.²¹

No action on the part of the stockholders is necessary except where it is otherwise provided by statute.²²

A formal resolution authorizing the mortgage is not necessary where a majority of the board of directors were present when it was executed.²³ The necessity for a meeting of the directors, the vote of a majority, the entry in the minutes of the resolution authorizing the mortgage, etc., raise questions not peculiar to mortgages but applicable to corporate deeds, leases, etc., and are considered in subsequent chapters.²⁴ The directors' meeting authorizing the mortgage may be held outside of the state where the company was incorporated;²⁵ and in any event the fact that the directors' meeting at which the mortgage was authorized was held in another state, where such fact does not appear from the mortgage, does not render it void or inferior to a judgment obtained after the recording of the mortgage.²⁶

§ 1300. Stockholders. Stockholders, although owning all the stock of the company, cannot execute a good legal mortgage, but such mort-

¹⁷ See § 1286, supra.

¹⁸ Parkhurst v. Northern Cent. R. Co., 19 Md. 472, 81 Am. Dec. 648. See also Schmidt v. Louisville, C. & L. Ry. Co., 15 Ky. L. Rep. 785, 26 S. W. 547, 25 S. W. 494.

¹⁹ Chap. 42.

²⁰ Wolf v. Erwin & Wood Co., 71 Ark. 438, 75 S. W. 722; Blood v. La Serena Land & Water Co., 113 Cal. 221, 226, 45 Pac. 252, 41 Pac. 1017, holding that where the only authority upon which the president and secre-

tary acted was the resolution passed at the preliminary meeting of stockholders, before organization of the board of directors, it was insufficient. See also Chap. 42.

²¹ Chap. 42, infra.

²² See § 1300, infra.

²³ South Baptist Soc. in Albany v. Clapp, 18 Barb. (N. Y.) 35.

²⁴ See Chap. 35 on Execution of Corporate Instruments and Chap. 42.

²⁵ Chap. 42.

²⁶ Schultz v. Van Doren, 64 N. J.

gage may be enforced in equity as being an equitable mortgage.²⁷

Where there are only two stockholders and no outstanding debts, they may bind the corporation by a mortgage for their own benefit as individuals as against themselves and all others who subsequently become creditors or stockholders with full notice of the mortgage and the purpose for which it was given.²⁸

§ 1301. Necessity for consent of stockholders. Unless required by statute, it is settled that the consent of the stockholders, or any of them, is not necessary to authorize the execution of a corporate mortgage.²⁹ However, in many of the states there are statutes which are applicable either to all corporations or corporations of a certain class, requiring the consent of all or a certain proportion of the stockholders, or of the stock.³⁰

Eq. 465, 53 Atl. 815, aff'd without opinion 65 N. J. Eq. 764, 55 Atl. 1133.

²⁷ Chapter on Stock and Stockholders, *infra*.

²⁸ *Shumpert v. National State Bank of Columbia*, 231 Fed. 82.

²⁹ *Hodder v. Kentucky & G. E. Ry. Co.*, 7 Fed. 793.

Hence if there is no statute, the fact that the notice of the stockholders' meeting at which the mortgage was authorized was insufficient is immaterial. *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94.

³⁰ **United States.** *Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co.*, 168 Fed. 770, holding, however, that West Virginia statute did not apply to a mortgage given for the original construction of a railroad; the *Vigilancia*, 73 Fed. 452, under New York statute; *Moran v. Straus*, Fed. Cas. No. 9,787, holding New York statute not applicable to personal property.

California. *Forbes v. San Rafael Turnpike Co.*, 50 Cal. 340.

New York. *Lord v. Yonkers Fuel Gas Co.*, 101 N. Y. 614, 3 N. E. 902; *Davidson v. Westchester Gaslight Co.*, 99 N. Y. 558, 2 N. E. 892, holding, however, that particular statute dispensed with consent as to company

organized under specified statute; *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328, holding particular writing sufficient to show assent of stockholders; *Atlantic Trust Co. v. Crystal Water Co.*, 72 App. Div. 539, 76 N. Y. Supp. 647; *Quee Drug Co. v. Plaut*, 51 App. Div. 607, 64 N. Y. Supp. 52.

North Carolina. See *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143, 20 S. E. 366, where charter required consent.

Ohio. *Shoemaker's Ex'rs v. Dayton & U. R. Co.*, 10 Ohio Dec. 252, 19 Cinc. L. Bul. 322, aff'd 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270.

Particular statutes applicable only to mining companies often require such consent. *Williams v. Gaylord*, 102 Fed. 372, aff'd 186 U. S. 157, 46 L. Ed. 1102; *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Bennett v. Red Cloud Min. Co.*, 14 Cal. App. 728, 113 Pac. 119; *Firestone Coal Co. v. McKissick*, 24 Colo. App. 294, 134 Pac. 147.

In Colorado, the statute, so far as mining companies are concerned, does not apply to a mortgage on lands platted into town lots, although a tunnel had been run under some of them,

However, if all the stock is owned by the directors, a mortgage approved by all the directors at a directors' meeting is valid.³¹

The assent of stockholders, after the mortgage is executed, validates the mortgage.³² Of course, the power to mortgage is no broader than the terms of the consent.³³

Furthermore, it is sometimes required that the mortgage be authorized by the stockholders "at a meeting called for that purpose";³⁴ and the statutes in some states require the consents of the

where it does not appear that mineral had been found there or that the tunnel was being mined, since it applies only to a mortgage of the "mines or plant" and machinery. *Firestone Coal Co. v. McKissick*, 24 Colo. App. 294, 134 Pac. 147.

It is immaterial that there are only two stockholders where both consent. *Welch v. Importers' & Traders' Nat. Bank*, 122 N. Y. 177, 25 N. E. 269.

The statute cannot be evaded by the transfer of the property by the directors to a third person and then having him give the mortgage. *Georgia Bldg. Co. v. Burdett*, 150 N. Y. Supp. 27.

An assignment by a corporation to a third mortgagee of the rents of the mortgaged premises is not a mortgage, within a statute requiring the consent of stockholders to the execution of mortgages, where the corporation neither executed nor assumed such third mortgage so as to be personally liable. *Hirsch v. Twelfth Ward Bank*, 66 N. Y. Misc. 290, 122 N. Y. Supp. 1076.

Statute as applicable to foreign corporations, see chapter on Foreign Corporations, *infra*.

In figuring the amount of stock, the stock actually issued and owned determines whether the necessary per cent. consent to the mortgage. *Swan v. Stiles*, 94 N. Y. App. Div. 117, 87 N. Y. Supp. 1089. See also chapter on Stock and Stockholders, *infra*.

When the stockholders authorize

the directors to mortgage "any or all of the rights, estates, property and franchises" of the corporation, they may mortgage land in which the interest of the corporation has changed from an estate for years to a freehold estate between the time of the stockholders' meeting and the execution of the mortgage. *Evans v. Boston Heating Co.*, 157 Mass. 37, 41, 31 N. E. 698.

Authority to execute the mortgage is shown by a recital in the corporate records that at a meeting of the stockholders when all were present, "the mortgage having been drawn up and read, a motion was made and carried, approving the same." *Crossette v. Jordan*, 132 Mich. 78, 92 N. W. 782, 9 Det. L. N. 507.

The New York statute is not retroactive. *The Segurancas*, 68 Fed. 781.

³¹ *Thomas v. Citizens' Horse-Railway Co.*, 104 Ill. 462.

³² *Rochester Sav. Bank v. Averell*, 96 N. Y. 467.

³³ *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547, 2 N. E. 909, where the consent held not broad enough to cover a mortgage of franchises.

³⁴ *Evans v. Boston Heating Co.*, 157 Mass. 37, 41, 31 N. E. 698, holding sufficient a notice of meeting "to consider the question of an issue of bonds of the company secured by a mortgage of its property," as against the objection that it did not indicate that final action was to be taken.

stockholders to be "filed."³⁵ However, the provision requiring filing is intended merely to preserve the evidence, and hence where the required number of stockholders consent to the mortgage, the fact that the consent is not in writing and filed in the office of the county clerk, as required by statute, does not, in equity, render the mortgage void, nor authorize the cancellation of it at the suit of the receiver of the corporation.³⁶

A mortgage cannot be attacked on the ground of failure to so file by a subsequent mortgagee with knowledge thereof.³⁷

It is no defense that the assent of the stockholders was not manifested by filing written consents with the county clerk as required by statute.³⁸

Sometimes, these statutes do not apply to certain mortgages.³⁹ Thus, purchase money mortgages are sometimes expressly excepted from the rule requiring consent of stockholders.⁴⁰

Statutes requiring such consent in case of railroad mortgages are sometimes applicable only where a railroad already in existence is mortgaged and do not apply to mortgages for the original construction of the road.⁴¹ And it has been held that statutes requiring consent of stockholders and approval of the railroad commission, as conditions precedent, do not apply to railroad mortgages executed to secure a statutory lien which has already attached to the prop-

³⁵ *Greenpoint Sugar Co. v. Kings County Mfg. Co.*, 7 Hun (N. Y.) 44, aff'd 69 N. Y. 328.

It is sufficient that the assent be filed simultaneously with the filing of the mortgage. *Welch v. Importers' & Traders' Nat. Bank*, 122 N. Y. 177, 25 N. E. 269.

³⁶ *Black v. Ellis*, 129 N. Y. App. Div. 140, 113 N. Y. Supp. 558, aff'g 58 N. Y. Misc. 391, 111 N. Y. Supp. 347. To the same effect, see *Rochester Sav. Bank v. Averell*, 96 N. Y. 467.

³⁷ *Rochester Sav. Bank v. Averell*, 26 Hun (N. Y.) 643, aff'd 96 N. Y. 467.

³⁸ *First Nat. Bank of Hailey v. G. V. B. Min. Co.*, 89 Fed. 439, aff'd 95 Fed. 23.

³⁹ In Pennsylvania, the constitutional provision does not apply to a mortgage given to secure debts in-

curred in the course of the ordinary business of the corporation. *West v. Dyson*, 230 Pa. 619, 79 Atl. 782.

⁴⁰ *Black v. Ellis*, 197 N. Y. 402, 90 N. E. 958, aff'g 129 N. Y. App. Div. 140, 113 N. Y. Supp. 558, 58 N. Y. Misc. 391, 111 N. Y. Supp. 347.

Where a mortgage is given in pursuance of a contract whereby the corporation purchases a lease of premises, and is merely a renewal of a purchase money mortgage, the assent of stockholders is not necessary, the statute excepting from its operation purchase money mortgages. *Black v. Ellis*, 58 N. Y. Misc. 391, 111 N. Y. Supp. 347, aff'd 129 N. Y. App. Div. 140, 113 N. Y. Supp. 558.

⁴¹ *Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co.*, 168 Fed. 770, West Virginia statute.

erty for work done and materials furnished in construction, and by the execution of which the company merely secures an extension of time on the debt.⁴²

Failure to obey the statute makes the mortgage only voidable and not void,⁴³ and it has been held that this is true even where the statute provides that the want of consent shall make the mortgage "void and of no effect."⁴⁴

This provision is solely for the protection of stockholders. Hence they may waive it or be estopped to rely thereon.⁴⁵ Only stockholders can take advantage of a failure to comply with the statute,⁴⁶ and it has even been held that the defense cannot be urged by the corporation as distinguished from the stockholders.⁴⁷

Creditors of the corporation cannot attack the mortgage on this ground,⁴⁸ and this rule applies equally well to their representatives

⁴² Galveston, B. & S. W. Ry. Co. v. Fontaine, 23 Tex. Civ. App. 519, 57 S. W. 872.

⁴³ Bishop & Co. v. Kent & Stanley Co., 20 R. I. 680, 41 Atl. 255; Eastman v. Parkinson, 133 Wis. 375, 13 L. R. A. (N. S.) 921, 113 N. W. 649.

If the statute requiring the consent of stockholders is wholly disregarded, and the mortgage authorized only by the board of directors, the mortgage is not void but merely voidable at the suit of the stockholders. Dillon v. Myers, 58 Colo. 492, Ann. Cas. 1916 C 1032, 146 Pac. 268.

⁴⁴ Beecher v. Marquette & P. Rolling Mill Co., 45 Mich. 103, 7 N. W. 695, leading case; Bishop & Co. v. Kent & Stanley Co., 20 R. I. 680, 41 Atl. 255.

"The reason upon which these and other similar cases are based is that where the evident intention of the statute is to furnish protection to certain determinate individuals, and no question of public policy is involved, the purpose of the statute is sufficiently accomplished if such persons are given the liberty of avoiding it." Bishop & Co. v. Kent & Stanley Co., 20 R. I. 680, 41 Atl. 255.

⁴⁵ Stockholders, by acquiescing in

the mortgage for a long time, may be estopped to set up its invalidity on this ground. Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co., 168 Fed. 770; Bishop & Co. v. Kent & Stanley Co., 20 R. I. 680, 41 Atl. 255.

⁴⁶ In re New York Economical Printing Co., 110 Fed. 514; Dillon v. Myers, 58 Colo. 492, Ann. Cas. 1916 C 1032, 146 Pac. 268; Eastman v. Parkinson, 133 Wis. 375, 13 L. R. A. (N. S.) 921, 113 N. W. 649.

If the statute is violated, it seems that stockholders may sue to set aside the mortgage. Peerson v. Gray, 184 Ala. 312, 63 So. 467.

⁴⁷ Firestone Coal Co. v. McKissick, 24 Colo. App. 294, 134 Pac. 147.

So held in regard to a corporate lease. Westerlund v. Black Bear Min. Co., 203 Fed. 599, reviewing the authorities at length.

In Alabama, however, it seems that the corporation may have such a mortgage set aside. Southern Building & Loan Ass'n v. Casa Grande Stable Co., 128 Ala. 624, 29 So. 654.

⁴⁸ United States. Hervey v. Illinois Midland Ry. Co., 28 Fed. 169.

California. McKee v. Title Insurance & Trust Co., 159 Cal. 206, 113 Pac. 140, overruling, in effect, Pekin

such as an assignee in insolvency of the corporation⁴⁹ or trustees in bankruptcy.⁵⁰

But while a general creditor of the corporation cannot attack the mortgage on this ground, it has been held that a receiver who represents the stockholders as well as creditors may do so.⁵¹

General questions relating to the necessity for and sufficiency of a stockholders' meeting, or notice thereof, who are eligible to vote thereat, etc., are considered in a subsequent chapter, since they are applicable to all special meetings of stockholders.⁵²

V. FORM, CONTENTS, EXECUTION, VALIDITY, ETC.

§ 1302. Form and formal requisites—In general. If the statute authorizing the mortgage, or some other statute relating to corporations, does not provide any mode of executing or recording the mortgage, and specifies no form for it, it follows that such mortgages are subject to and governed by the general laws regulating mortgages, as far as applicable to the subject-matter of the mortgage.⁵³ Of course, if there are any statutory provisions governing the execution of such mortgages, they must be complied with.⁵⁴

Mining & Milling Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679, and *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178.

New York. *Beebe v. Richmond Light, Heat & Power Co.*, 3 N. Y. App. Div. 334, 38 N. Y. Supp. 395.

North Carolina. *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143, 20 S. E. 366.

Virginia. *Enders v. Board of Public Works*, 1 Gratt. 364.

Wisconsin. *Eastman v. Parkinson*, 133 Wis. 375, 13 L. R. A. (N. S.) 921, 113 N. W. 649.

An execution creditor of the corporation, joined as a defendant, cannot raise the objection that the mortgage is not, in its terms, authorized by the vote of the stockholders, where neither the corporation nor the stockholders make any such objection. *Citizens State Bank of Sturgis v. McGraft Lumber Co.*, 122 Mich. 573, 6 Det. L. N. 899, 81 N. W. 567.

⁴⁹ *Bishop & Co. v. Kent & Stanley Co.*, 20 R. I. 680, 41 Atl. 255.

⁵⁰ *State Bank of Williamson v. Fish*, 120 N. Y. Supp. 365.

⁵¹ "No distinction should be attempted to be drawn between stockholders and the corporation, or a receiver of the corporation, or an assignee for the benefit of creditors, or any one who represents the stockholders. The distinction to be drawn is between a general creditor on the one hand and, on the other hand, the stockholders, or the corporation, or a receiver or other officer who represents stockholders." *Glover v. Ehrlich*, 62 N. Y. Misc. 245, 114 N. Y. Supp. 992.

⁵² Chapter on Meetings and Elections, *infra*.

⁵³ *Hunt v. Bullock*, 23 Ill. 320; *Palmer v. Forbes*, 23 Ill. 300.

⁵⁴ *Turner v. Kingston Lumber Co.*, 106 Tenn. 1, 58 S. W. 854.

In some states, statutes require that a corporate deed of trust shall be accompanied by an affidavit that it is made in good faith and without any

Where a statute requires the attaching of the certificate of the secretary to corporate mortgages, a ratification of the mortgage by the stockholders need not be attached.⁵⁵

The affidavit required by statute in case of a chattel mortgage, stating that the mortgage is made in good faith and without intent to defraud creditors, where executed by a corporation, need not be signed by all the members of the corporation.⁵⁶

Clerical errors in the name of a party are immaterial;⁵⁷ and the fact that the mortgage is not executed in the full name of the corporate mortgagor, a part of it being omitted, is not fatal where it is clear that it was intended to be the obligation of such corporation.⁵⁸

It is immaterial that the mortgage in its body uses the name of the corporation as a collective noun.⁵⁹

Bonds which pledge the property of the corporation for the payment of the debt are in effect a mortgage and will be so treated in equity.⁶⁰

The taking of preferred stock, where the dividend is payable out of the net earnings, is only another form of mortgage.⁶¹

A mortgage cannot be created by statute without the consent of the corporation.⁶²

The necessity for acknowledgment of the mortgage, its sufficiency, the curing of defects therein, etc., are governed by the rules relating to all corporate conveyances, as hereinafter considered.⁶³

design to hinder or delay creditors. *Teitig v. Boesmann*, 12 Mont. 404, 31 Pac. 371, holding, however, that the statute does not apply to trust deeds of both real and personal property, where actual delivery accompanies the conveyance.

⁵⁵ *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

⁵⁶ *Alferitz v. Scott*, 130 Cal. 474, 62 Pac. 735.

⁵⁷ *Germantown Farmers' Mut. Ins. Co. v. Dhein*, 57 Wis. 521, 15 N. W. 840.

⁵⁸ *Ex parte South Carolina Loan & Trust Co.*, 118 Fed. 892, aff'd *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569.

⁵⁹ *Edwards v. Snow Hill Supply Co.*, 150 N. C. 173, 63 S. E. 740. "The said Snow Hill Supply Company, of

the first part, their heirs and assigns."

⁶⁰ *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414, 16 L. Ed. 154; *King v. Tusculumbia, C. & D. R. Co.*, Fed. Cas. No. 7,808.

But bonds issued under a charter provision authorizing bonds to be issued which shall be liens, do not, ipso facto, become a lien on the corporate property, so as to be superior or even equal to, other bonds issued under the same authority and secured by a trust deed. *Brunswick & A. R. Co. v. Hughes*, 52 Ga. 557.

⁶¹ *West Chester & P. R. R. v. Jackson*, 77 Pa. St. 321.

⁶² *State v. Mexican Gulf R. Co.*, 3 Rob. (La.) 513.

⁶³ Chapter on Execution of Corporate Instruments, infra.

The absence of a seal does not invalidate the mortgage.⁶⁴

The mode of signing corporate mortgages is the same as the mode of signing other corporate contracts.⁶⁵

An approval of a mortgage by a public utility commission ordinarily does not, it seems, relate to the form of the mortgage.⁶⁶

§ 1303. — Mortgage or deed of trust. Corporate mortgages, at least in the case of railroad and other large quasi public corporations, where given to secure bonds, are ordinarily in the form of a trust deed.

The trust deed, where a mere security for a debt, is essentially a mortgage⁶⁷ and it is ordinarily immaterial what the security is called.⁶⁸ A trust deed may be in legal effect merely a mortgage, so as to leave title in the mortgagor, in jurisdictions where a mortgage is a mere lien or security.⁶⁹

Statutes relating to railroads sometimes require the execution of a deed of trust rather than a mortgage to an individual creditor.⁷⁰

An instrument is to be construed as a mortgage rather than a deed of trust where it is described in the bonds as a mortgage, has no provision for reconveyance, prescribes neither manner of nor notice for a sale by the trustee and uses the expression "this mortgage" and refers to "the lien or incumbrance hereby created."⁷¹

§ 1304. — Equitable mortgage. The rule applicable, without regard to corporations, that an "equitable mortgage" may be created by any writing or acts from which the intention to do so may be gathered, applies to corporations equally with individuals.⁷² Thus, there may be an equitable mortgage where there is a valid agreement

⁶⁴ See Chap. 19, *supra*.

⁶⁵ Chapter on Execution of Corporate Instruments, *infra*.

⁶⁶ Federal Trust Co. v. Bristol County St. R. Co., 222 Mass. 35, 45, 109 N. E. 880.

⁶⁷ McLane v. Placerville & S. Val. R. Co., 66 Cal. 606, 6 Pac. 748.

⁶⁸ McLane v. Placerville & S. Val. R. Co., 66 Cal. 606, 6 Pac. 748. See also Mason v. York & C. R. Co., 52 Me. 82, 99.

⁶⁹ Wisconsin Cent. R. Co. v. Wisconsin River Land Co., 71 Wis. 94, 98, 36 N. W. 837.

⁷⁰ In re York & C. R. Co., 50 Me. 552.

⁷¹ California Safe Deposit & Trust Co. v. Sierra Valleys R. Co., 158 Cal. 690, Ann. Cas. 1912 A 729, 112 Pac. 274.

⁷² Sturdivant Bank v. Schade, 195 Fed. 188; Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co., 168 Fed. 770, agreement to give a mortgage; Central Trust Co. of New York v. Bridges, 57 Fed. 753; Miller v. Rutland & W. R. Co., 36 Vt. 452, 477.

to give a mortgage, full performance by the party to whom it was to be given, and an effort to perform by giving a mortgage invalid because of failure to observe certain statutory requirements.⁷³ So an equitable mortgage exists where a corporation, under a promise to execute a mortgage to secure the payment of the property purchased, goes into possession of the property, and, after having used it, fails or refuses to execute the mortgage.⁷⁴

Where a mortgage is illegal because executed in part to secure the debt of a stockholder, it may stand as an equitable mortgage to the extent of the debt of the corporation secured by it.⁷⁵

Where a contract calls for a corporate mortgage, and the corporation has accepted and retained the benefits of the contract, equity may require the corporation to execute the mortgage.⁷⁶

In some states the mere deposit of title deeds as a security for debt does not create an equitable mortgage on the land.⁷⁷

§ 1305. Contents—In general. There are no fixed rules as to what a corporation mortgage or trust deed must contain.⁷⁸ The mortgagor may mold the trust and give it any shape it chooses.⁷⁹ However, certain clauses are commonly found in nearly all such instruments. Of course, the property covered should be clearly designated, governed by the same rules applicable to all mortgages.⁸⁰

The mortgage need not fix the rights and duties of the trustee.⁸¹

Where the resolution authorizing the mortgage does not prescribe its terms, it is proper to insert such stipulations as are usual in such instruments.⁸² Thus, it is usual and proper to insert a provision authorizing foreclosure for the whole debt on nonpayment of interest when due,⁸³ or provisions authorizing the mortgagee to keep

⁷³ *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614, aff'g 17 N. Y. App. Div. 152, 45 N. Y. Supp. 141.

⁷⁴ *Texas Western Ry. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98.

⁷⁵ *Hatch v. Johnson Loan & Trust Co.*, 79 Fed. 828.

⁷⁶ *Stiewel v. Webb Press Co.*, 79 Ark. 45, 116 Am. St. Rep. 62, 94 S. W. 915.

⁷⁷ *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 596, 69 Am. St. Rep. 888, 31 S. E. 673.

⁷⁸ For forms of corporation mortgages and trust deeds, see *Fletcher's Corporation Forms*.

⁷⁹ *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

⁸⁰ A corporate chattel mortgage need not detail the specific articles covered. *Clement v. Congress Hall*, 72 N. Y. Misc. 519, 132 N. Y. Supp. 16.

⁸¹ *Mercantile Trust Co. v. Portland & O. R. Co.*, 10 Fed. 604, especially where they are fixed by statute.

⁸² *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555.

⁸³ *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555; *Coe v. New Jersey Midland Ry. Co.*, 31 N. J. Eq. 105, modified 34 N. J. Eq. 266. But see *Jesup v. City Bank*, 14 Wis. 331, hold-

the property insured, to take possession and to foreclose if the property is attached,⁸⁴ or a covenant that the trustees shall be reimbursed for all necessary expenses, including expenses of attorneys, etc., in and about the trust,⁸⁵ although the resolution of the directors does not describe or mention such conditions.

A resolution authorizing a mortgage with the terms and conditions generally contained in such instruments authorizes the execution of a mortgage providing for the maturity of the principal upon a default in interest.⁸⁶

A resolution authorizing a railroad mortgage on all its property "now and hereafter belonging to the company" gives power to execute a mortgage conveying the tolls, freights, rents, incomes, etc.⁸⁷ And a resolution authorizing a mortgage of the railroad and its property includes power to mortgage its right to operate the road.⁸⁸

A resolution authorizing a mortgage of "the road and its property, etc.," includes the franchises of the railroad.⁸⁹

The fact that the mortgage does not strictly comply with the resolution authorizing it does not render it invalid, where it is afterwards ratified by the directors.⁹⁰

Ordinarily, a corporate mortgage contains provisions that the mortgagor may retain possession,⁹¹ that it shall pay all taxes on the property,⁹² that the principal shall become due on default in payment

ing the mortgage valid but the clause invalid.

⁸⁴ *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566, 35 Pac. 396.

⁸⁵ *Southern California Motor-Road Co. v. Union Loan & Trust Co.*, 64 Fed. 450.

But a general resolution authorizing a mortgage does not, it has been held, include power to insert therein a provision for an attorney's fee in case legal proceedings are taken to enforce it. *Pacific Rolling-Mill v. Dayton, S. & G. R. Co.*, 5 Fed. 852.

⁸⁶ *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. 881.

⁸⁷ *Kelly v. Alabama & C. R. Co.*, 58 Ala. 489.

⁸⁸ *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

⁸⁹ *Bardstown & L. R. Co. v. Met-*

calfe, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

⁹⁰ *First Nat. Bank of Montpelier v. Sioux City Terminal Railroad & Warehouse Co.*, 69 Fed. 441, where, after the execution, the directors ordered the issuance of the bonds which the mortgage was given to secure.

⁹¹ In issuing bonds a corporation may reserve to itself the right to use and manage the property securing the bonds so long as there is no default in payment of either principal or interest. *Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.*, 109 Fed. 523.

⁹² A statute requiring the mortgagor to pay debt and interest, without any deduction for taxes paid, was held not to apply to the five per cent. duty imposed by the Federal Revenue Act of 1864. *Haight v. Pittsburg, Ft. W. &*

of interest,⁹³ that the trustee shall foreclose upon the request of a certain per cent. of the value of the bonds as represented by the holders,⁹⁴ that the trustee may himself sell on default,⁹⁵ etc. So, also, a provision may be inserted that any new machinery which may be bought shall be substituted for that worn out and become security for the bonds,⁹⁶ or authorizing the sale of all or part of the property free from the mortgage lien.⁹⁷

A provision in a corporate mortgage authorizing the trustee to buy in the property for the bondholders is valid.⁹⁸

The fact that there is nothing in the body of the mortgage to show necessarily that the company signing it is a corporation is not fatal where it is undisputed that the mortgagor was a corporation, that its name was signed by its officers, and that the persons who signed were in fact such officers by whom such a paper would ordinarily be executed.⁹⁹

If a mortgage of mining claims provides that if assessment work is not done by the mortgagor, it may be done by the mortgagee and the expense made a further lien on the claims, the mortgagee is not obliged to accept a large amount of work done on one of the claims as done for the benefit of all the claims, where the question as to the validity of such act is doubtful.¹

§ 1306. — Authority to make mortgage. A mortgage to secure a loan need not show on its face that the officers of the company were authorized to borrow the money, in the absence of a statute or charter provisions requiring it.²

The approved practice is for the trust deed to show that it was executed by the authority of the stockholders (where necessary) and of the directors of the corporation.³

If the mortgage is under seal, the burden of showing that the

C. R. Co., 6 Wall. (U. S.) 15, 18 L. Ed. 818.

⁹³ Rumsey v. People's Ry. Co., 154 Mo. 215, 246, 55 S. W. 615. And see supra this section, and § 1362, *infra*.

⁹⁴ See § 1360, *infra*.

⁹⁵ See § 1343, *infra*.

⁹⁶ Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 117 Ky. 325, 78 S. W. 113.

⁹⁷ *Infra*, § 1321, rights and liabilities of parties.

⁹⁸ Etna Coal & Iron Co. v. Marting Iron & Steel Co., 127 Fed. 32.

⁹⁹ Bank of Dillon v. Murchison, 213 Fed. 147.

¹ Copper Belle Min. Co. v. Costello, 11 Ariz. 334, 95 Pac. 94.

² Turner v. Kingston Lumber Co. (Tenn.), 59 S. W. 410.

³ Turner v. Kingston Lumber Co., 106 Tenn. 1, 58 S. W. 854, holding recital in particular trust deed sufficient.

officer signing it was not authorized so to do by the board of directors is on the party so claiming.⁴

§ 1307. — Application of proceeds. Sometimes, the mortgage expressly provides how the proceeds of the sale of bonds shall be applied. But a recital in a mortgage that the money derived from the sale of bonds shall be used to pay the debts of the corporation creates no trust in favor of any creditor of the corporation either to deliver any of the bonds or to pay over the proceeds thereof to him.⁵

Where a mortgage executed by a holding company designated how the proceeds of the bonds were to be used, and after stating certain specific purposes added "and for the other purposes of company," it was held that the company had power to advance moneys to its subsidiary companies to prevent them from defaulting in the payment of the interest coupons as they matured.⁶

§ 1308. General statutes governing chattel mortgages as applicable —General rules. In many states statutes provide that chattel mortgages are invalid against subsequent purchasers and incumbrancers unless accompanied by an affidavit of good faith and want of design to defraud creditors, and unless recorded and filed in certain places. So far as corporate mortgages are concerned there is little or no doubt but that if they cover personal property and nothing else, they must comply with such statutes.⁷

However, corporate mortgages ordinarily cover both real and personal property and then two questions arise, viz.: 1. Is it sufficient, in such cases, to comply with the provisions relating to real estate mortgages as to recording, etc., without complying with the provisions of the chattel mortgage statute as to affidavit and recording? 2. Conceding that it is necessary to comply with the chattel mortgage act if personalty is covered, is rolling stock of a railroad and such property personal property or is it a fixture so as to be classed as real property and pass under a mortgage of real property, thereby relieving from the necessity of complying with the chattel mortgage statute? As to both these questions there is much conflict of opinion.

In one of the earliest cases, it was held by the Supreme Court of

⁴ Earle v. National Metallurgic Co., New Jersey Short Line R. Co., 193 77 N. J. Eq. 17, 76 Atl. 555. See also Fed. 507.
§ 1299, supra.

⁵ Roanoke St. Ry. Co. v. Hicks, 96 Va. 510, 32 S. E. 295.

⁶ Finance Co. of Pennsylvania v.

⁷ See dictum in Southern California Motor-Road Co. v. Union Loan & Trust Co., 64 Fed. 450.

the United States that a statute providing for recording chattel mortgages and that when recorded they should be valid for not to exceed two years, notwithstanding the property mortgaged was left in possession of the mortgagor, was not applicable to railway mortgages of all their property.⁸

Generally, the state courts hold that a railroad mortgage of both real and personal property must comply with the chattel mortgage statute, in order to be valid as to the personal property, as against other creditors,⁹ while the tendency of the federal courts is to hold the contrary.¹⁰

In the federal courts, it has been held that a state statute requiring a mortgage of personalty to be accompanied by the affidavit of the mortgagor that it is made in good faith, is not applicable to a mortgage of property devoted to public service, "for the reason that while some of it, considered separately, falls within the definition of personal property, it is all to be deemed a single indissoluble unit, because of its necessary relation to the public purpose to which it is devoted." ¹¹

However, this principle does not extend "to such articles of personalty as do not form constituent parts of the system, or are not presently necessary to its maintenance and operation," and as to such personalty the claims of other creditors are superior to those of the mortgagee where the affidavit does not accompany the mortgage.¹²

⁸ "If the construction contended for be sound, a railway mortgage security, so far as the personalty of the corporation is concerned, would cease to be of any value after the expiration of two years from its execution, unless the mortgagor, before the expiration of that time, takes possession of it; the authority to do which, in advance of the maturity of the mortgage debt and when there has been no default of the corporation in meeting its interest, would render the negotiation of the mortgage bonds difficult if not impossible." *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111, construing Illinois statute.

⁹ *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76; *Hunt*

v. Bullock, 23 Ill. 320; *Williamson v. New Jersey S. R. Co.*, 29 N. J. Eq. 311, rev'g 28 N. J. Eq. 277; *Radebaugh v. Tacoma & P. R. Co.*, 8 Wash. 570, 36 Pac. 460.

¹⁰ See *Stearns Lighting & Power Co. v. Central Trust Co.*, 223 Fed. 962, holding an electrical transmission line real property so as to be protected by the recording of a real estate mortgage; *Washington Trust Co. v. Dunaway*, 169 Fed. 37, holding that federal statutes relating to railroad mortgages in Alaska do not require the mortgage to be recorded as a chattel mortgage.

¹¹ *Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co.*, 228 Fed. 516.

¹² *Equitable Trust Co. of New York*

In some states it is held that the rolling stock of a railroad is a fixture¹³ and hence that a mortgage covering in part such property need not comply with the chattel mortgage statute;¹⁴ but it is otherwise as to a mortgage of coal, oil and other personalty which may be used, or is commonly used, for other than railroad purposes.¹⁵

In other jurisdictions where the rolling stock is considered personal property,¹⁶ it is held that the chattel mortgage statute must be complied with.¹⁷

If the statute provides an exclusive mode for mortgaging rolling stock, as by specifying that it may be made the subject of a chattel mortgage, it is held that a mortgage on both real and personal corporate property, including rolling stock, must, as to the latter, comply with the chattel mortgage statute;¹⁸ but it was held by a federal court construing the same statute, that the California statute providing that chattel mortgages may be made upon "locomotives, engines and other stock of a railroad" does not require that a mortgage on a railroad and its rolling stock shall comply with the chattel mortgage statute, where there was an independent state statute authorizing railroad companies to mortgage their corporate property and franchises.¹⁹

In a later federal decision it was held that where there is no statute

v. Great Shoshone & Twin Falls Water Power Co., 228 Fed. 516.

¹³ See § 1287, *supra*.

¹⁴ *Farmers' Loan & Trust Co. v. St. Joseph & D. C. R. Co.*, 3 Dill. (U. S.) 412, Fed. Cas. No. 4,669; *Booth v. Central Sav. Bank*, 58 Colo. 519, 146 Pac. 240; *Roberts v. Johnson*, 5 Colo. App. 406, 39 Pac. 346; *Hoyle v. Plattsburgh & M. R. Co.*, 51 Barb. (N. Y.) 45, *rev'd* 54 N. Y. 314, 13 Am. Rep. 595; *Bement v. Plattsburgh & M. R. Co.*, 47 Barb. (N. Y.) 104, *aff'd* 51 Barb. (N. Y.) 45; *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484.

¹⁵ *Farmers' Loan & Trust Co. v. St. Joseph & D. C. R. Co.*, 3 Dill. (U. S.) 412, Fed. Cas. No. 4,669.

¹⁶ See § 1287, *supra*.

¹⁷ *Williamson v. New Jersey S. R. Co.*, 29 N. J. Eq. 311, 323-335, *rev'g* on this point 28 N. J. Eq. 277; *Rade-*

baugh v. Tacoma & P. R. Co., 8 Wash. 570, 36 Pac. 460.

¹⁸ *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76.

¹⁹ *Southern California Motor-Road Co. v. Union Loan & Trust Co.*, 64 Fed. 450, *rev'g* on this point 51 Fed. 840.

See *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76, distinguishing the case above and other federal decisions as based on statutes authorizing railroad mortgages of franchises and real and personal property "as an entirety" from a case where a statute confers the power but without the words "as an entirety." However, in *Booth v. Central Sav. Bank*, 58 Colo. 519, 146 Pac. 240, the court, in referring to the California decision, properly states that "we think no such distinction exists."

conferring upon railroad companies the power to mortgage all their property and franchises as an entirety, and a statute provides that the personal property of a railroad company shall be liable to execution and sale in the same manner as the personal property of individuals, a railroad mortgage including personal property must contain the affidavit required by the general statute in case of chattel mortgages.²⁰

In several states statutory provisions relating to chattel mortgages, such as requiring them to be accompanied by an affidavit of good faith, filed and refiled, etc., are expressly or impliedly made not applicable, in part or in whole, to railroad mortgages.²¹

If the mortgage is valid in the state where executed and where the property is located, the law of the forum as to filing chattel mortgages does not govern.²²

§ 1309. — Change of possession. In some states, chattel mortgages unaccompanied by a delivery of possession are void against creditors, and the rule has been applied to corporate mortgages.²³

²⁰ *Illinois Trust & Savings Bank v. Seattle Elec. Railway & Power Co.*, 82 Fed. 936, construing Washington statutes.

²¹ *Southern California Motor-Road Co. v. Union Loan & Trust Co.*, 64 Fed. 450, construing California statute; *Metropolitan Trust Co. of New York v. Pennsylvania, S. & N. E. R. Co.*, 25 Fed. 760, construing New Jersey statute; *Cooper v. Corbin*, 105 Ill. 224; *Williamson v. New Jersey S. R. Co.*, 29 N. J. Eq. 311, 333, holding statute not retroactive; *State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 381, 39 N. Y. Supp. 258; *Guaranty Trust Co. of New York v. Troy Steel Co.*, 33 N. Y. Misc. 484, 68 N. Y. Supp. 915; *Hoyle v. Plattsburgh & C. R. Co.*, 51 Barb. (N. Y.) 45, rev'd 54 N. Y. 314, 13 Am. Rep. 595.

Statute held to apply to mortgage executed before its passage. *Kelly v. Boylan*, 32 N. J. Eq. 581, rev'd 36 N. J. Eq. 331.

"It was certainly the intention of

the legislature, in its enactment, to recognize the power of a corporation to include in a mortgage upon its railway, rights and franchises, property that was clearly personal in its character." *National Bank of Wilmington & Brandywine v. Wilmington, N. C. & S. Ry. Co.*, 9 Del. Ch. 258, 81 Atl. 70.

A statute providing that corporate mortgages on both real and personal property, executed to secure "bonds," need not be filed as chattel mortgages, applies to a mortgage securing a single non-negotiable bond, at least where a general statute provides that in construing statutes words in the singular include the plural and vice versa. *Clement v. Congress Hall*, 72 N. Y. Misc. 519, 132 N. Y. Supp. 16.

²² *Winslow v. Troy Iron & Nail Factory*, 1 Disney (Ohio) 229, 12 Ohio Dec. 591.

²³ *Klaus v. Majestic Apartment House Co.*, 250 Pa. 194, 95 Atl. 451.

But in case of railroad property, a mortgage of its personal property is valid, although possession is not delivered to the mortgagee, so far as all property necessary to carry on the business of the road is concerned, as against ordinary judgment creditors.²⁴

The effect of a mortgage reserving the right of possession in the mortgagor until default, as being invalid as against other creditors, at least as to property consumable in its use, has been held to be governed by the same rules applicable to mortgages executed by individuals.²⁵

In some states, however, by statute, the retention of possession by the mortgagor of chattels does not make the mortgage invalid as against creditors, in case of mortgages of the property of any manufacturing or mechanical establishment, provided the mortgage particularly describes the property and is recorded.²⁶ And, ordinarily, under the chattel mortgage statutes as they now exist, change of possession is not necessary where the chattel mortgage is recorded.

§ 1310. Place of execution. A mortgage is not void because executed outside of the state where the corporation is located.²⁷

§ 1311. Construction in general. Corporate mortgages will, if possible, be construed so as to give them operative effect rather than to destroy them.²⁸

Corporate bonds and mortgages will not be so interpreted as to make them void unless such an interpretation is required by their terms in the light of the surrounding circumstances.²⁹

If the mortgage covers corporate property generally, a resolution authorizing its issuance, in so far as it provides for payment out of a specified fund, is of no effect.³¹

²⁴ *Covey v. Pittsburg, Ft. W. & C. R. Co.*, 3 Phila. (Pa.) 173.

²⁵ "We do not concur in the position taken by counsel for the trustee, and which is supported by some text-writers, that a different rule necessarily applies to mortgages made by corporations from those made by individuals." *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019.

²⁶ *Central Trust Co. of New York v. Worcester Cycle Mfg. Co.*, 93 Fed. 712, construing Connecticut statute

and holding the description of the property not sufficiently definite to come within the statute.

²⁷ *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. 169; *Wright v. Bundy*, 11 Ind. 398, 404.

²⁸ *Rawlings v. New Memphis Gas-light Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

²⁹ *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019.

³¹ *Aetna Indemnity Co. v. Altadena*

§ 1312. Delivery and acceptance. The sufficiency of the delivery is governed by the same rules applicable to all mortgages and deeds.³² There need not be an actual delivery,³³ and where the same person is president of both the mortgagor and the mortgagee corporation he may make a delivery to himself.³⁴

The date of delivery of the mortgage fixes the rights of the parties rather than the date written in the mortgage.³⁵

If the mortgage is lost in the mails before delivery, ratification of a duplicate is not necessary.³⁶

There must be an acceptance of a mortgage as well as a delivery.³⁷ In order to justify a presumption of acceptance, it must clearly appear to be for the benefit of the beneficiaries therein, and not burdened with conditions which will deprive them of some material right.³⁸

A railroad mortgage covering stock held by the mortgagor in another railroad company and providing for a reservation of certain bonds by the trustee, to be delivered at so much per mile on the construction or purchase of additional mileage, does not authorize a delivery of such bonds for every mile acquired of the railroad in which the stock was held.³⁹

§ 1313. Diversion. If a mortgage is authorized to secure bonds for money borrowed, it is not a diversion of the mortgage to transfer it directly to the person from whom the money was borrowed.⁴⁰ So, although a trust deed was executed to secure a bond issue, where it was never delivered to the trustee nor any bonds issued, it may be delivered to a creditor to secure a debt.⁴¹

Min. & Inv. Syndicate, 11 Cal. App. 26, 165, 104 Pac. 470.

³² See *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892, holding delivery to trustee sufficient, although he returns it to the attorney for the mortgagor to be recorded.

³³ *In re McCurdy's Appeal*, 65 Pa. St. 290.

³⁴ *In re Jackson Brick & Tile Co.*, 189 Fed. 636.

³⁵ *Federal Trust Co. v. Bristol County St. R. Co.*, 222 Mass. 35, 44, 109 N. E. 880.

³⁶ *Bassett v. Monte Christo Gold & Silver Min. Co.*, 15 Nev. 293.

³⁷ *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575.

³⁸ *Reagan v. First Nat. Bank*, 157 Ind. 623, 62 N. E. 701, 61 N. E. 575.

³⁹ *Lehigh & H. R. Ry. Co. v. Central Trust Co. of New York*, 117 N. Y. Supp. 595.

⁴⁰ *Davidson v. Westchester Gas Light Co.*, 99 N. Y. 558, 2 N. E. 892.

⁴¹ *Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14.

§ 1314. Validity—In general. Invalidity of the mortgage does not ordinarily affect the liability on the debt secured.⁴²

A railroad mortgage given to a trustee is not void under the statute of uses and trusts.⁴³

A mortgage is not validated by the levy of an assessment by the directors to pay the debt secured, where the mortgage is invalid.⁴⁴

If a statute declares certain mortgages "void," it has been held that no rights can be asserted thereunder,⁴⁵ although this is not always so, the word "void" sometimes being construed as meaning "voidable."⁴⁶

Where bonds are payable from a fund to be created from surplus earnings, but on default they are to become an absolute and unconditional obligation of the company, the mortgage securing the bonds is not a nullity on the ground that the bonds are not unconditional obligations.⁴⁷

§ 1315. — Consideration. Like other mortgages, there must be a consideration therefor.⁴⁸

Where the loans secured are entirely fictitious, the mortgage is a nullity.⁴⁹ However, the surrender of a contract or obligation, which is a real disadvantage to a party, is a sufficient consideration for a mortgage.⁵⁰

If an obligation is assumed upon a valid agreement that the corporation benefited will execute a mortgage upon specified property to secure the liability, a mortgage executed within a reasonable time thereafter is based on a good consideration.⁵¹

If the bonds are invalid because issued in direct violation of a statute, the mortgage is affected by the same illegality.⁵²

⁴² *Olmsted v. Rochester & P. R. Co.*, 44 Hun (N. Y.) 627, 8 N. Y. St. Rep. 856, aff'd 106 N. Y. 673, 13 N. E. 927.

⁴³ *State of Minnesota v. Duluth & I. R. R. Co.*, 97 Fed. 353.

⁴⁴ *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373.

⁴⁵ *Farmers' Loan & Trust Co. v. Oregon & C. Ry. Co.*, 24 Fed. 407.

⁴⁶ See § 1277, supra.

⁴⁷ *Martin v. Bankers' Trust Co.*, — Ariz. —, 156 Pac. 87, distinguishing *Synnot v. Tombstone Consol. Mines*

Co., 208 Fed. 251, 207 Fed. 544, as involving bonds payable only out of net surplus earnings.

⁴⁸ *Porter v. Lassen County Land & Cattle Co.*, 127 Cal. 261, 59 Pac. 563.

⁴⁹ *Investors' Syndicate v. North American Coal & Mining Co.*, 31 N. D. 259, 153 N. W. 472.

⁵⁰ *Fernald v. Highland Hall Co.*, 59 Kan. 534, 53 Pac. 861.

⁵¹ *In re Farmers' Supply Co.*, 170 Fed. 502.

⁵² *East Boston Freight R. Co. v. Hubbard*, 10 Allen (Mass.) 459, note.

§ 1316. — Effect of partial invalidity. If a mortgage is unauthorized as to part of the property covered, it is nevertheless valid as to the property as to which it was authorized. For instance, although there is no power to mortgage the franchise, the mortgage is valid as to the other property covered.⁵³ So a corporate mortgage in part to secure the purchase price of property then conveyed, or to secure any present consideration, is valid to such extent although it is void in so far as it attempts to secure pre-existing debts because made in contemplation of insolvency.⁵⁴ And a mortgage given to secure a valid corporate debt and also the individual debts of an officer may be valid in part.⁵⁵

§ 1317. — Who may attack validity. As in case of other mortgages, there may be an estoppel to question the validity of a corporate mortgage.⁵⁶ And, of course, a corporation succeeding to the property of another corporation may be estopped by its acts or conduct to deny the validity of a mortgage executed by its predecessor in title.⁵⁷

However, a second mortgagee may attack the first mortgage on the ground that it was executed without authority, where the second mortgage was not expressly made subject to the first mortgage.⁵⁸

The rule that intervening creditors having no judgment or other lien on the property cannot question the validity of a mortgage by intervening in the foreclosure suit does not apply where the claims of such creditors have been filed and allowed as valid, subsisting claims against the estate in the hands of a receiver appointed in a creditor's suit.⁵⁹

The right to attack a mortgage by creditor's bill is treated of in a subsequent volume.⁶⁰

⁵³ *Butler v. Rahm*, 46 Md. 541; *Glovinger v. Pittsburg & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211, 27 Wkly. Notes Cas. 497.

⁵⁴ *Reed v. Helois Carbide Specialty Co.*, 64 N. J. Eq. 231, 53 Atl. 1057.

⁵⁵ *Greenwood County Bank v. O. B. Walker Tel. Co.*, 88 Kan. 287, 128 Pac. 357.

⁵⁶ *Beekman v. Hudson River West Ind. Ry. Co.*, 35 Fed. 3.

⁵⁷ *Federal Trust Co. v. Bristol*

County St. R. Co., 222 Mass. 35, 109 N. E. 880, holding, however, that negotiations relating to release of property from lien or the payment of interest on the bonds were no estoppel

⁵⁸ *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

⁵⁹ *Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co.*, 228 Fed. 516.

⁶⁰ Chapter on Insolvency, *infra*.

§ 1318. — **What law governs.** Generally, the validity of a mortgage is governed by the law of the state where the corporate mortgagor is domiciled.⁶¹

A corporate deed of trust executed at its domicile will be governed by the laws of that state as to its nature, character and interpretation, although it involves choses in action in another state where the corporation is doing business and where suit is brought.⁶²

§ 1319. **Recording mortgage.** The question of recording of corporate mortgages depends, of course, upon the terms of the governing statute.⁶³ The statutes generally expressly provide as to where railroad mortgages shall be recorded.⁶⁴ Like other mortgages, a corporate mortgage need not be recorded in order to be valid as between the parties.⁶⁵

As in case of other mortgages, the recordation makes the mortgage constructive notice to subsequent purchasers and incumbrancers of the existence and contents of the mortgage.⁶⁶

If the mortgage is not recorded, a purchaser without notice of the mortgage takes free from the lien.⁶⁷

Under the statutes of some states, the failure to record as a chattel mortgage is of no effect if possession is taken by or on behalf of the mortgagee before a levy or seizure is made in behalf of those persons as to whom it is void.⁶⁸

If the bonds themselves are a lien so as to constitute a mortgage, they are governed by the recording laws in the same manner as any other mortgage.⁶⁹

Failure of the trustee promptly to record the mortgage does not

⁶¹ *T. E. Wells & Co. v. Sharp*, 208 Fed. 393. But see *Franklin Trust Co. v. Rutherford, Boiling Springs & Carlstadt Elec. Co.*, 57 N. J. Eq. 42, 48, 41 Atl. 488, where the defense of usury was held to be governed by the law of the state where the mortgage and bonds were executed and where all the negotiations therefor took place.

⁶² *Smead v. Chandler*, 71 Ark. 505, 65 L. R. A. 353, 76 S. W. 1066.

⁶³ *Boston & N. Y. Air Line R. Co. v. Coffin*, 50 Conn. 150.

In Connecticut, mortgages by railroad and street railway companies need be recorded only with the secre-

tary of state. *Washington Trust Co. v. Norwich & W. Traction Co.*, 89 Conn. 59, 92 Atl. 880.

⁶⁴ *Gilchrist v. Helena, H. S. & S. R. Co.*, 47 Fed. 593, construing Montana statutes.

⁶⁵ *Illinois Cent. R. Co. v. Mississippi Cent. R. Co.*, Fed. Cas. No. 7,008.

⁶⁶ *Stearns Lighting & Power Co. v. Central Trust Co.*, 223 Fed. 962.

⁶⁷ *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682.

⁶⁸ *State Trust Co. v. Kansas City, P. & G. R. Co.*, 120 Fed. 398, under Kansas statutes.

⁶⁹ *King v. Tuscumbia, C. & D. R. Co.*, Fed. Cas. No. 7,808.

estop bondholders from asserting the lien after the mortgage is recorded.⁷⁰

An officer of a corporation to whom it executes a mortgage, where he fails to record it, in order to give the corporation a fictitious credit, cannot set it up against persons extending credit to the company between its execution and registration.⁷¹

The applicability of statutes governing the recording of chattel mortgages to a corporate mortgage embracing both real and personal property has already been noticed.⁷²

§ 1320. Debts secured. A corporate mortgage may be given to secure future advances.⁷³ So a mortgage to a trustee to secure the payment of bonds to be thereafter issued is valid, and becomes effective as the bonds are disposed of.⁷⁴

The mortgage secures only the debts it purports to secure,⁷⁵ and the bonds secured by the mortgage depend of course upon the terms of the mortgage.⁷⁶

Where the mortgage expressly covers all renewals of the notes secured thereby, it is not limited by the affidavit attached thereto which merely discloses the extent to which, at the time the mortgage was given, there was an agreement to renew.⁷⁷

It is sometimes a question whether an issuance of bonds is for a purpose within the terms of the mortgage in so far as it states for

⁷⁰ *Davis v. Hanover Sav. Fund Society*, 210 Fed. 768.

⁷¹ *Wall v. Rothrock*, 171 N. C. 388, 88 S. E. 633.

⁷² See § 1308, *supra*.

⁷³ *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030.

A mortgage to secure bonds to be issued to raise money to pay debts of the corporation is not invalid as given to secure future advances. *Richards v. Merrimack & C. R. R.*, 44 N. H. 127.

⁷⁴ *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

⁷⁵ *Mason v. York & C. R. Co.*, 52 Me. 82.

Where sureties on a note make payments thereon and a note is executed by the principal to each surety for the amount paid by him, such pay-

ments are not to be treated as loans to the principal, but as payments upon the note on which they were sureties, and are covered by a mortgage given them by the principal to indemnify them as such sureties. *Bray v. First Ave. Coal Min. Co.*, 148 Ind. 599, 47 N. E. 1073; *Pollard v. Pittman*, 37 Ind. App. 475, 77 N. E. 293.

⁷⁶ See *Clafin v. South Carolina R. Co.*, 4 Hughes (U. S.) 12, 8 Fed. 118; *Butler v. Rahm*, 46 Md. 541; *Day v. Ogdensburg & L. C. R. Co.*, 107 N. Y. 129, 13 N. E. 765; *Gibbes v. Greenville & C. R. Co.*, 13 S. C. 228; *Poland v. Lamoille Valley R. Co.*, 52 Vt. 144; *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 9 S. E. 748.

⁷⁷ *Earle v. National Metallurgic Co.*, 77 N. J. Eq. 17, 76 Atl. 555.

what purposes the proceeds of the secured bonds may be used. In one case, railroad bonds were held authorized by the mortgage, although issued to pay for shares of stock of other railroads, where the mortgage authorized bonds "for or in aid of the purchase or construction of extensions, branches or spurs, * * * and such other purposes as the board of directors of the railway company may deem calculated permanently to increase the business and earning capacity of the property"; the purchase of the stocks being deemed a purchase of the railroads, and the purchase being of the same broad general class as extensions to the existing system so as to satisfy the rule of *ejusdem generis*.⁷⁸

§ 1321. Rights and liabilities of parties. There is little, if anything, relating to the laws of mortgages, so far as the rights and liabilities of the parties as between themselves is concerned, that is peculiar to corporation mortgages. Thus, the rules as to the right to possession and control of the mortgaged property are the same as those relating to all mortgages.⁷⁹ And the right to rents and profits are the same as in case of other mortgages.⁸⁰

If the right to use and enjoy the property is expressly reserved to the mortgagor, it may vote shares of stock of another company included in the mortgage.⁸¹

If another competing corporation, by purchases of stock, secures control of a corporation which has mortgaged its property, including its income and good-will, the controlling corporation becomes a fiduciary and liable to the bondholders of the old company for any improper diversion of the mortgaged property, its income or good-will.⁸²

If the mortgage is regarded merely as a security, as it is in most jurisdictions, the mortgagor may dispose of the property, subject to the mortgage, and special provisions are sometimes inserted in corporate mortgages authorizing the mortgagor to dispose of part or all of the property free from the mortgage lien,⁸³ at least with the

⁷⁸ *Lisman v. Knickerbocker Trust Co.*, 211 Fed. 413.

⁷⁹ If mining property is mortgaged, the mortgagor corporation and its lessees have the right to work the mine reasonably and properly, although the result is its exhaustion. *Young v. Haviland*, 215 Mass. 120, 102 N. E. 338.

⁸⁰ See § 1298, *supra*.

⁸¹ *Georgia Granite R. Co. v. Miller*, 144 Ga. 665, 667, 87 S. E. 897.

⁸² *Davis v. Virginia Railway & Power Co.*, 229 Fed. 633.

⁸³ *Rowe v. Lewis*, 30 Ind. 163; *Sample v. Rowe*, 24 Ind. 208.

Where a mortgage authorized the mortgagor to exchange, sell or lease any part of the mortgaged property free from the lien of the mortgage,

consent of the trustee,⁸⁴ and such provisions are valid in any event as to property worn out or not necessary to the use of the corporation,⁸⁵ or where the security is not diminished.⁸⁶ Even if a provision authorizing a sale of all the property without restriction makes the

provided that the proceeds of any sale so made should, at the option of the mortgagor, be invested by it either in the improvement of the mortgaged premises or in the purchase of other property suitable to promote the business of the company, it was held that where expenditures for substantial improvements were made in advance of sales of property, the proceeds of subsequent sales could be applied to reimburse the company for such expenditures. *Mercantile Trust & Deposit Co. of Baltimore v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.*, 122 Md. 502, 90 Atl. 98, distinguishing *Mt. Vernon-Woodberry Cotton Duck Co. v. Continental Trust Co. of Baltimore*, 121 Md. 163, 88 Atl. 103, and also holding that all of the property purchased need not be of a strictly permanent nature.

Power reserved in the mortgagor to lease the property before condition broken does not authorize a lease after condition broken, even with the consent of the trustee. *Haven v. Adams*, 4 Allen (Mass.) 80.

If the mortgagor is authorized by the mortgage to sell the mortgaged land and pay the proceeds to the trustee, after deducting expenses, it may retain moneys for expenses in making the sale and also pay the taxes from the proceeds. *Nickerson v. Atchison, T. & S. F. R. Co.*, 3 McCrary (U. S.) 455, 17 Fed. 408.

⁸⁴ See § 1340, *infra*.

⁸⁵ *Wylly-Gabbett Co. v. Williams*, 53 Fla. 872, 938, 42 So. 910; *Butler v. Rahm*, 46 Md. 541; *Ludlow v. Hurd*, 1 Disney (Ohio) 552, 12 Ohio Dec. 791.

In New York, however, a sale under a power in a mortgage given by a manufacturing company, authorizing sales by the mortgagor in the usual course of business, was held invalid as against a trustee in bankruptcy. *Zartman v. First Nat. Bank*, 189 N. Y. 267, 12 L. R. A. (N. S.) 1083, 82 N. E. 127, *aff'g* 109 N. Y. App. Div. 406, 96 N. Y. Supp. 633.

A statute authorizing a railroad mortgagor to sell was construed as applicable only to property not needed for operating the road. *Spence v. Mobile & M. Ry. Co.*, 79 Ala. 576.

⁸⁶ A mortgage is valid although it requires the trustee to sell any of the mortgaged property on the request of the mortgagor, where the proceeds are to be retained by the trustee, or in case of worn-out or useless property it authorizes the mortgagor to sell it provided that other like property shall be immediately substituted and the mortgage security not impaired. *Hasbrouck v. Rich*, 113 Mo. App. 389, 88 S. W. 131.

A mortgage on real property is not invalid because it provides that the mortgaged premises may be sold or exchanged by the mortgagor corporation, where it is also provided that "the security of the bonds not to be lessened thereby." "This power to sell or exchange during the running of the mortgage did not involve the power to convey. That was alone in the trustee, and this could only be done by him when the security of the bonds protected by the mortgage was not lessened." *Rawlings v. New Memphis Gaslight Co.*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206,

mortgage void as against existing creditors, it does not have that effect as against subsequent creditors.⁸⁷

The mortgagee cannot enjoin a transfer by the mortgagor of property not covered by the mortgage, although the mortgagor is insolvent, where it does not appear but that the mortgaged property is sufficient to pay the mortgage debt.⁸⁸

It has been held that a railroad company which has given a mortgage on all of its property may nevertheless dispose of its personal property in the usual course of business.⁸⁹

If the mortgagor is not obliged, by the terms of the mortgage, to keep the property insured, the mortgagee cannot be given a lien on the proceeds of insurance taken out by a purchaser of the property from the corporation.⁹⁰

If the mortgage requires the mortgagor to pay a certain per cent. of the gross earnings to create a sinking fund to redeem the bonds, the mortgagee is entitled to an accounting, in case of default, and the rule that where the mortgage covers the income as well as the other property, the mortgagee is not entitled to the income until he takes or demands possession of the property or secures the appointment of a receiver has no application, since that rule applies only where there is no special agreement as to the income.⁹¹

The right conferred on a mortgagor to acquire and exchange prior lien bonds for bonds issued under such mortgage passes to a purchaser of the property from the mortgagor.⁹²

The mortgagee of the plant of a waterworks company acquires substantial rights in the street franchises of the mortgagor, and cannot be deprived thereof by a proceeding directly impeaching their validity and duration, where he is not made a party thereto.⁹³

Surrender of the bonds, which the mortgage was given to secure, to the mortgagor is not a satisfaction of the mortgage, where done under an express agreement that the bonds were not to be canceled but were to be reissued.⁹⁴

⁸⁷ Central Trust Co. of New, York v. East Tennessee Land Co., 71 Fed. 353.

⁸⁸ Central Trust Co. of New York v. Denver & R. G. R. Co., 219 Fed. 110, applying this rule to a mortgage of railroad property.

⁸⁹ Union Trust Co. v. Morrison, 125 U. S. 591, 609, 31 L. Ed. 825.

⁹⁰ Farmers' Loan & Trust Co. v. Penn Plate-Glass Co., 103 Fed. 132, 56

L. R. A. 710, aff'd 186 U. S. 434, 46 L. Ed. 1234.

⁹¹ New York Trust Co. v. Michigan Traction Co., 193 Fed. 175.

⁹² Diggs v. Fidelity & Deposit Co., 112 Md. 50, 20 Ann. Cas. 1274, 75 Atl. 517.

⁹³ Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 Fed. 661.

⁹⁴ Pruyn v. Adams Furniture &

A purchase by a trustee in his own right, on the foreclosure of a prior mortgage, is not a payment of the prior mortgage by the trustee in the later mortgage.⁹⁵

Where the guarantor of bonds is expressly subrogated to the rights of the mortgagees in respect to any payments made by the guarantor, it may, where it has paid interest on the bonds, compel the trustee to foreclose, even though it would still be bound on its guaranty and would have the right to further foreclosures for future payments.⁹⁶

§ 1322. Lien. A corporate mortgage creates a lien on the property covered thereby, and a deed of trust, although not undertaking to convey to the trustee the legal title to corporate property, creates an equitable lien, where that is clearly the intention of the parties.⁹⁷

Where mortgaged land was sold for a sum made payable to the mortgagee in instalments, the lien of the mortgage attaches to the proceeds of the sale in the same manner and with the same effect as it bound the premises before the sale was made.⁹⁸

Ordinarily, the mortgage becomes a lien from the time it is delivered and recorded,⁹⁹ although it has been held that if the mortgage precedes the issuance of bonds, no lien is created until there is an issuance of bonds.¹ In most states, however, mortgages for future advances operate from the time of recording, although the advances are not made until a subsequent date.²

§ 1323. Cancellation or reformation. A corporate mortgage may be canceled at the suit of the corporation or stockholders in a proper case. But equity will not cancel a mortgage, at the suit of the corporate mortgagor, on the ground that it was not authorized by the stockholders, unless the complainant restores the amount due on the mortgage.³

Manufacturing Co., 92 Hun (N. Y.) 214, 36 N. Y. Supp. 361.

⁹⁵ Griggs v. Detroit & M. Ry. Co., 10 Mich. 117, 124.

⁹⁶ Dows v. Chicago & S. W. Ry. Co., Fed. Cas. No. 4,048, aff'd 94 U. S. 444, 24 L. Ed. 207.

⁹⁷ Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542.

⁹⁸ Union Trust Co. v. Beach, 227 Fed. 36,

⁹⁹ Lincoln v. Lincoln St. R. Co., 67 Neb. 469, 484, 93 N. W. 766.

¹ Allen v. Montgomery R. Co., 11 Ala. 437; Wade v. Donau Brewing Co., 10 Wash. 284, 291. To same effect, Reynolds v. Manhattan Trust Co., 83 Fed. 593, 599.

² Central Trust Co. v. Continental Iron Works, 51 N. J. Eq. 605, 607, 40 Am. St. Rep. 539, 28 Atl. 595.

³ Southern Building & Loan Ass'n v. Casa Grande Stable Co., 128 Ala. 624, 29 So. 654,

Minority stockholders who had agreed to a corporate mortgage to secure advances, but after the advances were made, had refused to consent to the mortgage, cannot obtain relief in equity by having the mortgage canceled, since they do not come into equity with clean hands.⁴

The mortgage cannot be canceled or set aside on behalf of the corporation or its stockholders, on the ground that the borrowing of the money was *ultra vires*, without an offer to return the loan.⁵

The corporation, or its receiver, cannot sue to remove an alleged cloud on title, arising from bonds and a mortgage on the corporate property, on the ground that the mortgage and bonds were unauthorized by the stockholders or directors so far as they constitute a lien on after-acquired property, since the corporation is estopped by its appropriation of the proceeds of the bonds.⁶

Where the mortgage and bonds secured are both illegal and *ultra vires*, the mortgagor corporation may sue to enjoin the foreclosure of the mortgage and to compel the surrender of the bonds for cancellation, where the bonds are in the hands of the original holders;⁷ and such a suit is not barred by laches, at least so far as the injunction is concerned, where there had been no attempt to assert rights under or enforce the mortgage until shortly before the injunction suit was commenced.⁸

Like other mortgages, a corporate mortgage may also be reformed in a proper case, as where the officers failed to execute it in the name of the corporation.⁹

VI. RIGHTS AND REMEDIES OF BONDHOLDERS

§ 1324. General rules. Having already noticed the rights of minority bondholders¹⁰ and the right of individual bondholders to bring an action at law on the bond or coupons,¹¹ it becomes necessary to consider their rights and remedies in connection with the mortgage securing the bonds.

To a certain extent, as far as the mortgage is concerned, bond-

⁴ Georgia Bldg. Co. v. Burdett, 150 N. Y. Supp. 27.

⁵ Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

⁶ Shafer v. Spruks, 225 Fed. 480.

⁷ Gunnison Gas & Water Co. v. Whitaker, 91 Fed. 191.

⁸ Gunnison Gas & Water Co. v. Whitaker, 91 Fed. 191.

⁹ Denver Brick & Manufacturing Co. v. McAllister, 6 Colo. 261.

¹⁰ See § 1067, *supra*.

As to the duty of the trustee to act as requested by a majority of the bondholders, see § 1338, *infra*.

¹¹ See §§ 1062, 1063, *supra*.

holders are represented by the trustee, and can only act through him, unless he refuses to act. Moreover, as a general rule, the acts of the trustee relating to the security, at least if within the scope of the powers of the trustee,¹² are binding on the bondholders,¹³ and judgments in actions to which the trustee is a party in his representative capacity are ordinarily binding on the bondholders although none of them were joined as parties to the action.¹⁴

The right of a bondholder to sue, except to bring an action on the bonds or coupons, ordinarily depends on a refusal of the trustee to sue.¹⁵ A bondholder cannot sue, where the action is one that should be brought by the trustee, unless a demand has been made on the trustee to take action and he has refused or neglected to do so, or unless the circumstances make it clear that such a demand would be useless.¹⁶

A trustee who has been requested to sue but has failed or refused to do so must be joined as a party defendant.¹⁷

A judgment in an action by one bondholder to enforce an equitable lien, where the action is brought in behalf not only of himself but of all those who may come in and contribute to the expenses and join in the prosecution of the suit, does not bind bondholders who do not become parties.¹⁸

An owner of bonds who refuses to accept an exchange of bonds has a right to set aside the sale of securities deposited with the trustee with the bonds, where such sale was made by the trustee on the demand of the other holders, and the sale was for a sum grossly inadequate.¹⁹

¹² Powers of trustee, see § 1339, *infra*.

¹³ See § 1337, *infra*.

¹⁴ See § 1337, *infra*.

¹⁵ As a general rule, where property is conveyed to a trustee as security for numerous bondholders, the trustee is the party to initiate or defend suits in respect to the security, and the bondholders have no standing unless he refuses or neglects to perform his duty. *Falmouth Nat. Bank v. Cape Cod Ship-Canal Co.*, 166 Mass. 550, 44 N. E. 617.

¹⁶ *Young v. Haviland*, 215 Mass. 120, 102 N. E. 338.

Bondholders cannot bring a suit to foreclose or any action to protect or recover the property of the corpora-

tion subject to, or which should be made subject to, the lien of the mortgage unless the trustee has been requested to do so and has refused or neglected to do so within a reasonable time, or he is in a position where he is unable to act. *Virginia Passenger & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

¹⁷ *Morgan v. Kansas Pac. Ry. Co.*, 15 Fed. 55.

In foreclosure suits, see § 1327, *infra*.

¹⁸ *Adelbert College of Western Reserve University v. Toledo, W. & W. Ry. Co.*, 5 Ohio S. & C. Pl. Dec. 14.

¹⁹ *Anthony v. Campbell*, 112 Fed. 212.

The right, if any, of an individual bondholder to sue to set aside a release of the mortgage by the trustee, in pursuance of a reorganization scheme, is barred by laches where he has acquiesced therein for several years.²⁰

Of course the rights of bondholders as fixed by the terms of the mortgage cannot be altered without their consent.²¹

The mortgage may itself expressly waive the right of the bondholders to have recourse to the stockholders, on account of their liability for unpaid stock.²²

§ 1325. Suit to foreclose—General rules. A bondholder may, in certain cases, file a bill to foreclose the mortgage,²³ and any bondholder may sue to foreclose the mortgage for the common benefit of all the bondholders where the trustee unreasonably neglects or refuses to discharge his duty to foreclose.²⁴

However, mere delay of the trustee in suing to foreclose does not authorize a bondholder to sue,²⁵ since ordinarily a bondholder cannot sue to foreclose without first making a demand upon the trustee to foreclose.²⁶

One who has turned over property to the corporation in exchange for bonds to be issued may sue to foreclose the mortgage securing such bond issue, although the bonds were never delivered to him.²⁷

²⁰ Lyman v. Kansas City & A. R. Co., 101 Fed. 636.

²¹ Vose v. Bronson, 73 U. S. 452, 18 L. Ed. 846.

²² Fidelity Trust Co. v. Washington-Oregon Corporation, 217 Fed. 588.

²³ First Nat. Bank of Chattanooga, Tennessee v. Radford Trust Co., 80 Fed. 569; Mason v. York & C. R. Co., 52 Me. 82.

A suit by a bondholder seeking the appointment of a receiver and the sale of the corporate property under the mortgage is a foreclosure suit so as to be subject to demurrer where the bill does not make a part thereof a copy of the mortgage nor refer to the place where it is recorded. Wagner v. Philadelphia, B. & T. St. R. Co., 233 Pa. 114, Ann. Cas. 1913 B 536, 81 Atl. 944.

A bondholder cannot himself bring a suit to foreclose, where the default

alleged is the refusal to pay interest on his bonds based on the ground of fraud and misrepresentations in regard to the property sold for the price of which such bonds were given, without first suing at law on such coupons where the question of fraud and misrepresentations can be decided. Nashua Sav. Bank v. Burlington Elec. Light Co., 99 Fed. 14.

²⁴ Seibert v. Minneapolis & St. L. Ry. Co., 52 Minn. 148, 20 L. R. A. 535, 38 Am. St. Rep. 530, 53 N. W. 1134; McFadden v. May's Landing & E. H. C. R. Co., 49 N. J. Eq. 176, 22 Atl. 932; Van Benthuyzen v. Central N. E. & W. R. Co., 63 Hun (N. Y.) 627, 17 N. Y. Supp. 709.

²⁵ Beebe v. Richmond Light, Heat & Power Co., 13 N. Y. Misc. 737, 35 N. Y. Supp. 1.

²⁶ Infra, next section.

²⁷ Jenkins v. John Good Cordage &

One whose bonds have been paid by a transfer of property of the corporation to him cannot sue to foreclose.²⁸

If the suit is brought by bondholders, the fact that the bonds in the hands of some of the bondholders are not enforceable does not prevent the granting of relief in favor of the other bondholders.²⁹

If the trustee has already sued for strict foreclosure, it seems that a bondholder who refuses to join a reorganization plan cannot file an independent bill for a foreclosure sale and removal of the trustees.³⁰

If the trustee refuses to act, bondholders may declare the debt due, where it was the duty of the trustee to do so because of defaults, and may sue to foreclose.³¹

Ordinarily, if the trustee refuses to sue to foreclose, a bondholder should sue in behalf of himself and all other bondholders,³² but it is not necessary to do so where the only default is on the bonds owned by complainant.³³

If some of the bondholders desire foreclosure and others do not, the latter, it seems, may pay the former the full amount of their bonds and be subrogated thereto, especially when it appears that a foreclosure is not for the benefit of the bondholders but for the benefit of the mortgagor company and its stockholders.³⁴

Where, on failure of the trustee to act, a bondholder himself sues to foreclose, he is not entitled to exercise, through the court, the contract powers of the trustee, but is restricted to the remedies furnished by the procedure of the court.³⁵

Machine Co., 56 N. Y. App. Div. 573, 68 N. Y. Supp. 239.

²⁸ Shepard v. Boulevard Land Co., 57 N. Y. App. Div. 617, 68 N. Y. Supp. 106.

²⁹ Medford v. Myrick, — Tex. Civ. App. —, 147 S. W. 876.

³⁰ Stern v. Wisconsin Cent. R. Co., 1 Fed. 555.

³¹ Lowe v. Los Angeles Suburban Gas Co., 24 Cal. App. 367, 141 Pac. 399.

Where a trust deed provides that, on default in interest, the principal shall become due, "at the election of the trustee," and also that the trustee should take such action on the request of one-fourth of the bondholders, the fact that the trustee refused to act on such request does not limit the

rights of bondholders to foreclose for interest due, but includes the right to foreclose for both principal and interest. Lowe v. Los Angeles Suburban Gas Co., 24 Cal. App. 367, 141 Pac. 399.

³² McFadden v. May's Landing & E. H. C. R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

³³ McFadden v. May's Landing & E. H. C. R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

³⁴ Tillinghast v. Troy & B. R. Co., 48 Hun (N. Y.) 420, 1 N. Y. Supp. 243, where the foreclosure was a mere scheme to pay off bonds bearing a high rate of interest and issue new bonds at a lower rate.

³⁵ McFadden v. May's Landing & E.

§ 1326. — **Necessity for refusal of trustee to sue.** Bondholders cannot sue to foreclose unless there has been a demand on the trustee to sue, except where the facts excuse a demand, and subsequent neglect or refusal of the trustee to act.³⁶ And bondholders may also sue to foreclose without requesting the trustee to sue, where he is in such a position that he cannot properly represent the bondholders,³⁷ as where he is insane.³⁸ Furthermore a bondholder may sue to foreclose without first making a demand on the trustee as required by the mortgage where such a demand is impossible or where the acts of the trustee render a demand unnecessary.³⁹

If the trustees are dead, one or more bondholders may sue to foreclose, on behalf of themselves and all the other bondholders.⁴⁰

Where one trustee refuses to bring suit to foreclose, but his co-trustee is willing to sue and a joint discretion as to suing is lodged in the two trustees, the bondholders may sue to foreclose, since there is in effect a refusal of the trustees to sue.⁴¹

Where the position of trustee is vacant, a bondholder in Louisiana, where the mortgaged property is located, may sue to foreclose without resorting to the dilatory measure of going to New Jersey, where the mortgagor was incorporated, and having another trustee appointed;⁴² but where a mortgage provides that no bondholder shall foreclose unless the trustee refuses or neglects to act, and that if the trustee becomes unable to act, the holder of a certain amount or more of the bonds may procure the appointment of a new trustee, the holder of such amount of bonds, on the trustee becoming incapable, cannot himself sue to foreclose, without taking such steps to procure a new trustee and making him a defendant and also joining known bondholders.⁴³

The trustee may demand indemnity, and if it is not furnished,

H. C. R. Co., 49 N. J. Eq. 176, 189, 22 Atl. 932.

³⁶ General Elec. Co. v. La Grande Edison Elec. Co., 87 Fed. 590, aff'g 79 Fed. 25; Stern v. Wisconsin Cent. R. Co., Fed. Cas. No. 13,378.

³⁷ Mercantile Trust Co. v. Lamoille Valley R. Co., 16 Blatchf. (U. S.) 324, Fed. Cas. No. 9,432.

³⁸ Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189, 40 Am. St. Rep. 587, 36 N. E. 1055, aff'g 66 Hun (N. Y.) 94, 20 N. Y. Supp. 772, holding it not necessary to appoint a new trustee.

³⁹ Cochran v. Pittsburg, S. & N. R. Co., 150 Fed. 682, where the trustee was antagonistic because of interest in a second mortgage.

⁴⁰ Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. Ed. 199.

⁴¹ Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 122 Fed. 914.

⁴² Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co., 56 Fed. 164.

⁴³ Johns v. Outwater, 55 N. J. Eq. 398, 36 Atl. 483.

there is no such refusal to sue as will authorize a bondholder to sue.⁴⁴ But a bill by a single bondholder to obtain a foreclosure, after the trustee has refused to act, should not be dismissed without hearing because it does not show an offer to indemnify the trustee to his reasonable satisfaction, as required by the mortgage, especially where the refusal of the trustee to proceed was based on other grounds.⁴⁵

If the trustee, while not positively declining to act, imposes terms which the bondholders are not bound to accept, one or more of such bondholders may bring suit to foreclose.⁴⁶

§ 1327. — Joinder of all bondholders. A single bondholder may sue to foreclose, where the trustee refuses to sue;⁴⁷ and he may sue without the consent of the other bondholders.⁴⁸ It is no defense that he is actuated by improper motives.⁴⁹

§ 1328. — Effect of provisions in mortgage. A single bondholder, or several combined, where secured by a mortgage given to a trustee, may bring a foreclosure suit in his or their own name or names, although the mortgage provides for a suit by the trustee, unless such right is taken away by some provision, express or implied, found in the mortgage itself.⁵⁰

However, provisions in the mortgage may affect the right of a bondholder to sue to foreclose. Thus, a provision in a mortgage that

⁴⁴ *Beebe v. Richmond Light, Heat & Power Co.*, 13 N. Y. Misc. 737, 35 N. Y. Supp. 1.

⁴⁵ *Lowenthal v. Georgia Coast & P. R. Co.*, 233 Fed. 1010.

⁴⁶ *Schultze v. Van Doren*, 64 N. J. Eq. 465, 53 Atl. 815, aff'd without opinion in 65 N. J. Eq. 764, 55 Atl. 1133.

⁴⁷ *Louisville & N. R. Co. v. Schmidt*, 21 Ky. L. Rep. 556, 52 S. W. 835. See also § 1328, *infra*.

The holder of even one bond may sue alone to foreclose, on a default, where the trustee refuses to sue. *Baker v. Consolidated Gas & Electric Co.*, 42 N. Y. Misc. 95, 85 N. Y. Supp. 1030.

⁴⁸ *Louisville & N. R. Co. v. Schmidt*, 21 Ky. L. Rep. 556, 52 S. W. 835.

⁴⁹ *Louisville & N. R. Co. v. Schmidt*,

21 Ky. L. Rep. 556, 52 S. W. 835.

⁵⁰ *Schultze v. Van Doren*, 64 N. J. Eq. 465, 53 Atl. 815, aff'd without opinion in 65 N. J. Eq. 764, 55 Atl. 1133.

"The right given to the trustee to foreclose is cumulative, and not exclusive of the right of the bondholders. Their rights arise out of the fact that they are the parties beneficially interested in the mortgage security." *Schultze v. Van Doren*, 64 N. J. Eq. 465, 53 Atl. 815.

The fact that the mortgage gives the trustee the right to take possession and sell does not preclude the right of a bondholder to judicial foreclosure. *Louisville & N. R. Co. v. Schmidt*, 21 Ky. L. Rep. 556, 52 S. W. 835.

no bondholder shall proceed at law or in equity to foreclose, independently of the trustee, until after the trustee refuses to sue on request by the holders of a certain per cent. of the bonds, is binding on individual bondholders.⁵¹

But if the trustee wrongfully refuses to foreclose, a bondholder may file a bill in equity for the appointment of a receiver to foreclose, and obtain relief where the security is in danger, notwithstanding the mortgage provides that it shall not be foreclosed except on request of one-third of the bondholders.⁵²

The holder of detached coupons is not precluded from suing to foreclose for overdue interest by a provision in the mortgage that default in paying interest for a certain time shall mature the debt at the option of the trustee or a certain per cent. of the bondholders, or by other like provisions, since in such an action there is no attempt to recover the principal of the bonds but only to foreclose for unpaid interest.⁵³

On default in payment of interest, if the trustee refuses to sue to foreclose, a bondholder may bring such a suit to the extent of accrued and unpaid interest, without regard to any provisions in the mortgage as to foreclosing for both principal and interest on default in payment of interest.⁵⁴

§ 1329. Action against trustees. Whenever the trustee fails to perform his duties, either through wilfulness, indifference or error of judgment, bondholders who are aggrieved thereby may obtain relief in equity.⁵⁵ Thus, when the trustee refuses or neglects to take any steps on default in payment of interest, bondholders may, by a suit in equity, compel him to act, and, in a proper case, take possession of the property as provided for in the mortgage.⁵⁶

Bondholders may sue the trustee in possession for an accounting.⁵⁷

⁵¹ *Seibert v. Minneapolis & St. L. Ry. Co.*, 52 Minn. 148, 20 L. R. A. 535, 38 Am. St. Rep. 530, 53 N. W. 1134.

A bondholder cannot restrain the making of an agreement by majority bondholders that they will not request a foreclosure. *Emery v. New York, L. E. & W. R. Co.*, 9 N. Y. Misc. 310, 30 N. Y. Supp. 306.

⁵² *Lowenthal v. Georgia Coast & P. R. Co.*, 233 Fed. 1010.

⁵³ *California Safe Deposit & Trust Co. v. Sierra Valleys R. Co.*, 158 Cal.

690, Ann. Cas. 1912 A 729, 112 Pac. 274.

⁵⁴ *Beekman v. Hudson River West Side Ry. Co.*, 35 Fed. 3.

⁵⁵ *First Nat. Fire Ins. Co. v. Salisbury*, 130 Mass. 303, 310.

⁵⁶ *First Nat. Fire Ins. Co. v. Salisbury*, 130 Mass. 303, 311, holding also that bondholders under a subsequent mortgage are not necessary parties to the bill.

⁵⁷ *Dwight v. Smith*, 13 Fed. 50.

And if moneys applicable to the payment of the bonds come into the hands of the trustee, each bondholder becomes immediately entitled to his share and may recover it.⁵⁸

However, a bondholder cannot set up an act as a breach of trust by the trustee, where he gave his consent thereto; nor can he claim a breach of trust and at the same time have a judgment for a proportionate part of the money received by the trustee in connection with such alleged breach of trust.⁵⁹

Whether an action against the trustee is barred by laches or the statute of limitations is governed by the rules applicable to actions against all kinds of trustees.

§ 1330. Actions against mortgagor or third persons. Any rights vested in the trustee, as against the mortgagor, inure to the benefit of the bondholders as the beneficiaries, and are enforceable by them, in case of refusal or neglect on the part of the trustee to act upon request.⁶⁰

But individual bondholders cannot bring an action to protect the mortgaged property unless it is shown that the trustees have refused to bring the action.⁶¹ Thus, the holder of income bonds cannot sue the mortgagor for an accounting, unless the trustee has been requested to sue and has failed or refused to do so.⁶²

Where additional underlying security for payment of the bonds has not been furnished as provided for in the mortgage, bondholders, on refusal of the trustee to sue, may sue to compel specific performance.⁶³

However, one who purchases bonds in the open market, with notice that the bonds or their proceeds have not been applied as provided for in the mortgage, cannot sue to compel the mortgagor to comply

⁵⁸ *Dwight v. Smith*, 13 Fed. 50.

⁵⁹ *Butterfield v. Cowing*, 112 N. Y. 486, 20 N. E. 369.

⁶⁰ *O'Beirne v. Allegheny & K. R. Co.*, 151 N. Y. 372, 45 N. E. 873, aff'g 80 Hun (N. Y.) 570, 30 N. Y. Supp. 588; *Virginia Passenger & Power Co. v. Fisher*, 104 Va. 121, 51 S. E. 198.

A suit to enforce the alleged right of bondholders to a certain fund received by the corporation may be brought by a single bondholder if the trustee refuses to sue. *Young v. Havi-*

land, 215 Mass. 120, 102 N. E. 338.

⁶¹ Rule applied to an action by bondholders to have declared unconstitutional an ordinance fixing the rates to be charged by a water company, the mortgagor. *Consolidated Water Co. v. San Diego*, 89 Fed. 272.

⁶² *Morgan v. Kansas Pac. Ry. Co.*, 21 Blatchf. (U. S.) 134, 15 Fed. 55.

⁶³ *O'Beirne v. Allegheny & K. R. Co.*, 151 N. Y. 372, 45 N. E. 873, aff'g 80 Hun (N. Y.) 570, 30 N. Y. Supp. 588.

with its covenant to devote the bonds or their proceeds to the improvement of the mortgaged property.⁶⁴

§ 1331. Injunction suits. The corporate mortgagor may be enjoined, at the suit of bondholders, from doing wrongful acts which will injure the security. Thus, bondholders may sue to prevent the impairment of the value of the mortgage security by the fraudulent issue of additional bonds by the insolvent corporation or by an improvident and unwarrantable sale of the land covered by the mortgage; this is so although the principal of the bonds is not due and no coupons are unpaid.⁶⁵

If the mortgage covers subsequently acquired property, bondholders may enjoin the fraudulent diversion by the corporation of such subsequently acquired property.⁶⁶

A bondholder, as a creditor having a lien on corporate property, may enjoin another corporation from wrongfully using the name of the corporation which issued the bonds, where such use is being made for the purpose of obtaining a grant of land owned or claimed by the latter corporation.⁶⁷

VII. TRUSTEES

§ 1332. Appointment—In general. At the present day, where a corporation executes an instrument securing a bond issue, the instrument is in the form of a trust deed and made to a third person called a trustee.

The trustee or trustees are ordinarily chosen by the mortgagor corporation and expressly designated in the trust deed.⁶⁸ However, the trust deed is not invalid because the trustee named is a non-resident and incapable of acting, since in such case the court will appoint a trustee.⁶⁹

§ 1333. — Who eligible. Generally a trust company is made the trustee, and a company of this character has power to act as such in relation to corporate mortgages.

⁶⁴ *Belden v. Burke*, 147 N. Y. 542, 42 N. E. 261, rev'g 72 Hun (N. Y.) 51, 25 N. Y. Supp. 601.

⁶⁵ *Whitmore v. International Fruit & Sugar Co.*, 214 Mass. 525, 102 N. E. 59.

⁶⁶ *Weetjen v. St. Paul & P. R. Co.*, 4 Hun (N. Y.) 529.

⁶⁷ *Newby v. Oregon Cent. R. Co.*, Fed. Cas. No. 10,144.

⁶⁸ Statutes sometimes require the appointment of trustees under a railroad mortgage to be made by a court of equity. In *re Eastern R. Co.*, 120 Mass. 412.

⁶⁹ *Morse v. Holland Trust Co.*, 184 Ill. 255, 56 N. E. 369, aff'g 84 Ill. App. 84.

Statutes requiring trustees to be residents of the state have been held unconstitutional,⁷⁰ but, of course, foreign trust companies, to be eligible, must comply with the statutes of the state relating to foreign corporations.⁷¹

Independently of statute, a mortgage on railroad property may be made to a foreign trust company, at least where the bonds are made payable out of the state.⁷²

The fact that a corporation was not authorized by its charter to act as trustee is not a ground, available to a purchaser under a sale by receivers appointed in the foreclosure suit, for treating the foreclosure decree as a nullity.⁷³

Of course, individuals may be chosen as trustees, and it is immaterial that they are officers of the mortgagor corporation⁷⁴ or, it seems, of the corporation for whose benefit the instrument is executed.⁷⁵ Moreover, the same person or company may be the trustee of more than one mortgage on the same property.⁷⁶

§ 1334. Filling vacancies. Vacancies should be filled as provided for in the mortgage, where it contains provisions in regard thereto.⁷⁷ In such a case, statutes in regard thereto are not applicable.⁷⁸

If the trust deed makes no provision for filling vacancies, equity may, under its general powers, fill the vacancies,⁷⁹ but in such a case

⁷⁰ *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. 146; *Roby v. Smith*, 131 Ind. 342, 15 L. R. A. 792, 31 Am. St. Rep. 439, 30 N. E. 1093.

⁷¹ See *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 68 Fed. 412; *Morse v. Holland Trust Co.*, 184 Ill. 255, 56 N. E. 369, aff'g 84 Ill. App. 84.

⁷² *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. 169.

⁷³ *Southern Cotton Mills v. Ragan*, 136 Ga. 789, 72 S. E. 158.

⁷⁴ *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1, 13.

⁷⁵ *Copsey v. Sacramento Bank*, 133 Cal. 659, 663, 85 Am. St. Rep. 238, 66 Pac. 7, 204.

⁷⁶ See § 1357, *infra*.

⁷⁷ In *re Tarbell's Appeal*, 7 Pa. Super. Ct. 283, 42 Wkly. Notes Cas.

(Pa.) 192, effect of approval by court of acts of majority of bondholders.

The trust deed sometimes provides that on the death of one of two or more trustees, a court, upon request, may appoint his successor. *Pillsbury v. Consolidated European & N. A. Ry. Co.*, 69 Me. 394, holding that an order requiring the surviving trustee to execute all proper conveyances to vest title in the new trustee was authorized.

⁷⁸ *Macon & A. R. Co. v. Georgia R. Co.*, 63 Ga. 103, 119.

Statutes regarding the election of trustees by the bondholders, in case of vacancies, apply only when the trust deed makes no provision in regard thereto. In *re Inhabitants of Anson*, 85 Me. 79, 26 Atl. 996.

⁷⁹ In *re Inhabitants of Anson*, 85 Me. 79, 26 Atl. 996.

the mortgagor and surviving trustee are necessary parties to the proceeding.⁸⁰

Where vacancies can be filled only from the bondholders, one who procures bonds merely to qualify is eligible, where no fraud is shown,⁸¹ and he does not cease to be chargeable as trustee on parting with his bonds.⁸²

Where the trustee resigns, the owner of the bonds secured by the mortgage should not be appointed as trustee.⁸³

The legality of the substitution of a trustee cannot be collaterally inquired into on a motion by stockholders and bondholders to be allowed to intervene in the foreclosure suit.⁸⁴

§ 1335. Removal, disqualification and resignation. The trustee may be removed by a court of equity in a proper case,⁸⁵ and may be removed by the bondholders if the mortgage so provides, but not otherwise. Where the unrestricted power to remove the mortgage trustees and appoint others is vested in the majority of the bondholders, the power to determine whether there is good and sufficient cause for such removal is in them, subject only to the restraining authority of a court of equity against the abuse of the power.⁸⁶

A trustee will not be removed unless a clear case is made out. Thus a trustee cannot be charged with a neglect of his duties merely because he has not framed his complaint in the foreclosure suit so as to meet contingent situations which must be dealt with ordinarily through some supplemental remedies.⁸⁷ Nor should the trustee be removed merely because it has consented to act with certain bondholders, representing a majority of the outstanding bonds, in the foreclosure proceedings and contemplated reorganization of the mortgagor and its property, and has become the depository of the bonds of those entering into the bondholders' agreement.⁸⁸

⁸⁰ *In re Inhabitants of Anson*, 85 Me. 79, 26 Atl. 996.

⁸¹ *Richards v. Merrimack & C. R. R.*, 44 N. H. 127.

⁸² *Richards v. Merrimack & C. R. R.*, 44 N. H. 127.

⁸³ *In re Bostwick*, 110 N. Y. App. Div. 329, 97 N. Y. Supp. 76.

⁸⁴ *Bowling Green Trust Co. v. Virginia Passenger & Power Co.*, 132 Fed. 921.

⁸⁵ *Stevens v. Eldridge*, 4 Cliff. (U.

S.) 348, Fed. Cas. No. 13,396; *Beadleson v. Knapp*, 13 Abb. Pr. N. S. (N. Y.) 335. See also *North Carolina R. Co. v. Wilson*, 81 N. C. 223, trustee of a sinking fund.

⁸⁶ *March v. Romare*, 116 Fed. 355, rev'g 114 Fed. 200.

⁸⁷ *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600.

⁸⁸ *Fidelity Trust Co. v. Washington-Oregon Corporation*, 217 Fed. 588.

Mistake of the trustee, where not gross, in determining a question as to disposing of certain proceeds, where it was questionable which one of two provisions of the trust deed applied thereto, is not ground for his removal.⁸⁹

The trustee is not disqualified merely because of a contract entered into by its president by virtue whereof he has an interest in the success of a reorganization plan which is, or may be, in conflict with his duty as the chief executive of the trustee, where there is nothing to show that the trustee has not acted properly and nothing remains for it to do before a resale is had.⁹⁰ Nor does the mere fact that the president of the corporation trustee is a stockholder in a corporation which owns some of the bonds secured of itself disqualify the trustee;⁹¹ and the fact that some of the trustees were bondholders is not sufficient of itself to make them incompetent to consent to provisions in the foreclosure decree as to reorganization.⁹²

On the other hand, it is ground that the trustee refuses to convey, without adequate reason, pursuant to the terms of the foreclosure decree.⁹³

Voluntary removal of the trustee to a foreign country where he becomes a resident disqualifies him.⁹⁴

The rights of bondholders to remove a trustee, as provided for by the trust agreement, must be worked out as provided for therein, where no sufficient reason for disregarding such method is shown.⁹⁵

The mortgagor is a necessary party to a suit to remove the trustee.⁹⁶

In a proper case, it would seem, the foreclosure proceedings may be stayed to enable interveners to prosecute an independent suit seeking the removal of the trustee.⁹⁷

Of course, a trustee may resign, but the acceptance of the resignation may be necessary to absolve him or it from further liability. Where the mortgage provides that on the resignation of one or more of the trustees the trust shall vest in the survivor or survivors, it is

⁸⁹ Fidelity Trust Co. v. Washington-Oregon Corporation, 217 Fed. 588.

⁹⁰ Investment Registry v. Chicago & M. Elec. R. Co., 213 Fed. 492.

⁹¹ Investment Registry v. Chicago & M. Elec. R. Co., 213 Fed. 492.

⁹² Shaw v. Little Rock & Ft. S. Ry. Co., 100 U. S. 605, 25 L. Ed. 757.

⁹³ Harrison v. Union Trust Co., 144 N. Y. 326, 39 N. E. 353.

⁹⁴ Farmers' Loan & Trust Co. v. Hughes, 11 Hun (N. Y.) 130; Hughes v. Chicago, M. & St. P. Ry. Co., 47 N. Y. Super. Ct. 531.

⁹⁵ Dillaway v. Boston Gas Light Co., 174 Mass. 80, 54 N. E. 359.

⁹⁶ Hidden v. Washington-Oregon Corporation, 217 Fed. 303.

⁹⁷ Fidelity Trust Co. v. Washington-Oregon Corporation, 217 Fed. 588.

not necessary, when a trustee resigns, to make a conveyance to the survivors.⁹⁸

§ 1336. Nature of office—General rules. The trustees are not officers of the court and do not act under its direction.⁹⁹

It has been said that the trustee is the agent of both the mortgagor and the bondholders and hence he must act without partiality towards either of them.¹

If an individual mortgagee transfers part of his bonds, he holds as trustee as far as the portion of the debt transferred is concerned.²

If the mortgagor delivers to the trustee property not embraced in the mortgage, the trustee is a bailee or agent of the mortgagor in regard thereto.³

Any abuse of discretion upon the part of the trustee is a matter which may be corrected by a court of equity.⁴

§ 1337. — Trustee as representing bondholders. The trustee is the representative and agent of the bondholders in many matters,⁵ including all litigation connected with the trust.⁶ The general rule is that the bondholders are bound by the acts of the trustee, in the absence of fraud.⁷

However, the trustee is not, at least for all purposes, the agent of

⁹⁸ *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1, 12.

⁹⁹ *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1, 34.

¹ *Charles Green Real Estate Co. v. St. Louis Mut. House Bldg. Co.*, No. 3, 196 Mo. 358, 370, 93 S. W. 1111.

The trustees do not merely represent the bondholders but also represent the mortgagor. *Phillips v. Southern Division C. & O. R. Co.*, 110 Ky. 33, 46, 22 Ky. L. Rep. 1530, 60 S. W. 941.

² *In re York & C. R. Co.*, 50 Me. 552.

³ *Parish v. Wheeler*, 22 N. Y. 494.

⁴ *Struthers Coal & Coke Co. v. Union Trust Co.*, 227 Pa. 29, 75 Atl. 986.

⁵ *Barrett v. Twin City Power Co.*, 118 Fed. 861.

⁶ *Winslow v. Minnesota & P. R. Co.*,

4 Minn. 313, 77 Am. Dec. 519; *McElrath v. Pittsburg & S. R. Co.*, 68 Pa. St. 37.

⁷ *Credit Co. of London, England v. Arkansas Cent. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. 46.

“The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding.” *Shaw v. Little Rock & Ft. S. Ry. Co.*, 100 U. S. 605, 25 L. Ed. 757.

the bondholders.⁸ It is only where he acts within the scope of his powers that his acts bind the bondholders.⁹

The relation of trustee and cestui que trust exists between the trustee under a corporation mortgage and the bondholders;¹⁰ but no such relation exists as between the trustee and one for whom the trustee agreed to hold certain of the bonds in trust to secure a contract, where no bonds were ever issued to such person.¹¹

The courts need not deal with bondholders only through the trustee, where he is in a position prejudicial to the bondholders.¹²

Where the trustee applies for a receiver, bondholders who do not appear are bound by the acts of the trustee; and if they do not want a receiver they should promptly object thereto.¹³

It follows from what has been said that notice to the trustee may constitute notice to the bondholders, although in regard to this matter there is considerable conflict of opinion.¹⁴

The rights and duties of trustees who purchase at the foreclosure sale are noticed hereafter.¹⁵

§ 1338. — Trustee as bound by majority of bondholders. It is the duty of the trustee to act for the best interests of all the bondholders rather than in behalf of the majority alone.¹⁶

Thus, where railroad stock is mortgaged, and it is provided that the right to vote the shares shall be exercised by the trustee, on default in payment of interest, the trustee cannot vote according to the dictation of the holders of a majority of the bonds, but must exercise judgment and discretion, having regard to the general interests of the trust.¹⁷ As was said by Chief Justice Redfield, the

⁸ Curtis v. Leavitt, 15 N. Y. 194.

⁹ Moran v. Hagerman, 64 Fed. 499; Unity Co. v. Equitable Trust Co., 204 Ill. 595, 64 N. E. 654, aff'g 107 Ill. App. 449.

Trustees represent the bondholders only in matters affecting the enforcement of the security and administration of the trust property under the terms of the trust. Baker v. Central Trust Co. of New York, 235 Fed. 17.

¹⁰ Sprigg v. Commonwealth Title, Insurance & Trust Co., 206 Pa. 548, 56 Atl. 33.

¹¹ Sprigg v. Commonwealth Title, Insurance & Trust Co., 206 Pa. 548, 56 Atl. 33.

¹² Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 66 Fed. 169.

¹³ Title Insurance & Trust Co. v. California Development Co., 171 Cal. 227, 152 Pac. 564.

¹⁴ See § 1027, supra.

¹⁵ See § 1347, infra.

¹⁶ Toler v. East Tennessee, V. & G. Ry. Co., 67 Fed. 168; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782, per Justice Gray.

¹⁷ "The majority have no right to employ the voting power as an instrument by which the rights of the minority shall be injuriously affected." Toler v. East Tennessee, V. & G. Ry. Co., 67 Fed. 168.

duty of the trustees being "to the body severally they were not at liberty to follow the advice or wishes of the majority, as they were still liable to the minority for faithful administration. And in showing this, the advice of the majority would be no more conclusive, in their favor, than that of others, equally skilled and equally interested in the question."¹⁸ The rule was stated by Chief Justice Waite of the Supreme Court of the United States as follows: "The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust."¹⁹

Where it was the duty of the trustee, by the terms of the mortgage, to foreclose on default in payments, bondholders cannot control the action of the trustee in this respect, and this seems to be true although all the bonds are owned by one person.²⁰

§ 1339. Powers—In general. The powers of a trustee include (1) those inherent in the nature of the trust, and (2) those expressly conferred upon the trustee by the trust deed. If his powers are prescribed by the trust deed, the provisions thereof, of course, govern.²¹

Undoubtedly the trustee has the power to do anything without a special order, if the act is one which the court under proper proceedings would order.²² The trustee may insure the property and charge the expense to the mortgaged property.²³

He has no authority to waive defaults or otherwise deprive bondholders of their rights.²⁴ Thus, unless the mortgage clearly provides therefor, a trustee has no power to waive defaults in payments of

¹⁸ *Sturges v. Knapp*, 31 Vt. 1, 59, 60.

¹⁹ *Shaw v. Little Rock & Ft. S. Ry. Co.*, 100 U. S. 605, 25 L. Ed. 757.

²⁰ *Phillips v. Southern Division C. & O. R. Co.*, 110 Ky. 33, 49, 22 Ky. L. Rep. 1530, 60 S. W. 941.

²¹ *Baltimore Trust Co. v. Bellevue Mills Co.*, 223 Fed. 753.

²² *Nay Aug Lumber Co. v. Scranton Trust Co.*, 240 Pa. 500, Ann. Cas. 1915 A 235, 87 Atl. 843.

²³ *Farmers' Loan & Trust Co. v.*

Penn Plate Glass Co., 186 U. S. 434, 46 L. Ed. 1234.

²⁴ *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782.

"It is hardly necessary to say that a trustee has no authority to bind bondholders not to enforce their security in case of default, when neither the trust deed nor the individual bondholders give that authority." *Romare v. Broken Arrow Coal & Mining Co.*, 114 Fed. 194.

interest.²⁵ Nor have the trustees power to assent to and recognize a new mortgage so as to give it priority.²⁶

Generally a trustee who holds the legal title will not be permitted to speculate with the trust property. He cannot purchase an outstanding title and assert and hold it for his own use. It makes no difference in his favor that the title acquired was purchased at a judicial sale, nor that it is superior to the title conveyed to him in trust.²⁷ But if the mortgage contains covenants of warranty, the trustee is entitled to pay off a prior incumbrance to protect the property from a forced sale, and should be reimbursed the amount paid, with legal interest.²⁸

Where the mortgage provided that certain long-term bonds might be redeemed at a premium and that other serial bonds might be redeemed at par, and it authorized the trustee to purchase with the sinking fund one or more of the bonds, it was his duty to redeem the bonds at par before redeeming the other class of bonds at a premium.²⁹

§ 1340. — Sales, change or compromise of security. The trustee can release all or part of the property from the lien, on its sale, only in so far as authorized by the deed of trust.³⁰

The trustee has no power to sell, change or compromise the security before a default, unless such power is conferred by the deed of trust.³¹ So, before default, the trustee has no implied power to sell to prevent waste.³²

However, a court of equity may authorize the trustee under an income mortgage to release certain property from the lien of the mortgage, where the interests of the bondholders will be promoted thereby;³³ and in Maryland it has been held that a decree author-

²⁵ Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782.

²⁶ Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782. But see Pierce v. Emery, 32 N. H. 484, holding that the consent of the trustee to the acquisition of a lien superior to the mortgage is binding on the bondholders.

²⁷ Baker v. Springfield & W. M. R. Co., 86 Mo. 75, 78.

²⁸ Memphis & L. R. R. Co. v. Dow, 120 U. S. 287, 301, 30 L. Ed. 595.

²⁹ Struthers Coal & Coke Co. v. Union Trust Co., 227 Pa. 29, 75 Atl. 986.

³⁰ Lamar Land & Canal Co. v. Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210.

³¹ Colorado & Southern R. Co. v. Blair, 214 N. Y. 497, Ann. Cas. 1916 D 1177, 108 N. E. 840, rev'g on other grounds 163 N. Y. App. Div. 698, 148 N. Y. Supp. 671, construing particular deed as not conferring such power.

³² Colorado & Southern R. Co. v. Blair, 214 N. Y. 497, Ann. Cas. 1916 D 1177, 108 N. E. 840.

³³ Mayor, etc., City of Baltimore v. United Rys. & Elec. Co., 108 Md. 64, 16 L. R. A. (N. S.) 1006, 69 Atl. 436.

izing the trustee to release certain property from the lien of the mortgage, rendered in a proceeding brought therefor by the trustee, is binding on the bondholders, although they are not made parties because it was practically impossible to do so.³⁴

But in New York it is held that while, before default, it seems that a court of equity under its general supervisory power over trusts, may, in the interest of all parties, direct a sale of the trust property, although not authorized by the deed of trust, yet where the trustee is given no authority to consent to a modification of the instrument creating the trust, he has no implied authority to represent the bondholders in a suit for that purpose, and hence the decree is not binding on bondholders where none of them were joined as parties; and this is true although the bondholders were numerous and unknown, where no attempt was made to join any of them as parties.³⁵

On the other hand, the trustee may release from the lien any part of the property where such act is expressly authorized by the mortgage, or, it has been held, the power may be implied "when the object or purpose of the trust cannot be accomplished by any person other than the designated trustee by the exercise of the power claimed."³⁶

Express power to release any portion of the premises mortgaged, not requisite for the use of the railroad, does not include power to release stock of another railroad company owned by the mortgagor.³⁷

Where a mortgage of shares of stock expressly authorizes the trustee to substitute new security of equal value, on request of the holders of a majority of the bonds, minority bondholders cannot complain of a substitution unless it injures the bondholders as a whole.³⁸

§ 1341. — Taking possession. Ordinarily, the trustee has no right to take possession of the security before default, such a provision being generally inserted in the mortgage itself. But it is often provided in the trust deed that on default the trustee may take

³⁴ Mayor, etc., *City of Baltimore v. United Rys. & Elec. Co.*, 108 Md. 64, 16 L. R. A. (N. S.) 1006, 69 Atl. 436.

³⁵ *Colorado & Southern R. Co. v. Blair*, 214 N. Y. 497, Ann. Cas. 1916 D 1177, 108 N. E. 840, rev'g on this point 163 N. Y. App. Div. 698, 148 N. Y. Supp. 671.

³⁶ *Fidelity Trust Co. v. National Coal & Iron Co.*, 28 Ky. L. Rep. 578, 89 S. W. 718.

³⁷ *Colorado & S. R. Co. v. Blair*, 81 N. Y. Misc. 654, 143 N. Y. Supp. 510.

³⁸ *Ekelheimer v. Consolidated Tobacco Co.* (N. J. Ch.), 59 Atl. 363.

possession;³⁹ and the trustee may take possession, on default, without bringing an action to foreclose, where the mortgage so provides.⁴⁰

Where the mortgage authorizes the trustee to take possession on default, he is entitled to possession although the property is in the hands of a receiver, where the receiver was appointed after the execution of the mortgage.⁴¹ And if after-acquired property is covered by the mortgage, the trustee may take possession thereof as well as the other property.⁴²

But power to take possession of the mortgaged railroad does not include power to take possession of detached portions thereof.⁴³

On taking possession, the trustee is not bound by contracts made by the mortgagor, unless authority therefor is given or reserved in explicit terms in the mortgage.⁴⁴

Where a mortgage covers the road, rolling stock, etc., of a railroad company, ejectment does not lie to obtain possession on default, but the proper remedy is by a bill in equity for specific enforcement of the mortgagee's rights.⁴⁵

Equity may decree a specific performance of a stipulation in the mortgage authorizing the trustee to take possession of the mortgaged property for failure to make payments.⁴⁶

If the trustee takes possession on default, equity may decree a surrender of possession to the mortgagor, as per an agreement, on payment of all interest in default.⁴⁷

Where the trustee went into possession on default, he has such an

³⁹ Power conferred on trustees to take possession and operate the railroad, on default, through its "superintendents, managers, receivers or servants, or other attorneys or agents," does not mean a technical receiver appointed by the court but instead one of the trustees. *Rice v. St. Paul & P. R. Co.*, 24 Minn. 464.

The power survives the dissolution of the corporation. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

As to the amount required to redeem, see *Boston & W. R. Corporation v. Haven*, 8 Allen (Mass.) 359.

⁴⁰ *Seibert v. Minneapolis & St. L. Ry. Co.*, 52 Minn. 246, 53 N. W. 1151.

The right of the trustee to possession on default, as provided for by

the mortgage, is superior to the contract right of contractors engaged in constructing the road to possession until the contract is completed. *Allen v. Dallas & W. R. Co.*, 3 Woods (U. S.) 316, Fed. Cas. No. 221.

⁴¹ *In re New Paltz & W. Val. R. Co.*, 26 N. Y. Misc. 324, 56 N. Y. Supp. 1060.

⁴² *Buck v. Seymour*, 46 Conn. 156.

⁴³ *Coe v. Peacock*, 14 Ohio St. 187.

⁴⁴ *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1, 36.

⁴⁵ *Dow v. Memphis & L. R. R. Co.*, 20 Fed. 260, under Arkansas law.

⁴⁶ *Shepley v. Atlantic & St. L. R. Co.*, 55 Me. 395.

⁴⁷ *Union Trust Co. of New York v. Missouri, K. & T. Ry. Co.*, 26 Fed. 485.

interest as entitles him to compel a conveyance by one who has sold property to the mortgagor, on payment of the balance due.⁴⁸

The trustee cannot refuse to take possession on default, as required by the mortgage, merely because litigation may be necessary to determine the property covered by the mortgage,⁴⁹ nor because the trustee will incur personal liability for injuries sustained in operating the property.⁵⁰

§ 1342. — Power to conduct the business. According to one view, it would seem that a trustee in possession has no implied power to conduct the business.⁵¹

On the other hand, it is undoubted that the power of a railroad to mortgage its property necessarily includes power to transfer to a trustee the right to operate the road upon a default under the mortgage;⁵² and the trustee or mortgagee in possession of a railroad has powers, in the nature of a franchise, to enable him to discharge the duty of keeping the road in repair and operating it and to receive suitable tolls therefor.⁵³

After a strict foreclosure of a railroad, and while the trustees are in charge of the road, they may lease it, where it is impracticable for the trustees to operate it;⁵⁴ and a lease for ten years was held not for an unreasonable time.⁵⁵

§ 1343. — Sale of all of property on default. The mortgage may legally authorize foreclosure by sale by the trustee, without resort to judicial proceedings,⁵⁶ and without causing the property to be ap-

⁴⁸ *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114.

⁴⁹ *First Nat. Fire Ins. Co. v. Salisbury*, 130 Mass. 303.

⁵⁰ *First Nat. Fire Ins. Co. v. Salisbury*, 130 Mass. 303.

⁵¹ *Wheeler v. Ocker & Ford Mfg. Co.*, 162 Mich. 204, 17 Det. L. N. 492, 127 N. W. 332.

⁵² *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

⁵³ *Palmer v. Forbes*, 23 Ill. 301.

⁵⁴ *Sturges v. Knapp*, 31 Vt. 1, 59.

⁵⁵ *Sturges v. Knapp*, 31 Vt. 1, 61.

⁵⁶ *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32; *Chilton v. Brooks*, 71 Md. 445, 18 Atl. 868.

"The power of sale, when carried into effect, defeats the right of redemption. Its existence is not to be inferred unless the inference is unavoidable. The language giving it should be clear. Its meaning should be obvious. The power should be such that it can be carried into effect. The persons, by whom it is to be done, should be named. In the case before us, the alleged power, if conferred upon any one, is conferred upon any bondholder as such. The power is given to no one specifically. The bondholders are perpetually changing. Such a power is void from its very indefiniteness." *Mason v. York & C. R. Co.*, 52 Me. 82, 103.

praised;⁵⁷ and a sale by the trustee, without a resort to the courts, passes a good title, where authorized by and pursuant to the provisions of the mortgage.⁵⁸

On the other hand, the trustee may "be controlled, restrained, and directed by a court of equity at the suit of a party standing in the relation of a cestui que trust, the rule for his guidance being derived from the instrument itself."⁵⁹ Furthermore a sale by a trustee, without a resort to the courts, as authorized by the mortgage, passes no title where the mortgage expressly limits the right to sell and imposes conditions, but in fact the conditions necessary to authorize a sale did not exist and the steps necessary to make the sale valid were not taken.⁶⁰

However, where the trustee is given power to sell the property of a railroad without resorting to the courts, on condition that it take actual possession before making the sale, it is sufficient for the trustee to take actual possession of the railroad and run it, and it is not necessary to enter upon and take possession of separate parcels of land, outside of the railroad location, but contiguous to and connected with it.⁶¹

Where a corporation is in the hands of a receiver and application is made to the court to allow the trustee under a deed of trust to sell the property, after a default, the court cannot refuse the application because such sale at that time will work a hardship on other creditors of the mortgagor. *Gay v. Hudson River Elec. Power Co.*, 184 Fed. 689.

Only the trustee can make the sale. *Frostburg Mut. Bldg. Ass'n v. Lowdermilk*, 50 Md. 175.

The sale need not be delayed until it is ascertained how many of the bonds are justly due. *State v. Brown*, 64 Md. 199, 205, 6 Atl. 172, 1 Atl. 54.

In Michigan, by statute, mortgages by railroad companies may authorize a sale of the property by the trustee. *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 114 Mich. 494, 500, 4 Det. L. N. 650, 72 N. W. 362.

Statutes authorizing a foreclosure by advertising, without resorting to a court, have been held applicable to mortgages executed before their pas-

sage. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9, 24.

⁵⁷ *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32, construing Ohio statute as not forbidding.

⁵⁸ *Brunswick & A. R. Co. v. Hughes*, 52 Ga. 557; *Coe v. New Jersey M. Ry. Co.*, 31 N. J. Eq. 105, modified 34 N. J. Eq. 266.

The advertisement of sale must comply with the terms of the mortgage. *Macon & A. R. Co. v. Georgia R. Co.*, 63 Ga. 103.

⁵⁹ *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141.

⁶⁰ *Washington County R. Co. v. Canadian Colored Cotton Mills Co.*, 104 Me. 527, 543, 72 Atl. 491, where the court said that the trustee's "want of power appeared upon the face of the instrument. Unless the trustees in making sale followed the requirements of the trust deed as to taking possession, giving notice and so forth, their deed was ipso facto void, and conveyed no title whatever."

⁶¹ *Washington County R. Co. v.*

Power to sell is not precluded by the fact that the trustee has already gone into possession as authorized by the mortgage, since the power to take possession and the power to sell coexist.⁶²

Power to sell includes power to warrant the title to lands sold.⁶³

§ 1344. — Power to sue. The trustee may bring suits, other than foreclosure suits, in a proper case. Thus, the trustee has the right, and it is its duty, when, in its opinion, the security covered by the mortgage is jeopardized or the interest of the bondholders is endangered, to come into a court of equity, independently of the provisions of the mortgage, under the general principle of the law of trusts, for the purpose of conserving the property covered by the mortgage.⁶⁴ For instance, in a proper case, the trustee may bring an injunction suit against third persons interfering with or injuring the security,⁶⁵ or may sue to cancel transfers by the mortgagor,⁶⁶ or to compel

Canadian Colored Cotton Mills Co., 104 Me. 527, 540, 72 Atl. 491.

⁶² "They may enter, and afterwards decline to sell; or they may both enter and sell." *Macon & A. R. Co. v. Georgia R. Co.*, 63 Ga. 103, 120.

⁶³ *Dubuque & S. C. R. Co. v. Pier-son*, 70 Fed. 303.

⁶⁴ *Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.*, 109 Fed. 523.

It is well settled that the trustee, independently of the provisions of the trust deed, has the power, and it is his duty, whenever the necessity arises, to invoke the aid of a court of equity to preserve the trust estate. *Old Colony Trust Co. v. Wichita*, 123 Fed. 762.

⁶⁵ Where a street railroad company mortgages its property, the trustee may enjoin a course of conduct threatened by the company which, it may reasonably be inferred, may result in preventing or diminishing the power of the company to make profitable use of the plant under the franchises, as where the company has contracted to give rival companies a part of a terminal plat to be used in competition with it for the traffic which gives it profits. *Fidelity Trust*

Co. v. Hoboken & M. R. Co., 71 N. J. Eq. 14, 63 Atl. 273.

The mortgagee or trustee of a telephone system may sue to enjoin the municipality from unlawfully interfering with the mortgaged property. *Old Colony Trust Co. v. Wichita*, 123 Fed. 762.

The mortgagee of waterworks may sue to enjoin the municipality from constructing and operating a rival water system, to the injury of his security, on the ground of want of power in the municipality. *Farmers' Loan & Trust Co. v. Sioux Falls*, 131 Fed. 890, rev'd on other grounds 136 Fed. 721.

But the trustee cannot sue to restrain strikers from boycotting, picketing and intimidating the employees of the mortgagor, especially where the mortgage forbids the trustee from bringing any action except upon certain contingencies which are not applicable. *Illinois Trust & Savings Bank v. Minton*, 120 Fed. 187.

The trustee may enjoin an execution sale of part of the mortgaged property. *Winslow v. Troy Iron & Nail Factory*, 1 Disney (Ohio) 229, 12 Ohio Dec. 591.

⁶⁶ If the mortgagor corporation has

specific performance of contracts made with the mortgagor,⁶⁷ or to reform the mortgage.⁶⁸ So where a corporation leased its unfinished road to another and has also mortgaged its property to secure bonds to be delivered to the lessee to raise money to complete the road, and the lessee mortgaged its earnings to the trustee for the bondholders, the latter may sue the lessee to recover damages for the breach of its covenant to restore the leased premises to the lessor in good repair.⁶⁹

But the mortgagee or trustee or the purchaser at the foreclosure sale cannot enforce the covenants of a lease made by the mortgagor after the execution of the mortgage in regard to making good depreciations in the property, where the depreciation was not restrainable waste.⁷⁰

Where the mortgagor covenants in its mortgage to pay a certain per cent. of its income to the trustee as a sinking fund, a default in so doing does not merely give the trustee the right to foreclose, but authorizes him to sue to compel the performance of such agreement and for an accounting; and it is no defense that the mortgage also requires the mortgagor to maintain and improve the railroad and equipment so that the service required by the franchises may be furnished, and that such duty is a superior duty so that if, after fulfilling it, the income is exhausted, the trustee is not entitled either to payment of, or an accounting concerning, the moneys due him for the sinking fund.⁷¹

The trustee cannot maintain an independent action upon the

the right under its mortgage to lease its property so long as no default is made in the payment of either principal or interest, the trustee may sue to cancel a lease executed while the corporation was in default in payment of interest. *Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.*, 109 Fed. 523.

⁶⁷ *Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 38 L. R. A. 809, 19 Ky. L. Rep. 666, 41 S. W. 1015.

The trustee may maintain an action to compel a lessee of the mortgaged property to continue to operate the mortgaged railroad in accordance with the lease, for the benefit of the bondholders. *Schmidt v. Louisville & N. R. Co.*, 101 Ky. 441, 470, 38 L. R. A. 809, 19 Ky. L. Rep. 666, 41 S. W. 1015.

He may sue to compel performance of a covenant for further assurance by the assignment of certain property. *See Trust Co. of New York v. Universal Talking Mach. Co.*, 90 N. Y. App. Div. 207, 86 N. Y. Supp. 60, holding complaint insufficient for failure to allege demand.

⁶⁸ *See Trust Co. of New York v. Universal Talking Mach. Co.*, 90 N. Y. App. Div. 207, 86 N. Y. Supp. 60, holding complaint insufficient.

⁶⁹ *Louisville & N. R. Co. v. Schmidt*, 112 Ky. 717, 23 Ky. L. Rep. 2097, 66 S. W. 629.

⁷⁰ *Grand Trunk Ry. Co. v. Central Vermont R. Co.*, 91 Fed. 696.

⁷¹ *New York Trust Co. v. Michigan Traction Co.*, 193 Fed. 175.

bonds or coupons separate from the mortgage,⁷² and hence the bonds are not merged in a deficiency judgment taken in the foreclosure suit brought by the trustee.⁷³

The fact that the trustee becomes a pledgee of part of the bonds, by his own act, to protect advances made by him, does not preclude his enforcing such bonds, where there is no bad faith;⁷⁴ and the trustee has a right to sue a third person who has covenanted to pay any deficit in the interest on the bonds for a breach of covenants, for the benefit of the bondholders.⁷⁵

The power to bring a foreclosure suit is considered in a subsequent section in this chapter.⁷⁶

§ 1345. Duties—General rules. The duties of a trustee under a corporate trust deed are not merely those defined by the terms of the instrument but also include those which arise from the relation of the parties and the situation of the trust fund.⁷⁷ Thus, no one but the trustee can enforce the covenants and conditions of the mortgage or take proper measures to protect the interests of bondholders in respect to matters not provided for by the terms of the instrument.⁷⁸

Except as fixed by the trust deed, the duties of such trustees are regulated by the general rules of law which affect all trustees.⁷⁹

The law imposes upon a trustee "the duty of fidelity to the pecuniary interests of the cestuis que trustent, and the necessity for fidelity is measured somewhat by the situation of the trust fund."⁸⁰

If in doubt as to the construction of the trust deed, the trustee should apply to the court.⁸¹

Bonds are not invalid because not certified by the trustee, as required by the trust deed, but, if necessary, equity will compel the trustee to certify them.⁸²

Among the implied duties of a trustee, "one of the most imperative

⁷² *Welsh v. First Div. of St. Paul & P. R. Co.*, 25 Minn. 314.

⁷³ *Mackay v. Randolph Macon Coal Co.*, 178 Fed. 881.

⁷⁴ *Vancouver Trust & Savings Bank v. Union Woolen Mills*, 85 Wash. 114, 147 Pac. 643.

⁷⁵ *Ex parte Equitable Trust Co. of New York*, 231 Fed. 571.

⁷⁶ See § 1357, *infra*.

⁷⁷ *Frishmuth v. Farmers' Loan & Trust Co.*, 95 Fed. 5, *aff'd* 107 Fed. 169.

⁷⁸ *Frishmuth v. Farmers' Loan & Trust Co.*, 95 Fed. 5, *aff'd* 107 Fed. 169.

⁷⁹ *First Nat. Fire Ins. Co. v. Salisbury*, 130 Mass. 303, 310.

⁸⁰ *Frishmuth v. Farmers' Loan & Trust Co.*, 107 Fed. 169.

⁸¹ *Diggs v. Fidelity & Deposit Co.*, 112 Md. 50, 20 Ann. Cas. 1274, 75 Atl. 517.

⁸² *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 991, 9 S. E. 748.

is to use requisite diligence to protect the security he has taken for the bondholders. Being the grantee in the trust deed, this duty of vigilance requires him to exercise the care which a prudent grantee would deem to be necessary for his own protection.”⁸³

When the mortgage debt is amply secured, the duties of a trustee are ordinarily merely nominal until a default occurs in complying with the conditions of the mortgage.⁸⁴

But, as said by Chief Justice Redfield in one of the pioneer cases, “after the forfeiture occurs either by nonpayment of interest or principal, or both, * * * the duties of the trustees become, not only active and responsible but critical and delicate. It not only is not a dead, dry trust, but is one of the most active and momentous responsibility.”⁸⁵

It is the duty of the trustee to redress any remediable wrong which has resulted to the bondholders from a breach of the covenants of the deed of trust.⁸⁶

Of course, the trustee may refuse to countersign and deliver bonds in violation of the mortgage.⁸⁷

If the trustee has taken possession of the mortgaged railroad and is operating it, and has power to make repairs, he may be compelled to fulfil a statutory duty to maintain fences and construct crossings.⁸⁸

If trustees who have taken possession are executing the trust prejudicially to subsequent incumbrancers, the latter may enjoin the improper execution of the trust.⁸⁹

Whether it is the duty of the trustee to follow the directions of the majority bondholders has already been noticed.⁹⁰

The duties of trustees under a railroad mortgage are not terminated after a strict foreclosure, but the duty remains to manage the property for the benefit of the bondholders, until they can be legally excused.⁹¹

⁸³ Miles v. Vivian, 79 Fed. 848.

⁸⁴ Frishmuth v. Farmers' Loan & Trust Co., 95 Fed. 5, aff'd 107 Fed. 169.

Before default, the duties of a trustee are mainly passive. Colorado & Southern R. Co. v. Blair, 214 N. Y. 497, Ann. Cas. 1916 D 1177, 108 N. E. 840.

⁸⁵ Sturges v. Knapp, 31 Vt. 1, 54, 55.

⁸⁶ Belden v. Burke, 72 Hun (N. Y.) 51, 25 N. Y. Supp. 601, rev'd on other

grounds 147 N. Y. 542, 42 N. E. 261.

⁸⁷ Denver & R. G. R. Co. v. United States Trust Co., 41 Fed. 720, where, however, the trustee was held not justified in refusing to issue railroad bonds as the road was built.

⁸⁸ Jones v. Seligman, 81 N. Y. 190, aff'g 16 Hun (N. Y.) 230.

⁸⁹ Illinois Cent. R. Co. v. Mississippi Cent. R. Co., Fed. Cas. No. 7,008.

⁹⁰ See § 1338, supra.

⁹¹ Sturges v. Knapp, 31 Vt. 1, 58.

§ 1346. — Application of proceeds. Generally the trustee has no duties in connection with seeing to the application of the proceeds of the bonds by the mortgagor corporation. However, the trust deed sometimes imposes certain duties in regard thereto;⁹² and of course the trustee cannot apply the proceeds of the bond sale to purposes in violation of the express agreement of the parties.⁹³

Where a mortgage provided that during certain years of the life of the mortgage certain sums should be paid by the corporation to the trustee to apply in payment of prior mortgages, the trustee was liable to bondholders on an implied covenant to see that the proceeds of the bonds sold were so applied to the payment of such prior mortgages, although the corporation was entitled to receive the proceeds of the bonds.⁹⁴

§ 1347. — Bidding in property at foreclosure sale. It is the duty of the trustee to bid in the property at foreclosure sale, if necessary to protect the interests of the bondholders.⁹⁵ And an order permitting the trustee to bid "up to" a certain sum has been held not to forbid a higher bid if, in the exercise of his judgment as trustee, he deem it best for the interests of the bondholders.⁹⁶

§ 1348. — Duty to account. Trustees may be compelled to account,⁹⁷ but not unless a proper case is made therefor.⁹⁸

⁹² The mortgage sometimes expressly requires the trustees to approve the application of the proceeds. *Dillon v. Barnard*, Holmes (U. S.) 386, Fed. Cas. No. 3,915, aff'd 21 Wall. (U. S.) 430, 22 L. Ed. 673.

It may be the duty of the trustee to see that the proceeds of the bonds are properly applied by the mortgagor, as where the security is for the most part to be acquired from the proceeds of the bonds and the mortgage prohibits the trustee from delivering bonds or their proceeds to the mortgagor except on orders declaring the purposes for which they are to be used. *Frishmuth v. Farmers' Loan & Trust Co.*, 95 Fed. 5, aff'd 107 Fed. 169.

⁹³ *Herr v. Sullivan*, 25 Colo. 190, 54 Pac. 637.

⁹⁴ *Patterson v. Guardian Trust Co.*, 144 N. Y. App. Div. 863, 129 N. Y.

Supp. 807, rev'g 67 N. Y. Misc. 614, 122 N. Y. Supp. 773.

⁹⁵ *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486, aff'd 43 N. Y. 598, and see § 1396, *infra*.

⁹⁶ *James v. Cowing*, 82 N. Y. 449.

⁹⁷ *In re Easton R. Co.*, 120 Mass. 412.

As to payments as a condition precedent, see *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461, 34 N. Y. Supp. 1067.

If trustees under two mortgages of different parts of a railroad are sued for an accounting by the bondholders under one of the mortgages, the bondholders under the other mortgage are necessary parties. *Cram v. Farmers' Loan & Trust Co.*, 28 N. Y. Super. Ct. 226.

⁹⁸ *Harrison v. Union Trust Co.*, 144 N. Y. 326, 39 N. E. 353.

The trustee will not be compelled to make payments, ordinarily, where there are no funds in his hands.⁹⁹

If it is claimed that, in the foreclosure suit, the judgment allowed the trustee an excessive sum for attorney's fees and for interest, the remedy of the substituted trustee, in Pennsylvania, is by petition for a citation to file an account rather than by a bill in equity for an accounting.¹

§ 1349. Personal liability—In general. The bondholders may sue the trustee for neglect or misfeasance.² Ordinarily, however, there is no personal liability where the trustee acts in good faith.³

Of course, if the mortgage provides that the trustee shall not be liable for anything "except his own wilful and intentional breaches of the said trust," he is not liable for omissions to act resulting from mistakes or a misconception of his obligations.⁴

The usual ground of liability is negligence of the trustee. Thus, among the implied duties of trustees is the duty to see that the mortgage is duly recorded, so that no liens of a subsequent date will attach and obtain priority over the mortgage lien, and he is chargeable with any loss resulting from his neglect to record it;⁵ and the fact that the mortgage provides that the trustee shall not be liable for failure to record it does not prevent him making himself liable therefor by a special contract.⁶

The duty to foreclose, on default, is also personal to the trustee; and where he, on the application of a majority of the bondholders, allows them to foreclose in his name, but he pays no attention to the proceedings, he is liable to a minority bondholder for damages sustained through the wrongful acts of those in charge of the foreclosure.⁷

The trustee is liable to a bondholder for the amount of his bonds where it has satisfied the mortgage without the payment or surrender of such bonds.⁸

The trustee is not liable for failure to defend a suit to forfeit a

⁹⁹ *Bain v. Ben's Creek Coal & Coke Co.*, 59 Pa. Super. Ct. 356.

¹ *Merchants' Trust Co. v. Real Estate Trust Co.*, 215 Pa. 56, 64 Atl. 321.

² *Dunning v. Bates*, 186 Mass. 123, 71 N. E. 309.

³ *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782.

⁴ *Black v. Wiedersheim*, 143 Fed. 359.

⁵ *Miles v. Vivian*, 79 Fed. 848.

⁶ *McCauley v. Ridgewood Trust Co.*, 81 N. J. L. 86, 79 Atl. 327.

⁷ *Merrill v. Farmers' Loan & Trust Co.*, 24 Hun (N. Y.) 297.

⁸ *Nivin v. Chester County Trust Co.*, 231 Pa. 315, 80 Atl. 534.

land grant to the mortgagor, where it does not appear that there was any defense.⁹

The trustee is not liable to bondholders for the sums paid by them to it, merely because of the provisions of a partly executed instrument under which nothing was ever done and of which they had no knowledge, where the mortgage actually executed was a modification of such instrument.¹⁰

Where the mortgagor makes annual remittances to the trustee to pay the interest, the trustee being allowed a commission therefor, the trustee incurs no liability to bondholders by obeying a direction of the mortgagor to repay a balance, although all the interest has not been paid, since there is no irrevocable trust created in the remittance.¹¹

The acceptance of the trusteeship under a mortgage executed by a subsidiary company does not give a cause of action for damages in behalf of the bondholders of the parent company against the trustee who was also the trustee in a mortgage executed by the parent company, at least where they are not injured thereby.¹²

§ 1350. — Acts of co-trustees. A provision that neither of the trustees shall be responsible for the act or omission of any of his associates, or for any act not wilfully or grossly negligent, merely expresses what a court of equity would hold in the absence of such a provision.¹³

§ 1351. — Sales. Where the trustee makes a sale in violation of the mortgage and without authority of court, he is personally liable to bondholders for damages caused thereby.¹⁴ And where the misconduct of the trustee was a sale of property, it has been held that the measure of damages was the value of plaintiff bondholder's proportional part of the property wrongfully sold.¹⁵

The trustee may be held personally liable for negligence in reselling the property bought in by it at foreclosure sale for a small fraction

⁹ *Frishmuth v. Farmers' Loan & Trust Co.*, 107 Fed. 169; *Antelo v. Farmers' Loan & Trust Co.*, 95 Fed. 12.

¹⁰ *Elliott v. Guardian Trust Co. of New York*, 145 N. Y. App. Div. 166, 129 N. Y. Supp. 982.

¹¹ *Staten Island Cricket & Baseball Club v. Farmers' Loan & Trust Co.*,

41 N. Y. App. Div. 321, 58 N. Y. Supp. 460.

¹² *Gasquet v. Fidelity Trust & Safety-Vault Co.*, 75 Fed. 343.

¹³ *Riker v. Alsop*, 27 Fed. 251.

¹⁴ *James v. Cowing*, 17 Hun (N. Y.) 256, rev'd 82 N. Y. 449.

¹⁵ *James v. Cowing*, 82 N. Y. 449.

of its value, where there was no good reason for a sale of the property at that time, under the peculiar circumstances, or for the price which was received.¹⁶

If the trustee buys in the property at the foreclosure sale and then sells it for less than the bid and for a small fraction of its value, the fact that other bondholders who were present at and participated in the resale gave notice that no title would pass thereunder does not estop a bondholder who was not present at the sale from recovering against the trustee for his gross negligence in not adjourning the sale.¹⁷

§ 1352. — Use of bonds, proceeds or other moneys. Likewise, the trustee may be liable in damages to the bondholders for negligence in delivering bonds or their proceeds to the mortgagor. For instance, where at the date of the execution of a railroad mortgage, the only property of value owned by the mortgagors was a franchise and a land grant, and the proceeds of the bonds were to be used to pay for the land grant and construct the road, and the mortgage provided that the proceeds should be paid out by the trustee to the mortgagors only on written orders including a statement "declaring the purpose or purposes for which the proceeds of the bonds so ordered to be paid over are to be appropriated or used," the trustee is liable where it hands over to the mortgagors bonds or their proceeds on an order containing no declaration of the purposes for which they are to be used except a general one that they are to be used in the purchase of necessary materials "for the construction of its lines and the discharge of its obligations," and where the trustee knows, or has reason to believe, that the bonds or proceeds are not to be applied properly; and this is so although the mortgage expressly provides that the trustee shall not be obliged to "inquire into the application of the funds or the bonds which it may deliver over upon the receipt of such orders as aforesaid."¹⁸

But a trustee is not liable to bondholders for the money paid to

¹⁶ *Watson v. Scranton Trust Co.*, 240 Pa. 507, Ann. Cas. 1915 A 237, 87 Atl. 845.

¹⁷ *Watson v. Scranton Trust Co.*, 240 Pa. 507, Ann. Cas. 1915 A 237, 87 Atl. 845, holding that the trustee must account for the fair and reasonable value of the property as of the date of its sale by it.

¹⁸ *Frishmuth v. Farmers' Loan & Trust Co.*, 95 Fed. 5, aff'd 107 Fed. 169. See also, construing same mortgage, *Rhineland v. Farmers' Loan & Trust Co.*, 172 N. Y. 519, 65 N. E. 499, aff'g 58 N. Y. App. Div. 619, 69 N. Y. Supp. 1144, where, in the lower court, a different conclusion was reached.

him by them for the bonds, on the ground that he had paid it over to the mortgagor corporation in violation of a first mortgage which had in fact never been executed.¹⁹

Where, by the terms of the mortgage, it was the duty of the trustee to use a fund in its hands for the equal pro rata benefit of all the bondholders, but instead it paid all of the fund to the obligor to be used to cancel certain unissued bonds, the trustee is properly charged with the payments improperly made.²⁰

If the trustee wrongfully pays over the proceeds of the sale to a pledgee of the bonds, with knowledge that the mortgagor corporation claimed the surplus in excess of the amount for which the bonds were pledged, the trustee is personally liable for the amount wrongfully paid the pledgee.²¹

§ 1353. — Where in possession of mortgaged premises. Where trustees purchase the mortgaged railroad at foreclosure sale and thereafter operate it for the benefit of the bondholders, they are liable as common carriers for goods received by them as such, and do not occupy the position of receivers.²² So a trustee running a railroad is liable for injuries to person or property.²³

§ 1354. — Effect of certificate on bonds. It has already been noted that a trustee's certificate on bonds, where in the ordinary form, is not a representation or guaranty of the validity of the bonds.²⁴ Such certificate is not a representation or guaranty so as to render the trustee personally liable.²⁵

¹⁹ *Elliott v. Guardian Trust Co.* of New York, 145 N. Y. App. Div. 166, 129 N. Y. Supp. 982.

²⁰ It is no excuse that the mistake of the trustee was one of judgment or was a mistake of law in construing an ambiguous writing. "Having made voluntary distribution without application to the court, it did so at its own risk." *In re Colonial Trust Co.'s Appeal*, 241 Pa. 554, 88 Atl. 798.

²¹ *Brinkerhoff Zinc Co. v. Boyd*, 192 Mo. 597, 91 S. W. 523.

²² *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486, *aff'd* 43 N. Y. 598.

²³ *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424.

²⁴ See § 994, *supra*.

²⁵ *McCauley v. Ridgewood Trust Co.*, 81 N. J. L. 86, 79 Atl. 327, where certificate that "this bond is one of a series of bonds mentioned in the deed of trust within referred to, executed by the Bayamon Plantation Company to the trustee" was held not to make the trustee liable where the mortgage was not a first lien.

The trustee is not liable to bondholders because the mortgage is not a first mortgage, where there is nothing in the bonds, trustee's certificate on the bonds, or mortgage to indicate that the mortgage is a first mortgage, except that the mortgage recites a resolution of the stockholders that the mortgage was to be a first lien. *Byers*

A certificate by the trustee on bonds that "This bond is one of a series of bonds mentioned and described in the mortgage within referred to" is no guaranty that the bonds are first mortgage bonds, although the bonds were each indorsed by the mortgagor as "First Mortgage Bond."²⁶ So a certificate that "this bond is one of a series of six hundred bonds for five hundred dollars each for the security of which the within mortgage was executed" is not a guaranty that the property mortgaged is an adequate security, but is merely an identification of the bonds as "the" bonds of the company which the mortgage was executed to secure.²⁷

But it has been held that if the trustee indorses bonds with a certificate that they are secured by mortgage, when in fact there was no mortgage, he is liable for the amount in his hands under a subsequent mortgage of the same property, and owned by the trustee, in proportion to plaintiff's share in the security.²⁸

§ 1355. — Parties to actions. If an action is brought against the trustee for negligence, it cannot be maintained by individual bondholders alone, but should be brought in behalf of all the bondholders similarly situated who may choose to come in.²⁹ In such an action, the mortgagors against whom no relief is sought are not necessary parties.³⁰

Third persons cannot ordinarily sue. Thus, the trustee is not liable

v. Union Trust Co., 175 Pa. St. 318, 38 Wkly. Notes Cas. 207, 34 Atl. 629.

²⁶ Tschetinian v. City Trust Co. of New York, 186 N. Y. 432, 79 N. E. 401, aff'g 97 N. Y. App. Div. 380, 89 N. Y. Supp. 1053.

"The language employed, where interpreted in its natural and ordinary meaning, simply amounts to a statement identifying the bond whereon it is written as one of those mentioned in the mortgage, and the effect of this is an assurance to the purchaser that his bond is amongst those entitled to the benefits and protection afforded by such mortgage. But the statement does not upon any reasonable construction, in the absence, as in this case, of any allegation of fraud or deceit, active or passive, make the trustee a

guarantor of the quality and extent of the security given by the mortgage, or responsible for the accuracy of statements indorsed upon the bond by the mortgagor purporting to describe the nature of such security." Tschetinian v. City Trust Co. of New York, 186 N. Y. 432, 79 N. E. 401, aff'g 97 N. Y. App. Div. 380, 89 N. Y. Supp. 1053.

²⁷ Bauernschmidt v. Maryland Trust Co., 89 Md. 507, 512, 43 Atl. 790.

²⁸ Miles v. Roberts, 76 Fed. 919.

²⁹ Frishmuth v. Farmers' Loan & Trust Co., 95 Fed. 5, aff'd 107 Fed. 169.

³⁰ Frishmuth v. Farmers' Loan & Trust Co., 95 Fed. 5, aff'd 107 Fed. 169.

in damages to third persons for his wrongful refusal to cancel the mortgage.³¹

§ 1356. Compensation and reimbursement. Trustees are entitled to compensation for their services³² and to reimbursement for all necessary expenditures.³³ There is an implied obligation on the part of bondholders that the trustee shall be reimbursed any necessary expenditures he is required to make in the discharge of his duties.³⁴

Sometimes, the compensation, in whole or in part, is fixed by the terms of the mortgage.³⁵ Where not so fixed, the amount allowed as compensation depends on the circumstances of the particular case.³⁶

However, the trustee is not entitled to compensation or reimburse-

³¹ *Kaulbach v. Knickerbocker Trust Co.*, 148 N. Y. App. Div. 331, 132 N. Y. Supp. 350.

³² *Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.*, 36 Fed. 622; *Walker v. Quincy, M. & P. Ry. Co.*, 28 Fed. 734.

³³ *Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.*, 36 Fed. 622; *Read v. Memphis Gaslight Co.*, 107 Tenn. 433, 64 S. W. 769.

But the trustee in a mortgage, while a trustee for the bondholders, is not a trustee of a fund paid into court as rent for certain of the property during the pendency of a foreclosure suit, so as to entitle him to deduct therefrom his expenses incurred in defending the suit. *Western U. Tel. Co. v. Boston Safe Deposit & Trust Co.*, 112 Fed. 37.

Amount of allowance to counsel, see *Phinizy v. Augusta & K. R. Co.*, 98 Fed. 776.

³⁴ This rule was applied where a railroad company leased its unfinished road, and then mortgaged it and delivered the bonds to the lessee to raise money to finish the road, the lessee mortgaged its earnings, the first mortgage authorized the trustee to take possession of the road, and thereunder the trustee sued the lessee road to preserve the estate, and it was held that the lessee as one of the bondhold-

ers was liable for its share of the expenses of such suit against it, although not for its benefit and against its wishes. *Louisville & N. R. Co. v. Schmidt*, 128 Ky. 229, 107 S. W. 745.

³⁵ *Gilman v. Des Moines Valley R. Co.*, 41 Iowa 22; *Maury v. Chesapeake & O. R. Co.*, 27 Gratt. (Va.) 698, holding trustee entitled thereto where discharged after rendering services.

³⁶ *Phinizy v. Augusta & K. R. Co.*, 98 Fed. 776; *Easton v. Houston & T. C. Ry. Co.*, 40 Fed. 189, where allowance of five hundred dollars was held sufficient where services were merely nominal; *Girard Life Ins. Annuity & Trust Co. v. Bedford Coal & Iron Co.*, 20 Pa. Super. Ct. 304.

"Their compensation should be adjusted largely as an equivalent for the responsibility which they were thus obliged to assume." *Dow v. Memphis & L. R. R. Co.*, 23 Blatchf. (U. S.) 84, 32 Fed. 185.

Where the usual commission allowed to trustees, by the laws of the state, for receiving and paying out sums over ten thousand dollars is one per cent., besides their necessary expenses, such per cent. was allowed on a mortgage for two million, six thousand dollars for defending an action to set aside the mortgage. *Dow v. Memphis & L. R. R. Co.*, 32 Fed. 185.

ment for acts not within the scope of his duties,³⁷ and it has even been held that "prior to any active interference by the trustees for the protection of the bondholders, any compensation to which they may be or may become entitled should be met by the mortgagor."³⁸

A provision in the mortgage that the trustees shall be entitled to just compensation, to be paid by the mortgagor, does not make such compensation a lien on the mortgaged property.³⁹

The question whether the trustee is chargeable with interest on funds in his hands is to be determined by the general rules applicable to all trustees.⁴⁰

A statute fixing the commissions or fees of a trustee of an express trust, where the instrument fixes no specific compensation, has been held not applicable to a passive trustee such as one in a corporate trust deed.⁴¹

If the mortgage provides that the trustee shall be entitled to "just" compensation, the question of what is just compensation is one for the court, where the parties cannot agree, and the legislature cannot by a subsequent statute arbitrarily fix a fee to be estimated not upon the value of the services performed but upon the value of the cash and securities passing through the hands of the trustee.⁴²

One corporation is not liable for the compensation of a trustee under a mortgage executed by another corporation, although the latter corporation is merely a financial tool of the former which had voted to lend money to finance the subsidiary corporation.⁴³

Where minority bondholders, after a reorganization into which practically all the bondholders had gone, are held nevertheless to have the right to foreclose through the trustee, and the trust deed expressly makes the expenses of the trustee in executing the trust a first charge upon the proceeds of the sale, the court cannot impose such expenses on the bondholders at whose instance the suit was brought.⁴⁴

VIII. FORECLOSURE BY SUIT

§ 1357. General rules. Ordinarily, corporate mortgages are foreclosed by a suit in equity for foreclosure, ordinarily brought by the

³⁷ *Tracy v. Gravios R. Co.*, 13 Mo. App. 295, *aff'd* 84 Mo. 210.

³⁸ *Bound v. South Carolina R. Co.*, 62 Fed. 536.

³⁹ *Mercantile Trust & Deposit Co. v. Atlantic & N. C. R. Co.*, 99 N. C. 139, 5 S. E. 417.

⁴⁰ *Real Estate Trust Co. v. Union Trust Co.*, 102 Md. 41, 61 Atl. 228.

⁴¹ *Miami Valley Gas & Fuel Co. v.*

Mills, 157 N. Y. App. Div. 542, 142 N. Y. Supp. 862.

⁴² *Miami Valley Gas & Fuel Co. v. Mills*, 157 N. Y. App. Div. 542, 142 N. Y. Supp. 862.

⁴³ *Clark v. National Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930.

⁴⁴ *Fidelity Trust Co. v. Hutchinson Chemical & Alkali Co.*, 221 Fed. 63.

mortgagee or trustee,⁴⁵ but in a proper case a single bondholder, or several bondholders, may bring such a suit.⁴⁶

A clause that "for the debt and bonds secured hereby the railroad company is liable in personam, and any deficiency, after exhausting the mortgage security, may be enforced against the railroad company," requires that resort be first had to the mortgage security.⁴⁷

Where a trust deed was executed to secure a bond issue, but in fact it was never delivered to the trustee nor any bonds issued, but instead it was delivered as security to a corporate creditor, he may sue in equity to foreclose the mortgage rather than sell the security as collateral.⁴⁸

Two instruments may be treated as one mortgage, and foreclosed together, where the later one was executed to remedy defects in the execution of the earlier mortgage.⁴⁹

Separate suits to foreclose mortgages given by several public service companies managed and owned by practically the same persons may be consolidated so as to permit the properties to be sold together as a single system, where such a sale would be more advantageous.⁵⁰

Under the new equity rules in the federal courts permitting the joinder in one bill of as many causes of action cognizable in equity as plaintiff may have against a single defendant, but providing that if there is more than one defendant there must be either the assertion of liability against all the material defendants or "sufficient grounds must appear for uniting the causes of action in order to

⁴⁵ A trustee is not disqualified from conducting the foreclosure suit merely because it holds certain of the secured bonds as owner or as trustee under another trust. *Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

Provisions in the mortgage authorizing the trustee to require indemnity as a condition to compelling him to sue to foreclose are for his protection and in no way limit or restrict the rights of the trustee to institute suit. *Phillips v. Southern Division C. & O. R. Co.*, 110 Ky. 33, 49, 22 Ky. L. Rep. 1530, 60 S. W. 941.

The trustee must, ordinarily, declare a default for nonpayment of interest and proceed to foreclose where a request therefor is made by

the requisite number of bondholders. This is true even where the demand is made of the trustee by itself in its character as trustee under a subsequent trust. *Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

⁴⁶ See § 1327, *supra*.

Bondholders are entitled to the benefits of the mortgage as if they were parties thereto. *Butler v. Rahm*, 46 Md. 541.

⁴⁷ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 189 Fed. 661.

⁴⁸ *Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14.

⁴⁹ *Robinson v. Piedmont Marble Co.*, 75 Fed. 91.

⁵⁰ *Gay v. Hudson River Elec. Power Co.*, 190 Fed. 773.

promote the convenient administration of justice," two corporate mortgages may be foreclosed in a single suit where the bill alleges both mortgages were given to secure the same debt by different corporations, and that the one mortgage provided that when the bonds secured thereby should be paid and canceled by the trustee, a like amount of the bonds of the other company should also be canceled or delivered to the latter company uncanceled, since the rights of the parties can be adequately protected only in a single suit.⁵¹

Where a suit to foreclose a second mortgage is pending, and a receiver has been appointed, the trustee in the first mortgage who was made a party to the suit will not be permitted to bring an independent suit for foreclosure of the first mortgage, but all necessary relief can be obtained in the original suit by cross-bill or otherwise.⁵²

§ 1358. Strict foreclosure. Strict foreclosure, whereby the mortgagor's right to redeem is extinguished and the title to the mortgaged premises vested in the mortgagee without a sale, is now forbidden as to all mortgages by statutes in most of the states requiring a sale of the property or by other provisions.⁵³ However, in a few states, mostly in New England, a strict foreclosure is now, or was at one time, allowed and the remedy employed in case of corporate mortgages.⁵⁴

⁵¹ *Crawford v. Washington Northern R. Co.*, 233 Fed. 961.

⁵² *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 70 Fed. 518.

⁵³ See list of statutes in 9 Enc. Pl. & Pr. 97-118.

⁵⁴ "But in this country mortgages are executed, and have been from the earliest time, with power of sale, and the practice of strict foreclosure is entirely inapplicable, except in a few states and in a very limited class of cases." *Deck v. Whitman*, 96 Fed. 873.

⁵⁴ *Gates v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 333, 5 Atl. 695; *Pierce v. Ayer*, 88 Me. 100, 33 Atl. 777; *Somersett Ry. v. Pierce*, 88 Me. 86, 33 Atl. 772; *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9; *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1; *Haven v. Grand Junct. Railroad & Depot Co.*, 12 Allen (Mass.) 337;

Sturges v. Knapp, 31 Vt. 1. See also *Stern v. Wisconsin Cent. R. Co.*, 1 Fed. 555.

A railroad mortgage is an entirety and there can be but one foreclosure. *Gates v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 333, 5 Atl. 695.

"Even in states where a mortgage merely creates a lien and does not convey the legal title, as in this state, the remedy by strict foreclosure may be resorted to under special and peculiar circumstances." Thus, where the legal title to a railroad has been acquired by the holders of certain liens thereon, they are entitled to maintain a bill of strict foreclosure to cut off the equity and right of junior incumbrancers to redeem. *Crouch v. Dakota, W. & M. R. R. Co.*, 18 S. D. 540, 101 N. W. 722, writ of error dismissed 203 U. S. 582, 51 L. Ed. 327.

Even if a strict foreclosure is proper in certain cases, the right to a sale "cannot in any case be denied or suppressed, except in the presence of some adverse, dominating equity, which requires a departure from the general rule."⁵⁵

The reason why strict foreclosures are not favored in general cases has been stated as follows: "But a strict foreclosure was undesirable for all the parties. Not only would it have cut off entirely the bondholders secured by the second and third mortgages, whose interests were before the court, and which it was bound to protect as far as possible, but it would have made the large number of bondholders under the first mortgage practically tenants in common of the railroad property. The inconveniences of such a result are obvious enough."⁵⁶

§ 1359. Remedy as barred or limited by provisions of mortgage.

The right to sue in equity to foreclose is not barred by other remedies provided for in the mortgage.⁵⁷ Thus, the alternative remedy provided for by the trust deed of a sale by the trustee without resorting to the courts in case of a default does not preclude the bringing a suit in equity to foreclose.⁵⁸ In like manner, power conferred on the trustee to take possession and sell the property is a cumulative remedy and does not preclude the right to resort to a court of equity for a foreclosure.⁵⁹

Limitations in the mortgage upon the power of the trustee to take legal proceedings to enforce payment of the amount secured should be strictly construed in favor of the trustee and are not favored by the courts,⁶⁰ and conditions relating to the power of the trustee to

In Pennsylvania, at one time, courts of equity had no jurisdiction to decree a sale of the mortgaged premises at the instance of the mortgagee. *Ashhurst v. Montour Iron Co.*, 35 Pa. St. 30.

⁵⁵ *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126, 44 N. E. 781.

When allowable in general, see 9 Enc. Pl. & Pr. 123, 124.

⁵⁶ *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

⁵⁷ *Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.*, 109 Fed. 523; *Mendenhall v. West Chester & P. R. Co.*, 36 Pa. St. 145.

⁵⁸ *Land Title & Trust Co. v. Asphalt Co. of America*, 127 Fed. 1; *Eaton & H. R. Co. v. Hunt*, 20 Ind. 457; *Girard Trust Co. v. Avonmore Land & Improvement Co.*, 221 Pa. 52, 70 Atl. 266.

⁵⁹ *Dow v. Memphis & L. R. R. Co.*, 20 Fed. 260; *Alexander v. Central R. of Iowa*, 3 Dill. (U. S.) 487, Fed. Cas. No. 166.

The same rule applies to a statute conferring a power of seizure and sale. *State v. Florida Cent. R. Co.*, 15 Fla. 690.

⁶⁰ *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 35 L. Ed. 116; *Rein-*

take possession of the property or to sell it without resorting to the courts,⁶¹ as for instance where such acts, on default in payment of interest, are authorized only upon the request of the holders of a certain percentage of the bonds,⁶² do not apply and are not a condition precedent to a suit by the trustee to foreclose. Moreover, it has expressly been held that a clause in a mortgage providing that the mode of sale by the trustee provided for therein, without resort to the courts, "shall be exclusive of all others," is of no effect to oust the jurisdiction of the courts to foreclose, since it provides against a remedy in the ordinary course of judicial proceedings.⁶³

A provision in a mortgage forbidding the trustee from declaring the principal due before maturity or to maintain a foreclosure suit for the principal before the maturity of the bonds, without the consent of the holders of a majority of the bonds, does not preclude the

hart v. Interstate Tel. Co., 71 N. J. Eq. 70, 63 Atl. 1097; Las Vegas Railway & Power Co. v. Trust Co. of St. Louis County, 15 N. M. 634, 110 Pac. 856.

"If there is any proposition well settled in the courts of the United States, it is that limitations contained in a mortgage, restricting the right of foreclosure, must be strictly construed." Toler v. East Tennessee, V. & G. Ry. Co., 67 Fed. 168.

"There may be some departure from this rule among the state courts, but in the national courts it is uniform." Lowenthal v. Georgia Coast & P. R. Co., 233 Fed. 1010.

⁶¹ Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 35 L. Ed. 116.

Especially is this so where the mortgage also provides that "nothing herein contained shall be held or construed to prevent or interfere with the foreclosure of this instrument * * * by any court of competent jurisdiction." Morgan's Louisiana & T. R. & S. S. Co. v. Texas Cent. R. Co., 137 U. S. 171, 34 L. Ed. 625.

Limitations in the mortgage on the extraordinary powers conferred on the

trustee authorizing him to take immediate possession of all the corporate property on default and either to operate the business for the benefit of creditors or to sell it, do not apply to his right to foreclose, where not contained in the provision relating to the right to foreclose. Las Vegas Railway & Power Co. v. Trust Co. of St. Louis County, 15 N. M. 634, 110 Pac. 856.

⁶² Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 35 L. Ed. 116; First Nat. Fire Ins. Co. v. Salisbury, 130 Mass. 303, 310.

⁶³ Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 35 L. Ed. 116.

A provision that the trustee shall enforce the mortgage by entering and taking possession, and proceed to sell without the aid of any court, and that such remedy "shall be exclusive of all others" is impotent to deprive a court of equity "of its ancient and inherent right to supervise the conduct of trustees in the execution of their trust." Reinhardt v. Interstate Tel. Co., 71 N. J. Eq. 70, 63 Atl. 1097.

right to foreclose for the nonpayment of interest, as distinguished from a foreclosure for the principal, without such request.⁶⁴

§ 1360. Necessity for and sufficiency of request of bondholders to sue. Whether a request of bondholders, or a certain per cent. of them, is necessary before the trustee can act in case of default before the bonds are due, depends on the terms of the mortgage.⁶⁵

The trustee may sue to foreclose without a request of the majority of the bondholders, unless it is otherwise provided in the mortgage.⁶⁶ And that such a request is necessary by the terms of the mortgage to enable the trustee to take possession or to himself sell without resort to the courts does not therefore render it necessary as a condition to a suit to foreclose.⁶⁷

In any event, even if a provision requiring the holders of one-fourth of the bonds to request a foreclosure is valid, it will not be enforced so as to prevent a foreclosure in violation thereof, where a company owning a majority of the stock of the mortgagor also owns over three-quarters of the bonds, so that it could delay proceedings indefinitely.⁶⁸

A provision in the trust deed giving bondholders the right to sue to foreclose only on condition that the trustee, after due demand by the holders of a certain amount of bonds, fails or refuses to sue, does not preclude the trustee from suing on behalf of minority bondholders, although the bonds held by them amount to less than such sum.⁶⁹

The sufficiency of the request of bondholders upon the trustee to exercise the power of sale, on the occurrence of a default, depends largely upon the terms of the mortgage.⁷⁰

⁶⁴ *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. 146; *Alexander v. Central R. R. of Iowa*, 3 Dill. (U. S.) 487, Fed. Cas. No. 166. To the same effect, see *Credit Co. of London, England v. Arkansas Cent. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. 46.

⁶⁵ *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32.

⁶⁶ *Kniekerbocker Trust Co. v. Oneonta, C. & R. S. R. Co.*, 116 N. Y. App. Div. 78, 101 N. Y. Supp. 241.

⁶⁷ *Supra*, preceding section.

⁶⁸ *Linder v. Hartwell R. Co.*, 73 Fed. 320.

⁶⁹ *New York Security & Trust Co. v. Lincoln St. Ry. Co.*, 77 Fed. 525, 74 Fed. 67.

⁷⁰ *Union Trust Co. of Maryland v. Belvedere Bldg. Co.*, 105 Md. 507, 66 Atl. 450, holding that a request referring in general terms to certain defaults, and also setting up the admitted insolvency of the corporation, was sufficient.

§ 1361. Injunction against foreclosure. A foreclosure suit may be enjoined in a proper case,⁷¹ as where there is no adequate remedy at law,⁷² but not unless good reasons therefor are presented.⁷³

It has been held that the suit will be enjoined where commenced with knowledge of the pendency of receivership proceedings,⁷⁴ but it has also been held that where a railroad is in the hands of receivers, the court will not restrain other mortgage creditors from suing to foreclose in the same court.⁷⁵

The bankruptcy court often restrains a mortgagee from commencing foreclosure proceedings, and it is proper to do so, under ordinary circumstances, where there is nothing to justify apprehension of loss to the mortgagee by such delay.⁷⁶

Stockholders cannot sue to enjoin a foreclosure suit where the facts relied on can be set up as a defense in the foreclosure suit.⁷⁷

The fact that there are other claims, unpaid judgments and suits against the corporation is no ground for enjoining a foreclosure sale under a first mortgage, on the theory that because thereof the property would not sell for its full value, where the mortgage is prior and superior to all such claims.⁷⁸

§ 1362. What constitutes default—General rules. The mortgage or trust deed usually expressly provides what acts shall constitute such a default as will authorize a foreclosure of the instrument. Sometimes, the mortgage makes it obligatory on the trustee to foreclose on a certain happening, at least if requested to act by a certain percentage of the bondholders. Under other provisions, it is discretionary with the trustee whether to sue at once to foreclose.

If the trustee is authorized to declare the whole debt due on a certain contingency, it should do so only where it appears to be for the best interests of the bondholders.⁷⁹

⁷¹ *Western Division of Western N. C. R. Co. v. Drew*, 3 Woods (U. S.) 691, Fed. Cas. No. 17,433.

See generally, chapter on Injunctions.

⁷² *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo* (Tex. Civ. App.), 132 S. W. 868, where a claim for repairs was alleged to more than offset nonpayment of interest which was relied on as a default.

⁷³ *Sire v. Long Acre Square Bldg. Co.*, 50 N. Y. Misc. 29, 100 N. Y. Supp. 307.

⁷⁴ *Slade v. Massachusetts Coal & Power Co.*, 188 Fed. 369.

⁷⁵ *Mercantile Trust Co. v. Baltimore & O. R. Co.*, 89 Fed. 606.

⁷⁶ *Slade v. Massachusetts Coal & Power Co.*, 188 Fed. 369.

⁷⁷ *Waymire v. San Francisco & S. M. Ry. Co.*, 112 Cal. 646, 44 Pac. 1086.

⁷⁸ *Floore v. Morgan*, — Tex. Civ. App. —, 175 S. W. 737.

⁷⁹ *Bound v. South Carolina Ry. Co.*, 50 Fed. 853.

Where the mortgagor corporation violated a voting trust contract with the mortgagee, the latter has been held entitled to foreclose, on the theory that the breach was of the essence of the contract, although violating an agreement not to foreclose while any contract between the parties remained unperformed.⁸⁰

The fact that the mortgagor corporation has been judicially declared to be insolvent, in a proceeding properly instituted for its dissolution and the liquidation of its affairs, authorizes the mortgagee to proceed at once to exhaust its security by a sale of the mortgaged property, in order to determine the basis upon which it could participate in the liquidation;⁸¹ and it is immaterial that the mortgage provides that "in no other case and for no other purpose," except as provided therein, "shall the principal sum of any of said bonds become due and payable before the date fixed in said bonds for the payment thereof."⁸²

Where notice to certain officers of default is required to be delivered at the principal office of the company, as a condition to the right to foreclose, it is sufficient to deliver the notice to such officers at some other place.⁸³

§ 1363. — Default in payments. Generally, mortgages provide for foreclosure on default in payment of interest, either expressly or by necessary implication.⁸⁴

If no clause is inserted accelerating the maturity of the debt because of defaults in payments of interest, the court cannot ingraft

⁸⁰ Thompson-Starrett Co. v. E. B. Ellis Granite Co., 85 Vt. 282, 84 Atl. 1017.

⁸¹ Union Trust Co. of Maryland v. Belvedere Bldg. Co., 105 Md. 507, 66 Atl. 450, where the court added that it was neither necessary nor desirable to hold broadly, and as a general rule, that the mere insolvency of a corporation ipso facto matured the mortgage debt, or authorized the mortgagee at his election to treat it as mature.

The reason for the rule is that otherwise "the mortgagee would be precluded without its consent from proving its claim as a creditor against the assets in the hands of the receivers." If a foreclosure is refused, "and a sale is decreed subject to their

mortgage, the general assets will be distributed amongst other creditors, and, should a default be made hereafter, at any period while these bonds are unpaid, and a deficiency occur upon any subsequent sale made under their mortgage, these bondholders will be remediless." Union Trust Co. of Maryland v. Belvedere Bldg. Co., 105 Md. 507, 66 Atl. 450.

⁸² Union Trust Co. of Maryland v. Belvedere Bldg. Co., 105 Md. 507, 66 Atl. 450.

⁸³ Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co. (Del. Ch.), 77 Atl. 756.

⁸⁴ See Taber v. Cincinnati, L. & C. Ry. Co., 15 Ind. 459, 466, where power implied.

one on the contract,⁸⁵ and where there is such a clause, its provisions must be strictly followed.⁸⁶

Where a statute provides that bonds are "not to mature at an earlier period than thirty years," neither the bonds nor the mortgage can provide that on failure to pay interest when due the bonds shall mature within six months, although on failure to pay interest the mortgage may be foreclosed for the unpaid interest.⁸⁷

If the mortgage does not otherwise provide, a default in paying interest authorizes a foreclosure only for the unpaid interest and not for the principal.⁸⁸

However, a foreclosure suit and sale is allowable, on default in interest, although the principal has not become due, where the suit and sale are merely to pay arrearages of interest.⁸⁹

Failure to pay interest is a default authorizing a foreclosure, although the mortgage does not so provide, where it is given to secure interest as well as principal, especially where the mortgage provides that bondholders shall not levy on any part of the mortgaged premises for unpaid interest.⁹⁰ And default in payment of interest is ground for foreclosure, although not so provided in the mortgage, especially where the corporation has made an assignment for the benefit of creditors.⁹¹

Insolvency of the mortgagor may authorize foreclosure, on default, although there is no provision in the mortgage for foreclosure on default of payment of interest alone, especially where the property is in the hands of a receiver and a second mortgage is being foreclosed.⁹²

⁸⁵ *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 185, 22 Atl. 932.

⁸⁶ *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 185, 22 Atl. 932.

⁸⁷ *Howell v. Western R. R. Co.*, 94 U. S. 463, 24 L. Ed. 254.

⁸⁸ *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 185, 22 Atl. 932.

The fact that the mortgage authorizes the trustee, on default in payment of interest for a certain time, to sell all the mortgaged property and make payment of the principal, does not authorize a suit to foreclose, on

failure to pay interest, for more than the unpaid interest, where there are no provisions in the mortgage which expressly mature the principal debt for nonpayment of interest. *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 187, 22 Atl. 932.

⁸⁹ *Goodman v. Cincinnati & C. R. Co.*, 2 Disney (Ohio) 176.

⁹⁰ *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Philadelphia & R. R. Co.*, 69 Fed. 482.

⁹¹ *Mendenhall v. West Chester & P. R. Co.*, 36 Pa. St. 145.

⁹² *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655. See also *supra*, preceding section.

In any event, if the mortgagor is insolvent and the trustee has no funds with which to operate the property, the court may order a sale on default in paying interest, although the mortgage does not by its terms authorize foreclosure or sale merely on default in interest.⁹³

A clause in a mortgage that if the corporation should suffer any lawful tax or charges to fall in arrear, whereby the security might become impaired, the mortgagee should be entitled to foreclose, authorizes a foreclosure where the corporation makes default in paying taxes on its capital stock.⁹⁴

If the mortgage provides that the trustee may declare the debt due if the mortgagor does not "forthwith" discharge or pay any executions sued out against it, stockholders cannot insist, as a defense to the foreclosure suit, that the trustee acted with too great haste, where the corporation made no objection to an immediate declaration by the trustee that he would treat the debt as due.⁹⁵

Where the trustee had a fund in his possession from which he might pay interest in case of default by the corporation, in which case the latter was required to replace the amount withdrawn within one year, the trustee, after making two interest payments from the fund, which were not replaced, was authorized to foreclose, although the fund was not exhausted, especially where the corporation was insolvent.⁹⁶

Where a foreclosure is authorized if the proceeds of sale of another mortgage on different property is insufficient to pay all the bonds in full, and it appears that a foreclosure of such other mortgage would have produced nothing and been useless, a foreclosure may be had before the maturity of the bonds, as if the other mortgage had been foreclosed and nothing realized thereby.⁹⁷

A mortgage provision that the bonds shall become due after a certain length of time after default in payment of interest or any coupon is self-executing.⁹⁸ But where the mortgage provides that it shall become due, "at the election of the trustees," on nonpayment of interest, the legislature has no power to direct a sale of the property where the trustees have not elected to declare the mortgage due.⁹⁹

⁹³ *McLane v. Placerville & S. Val. R. Co.*, 66 Cal. 606, 6 Pac. 758.

⁹⁴ *Union Trust Co. of Maryland v. Belvedere Bldg. Co.*, 105 Md. 507, 66 Atl. 450.

⁹⁵ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423.

⁹⁶ *Land Title & Trust Co. v. Asphalt Co. of America*, 127 Fed. 1.

⁹⁷ *Chicago & G. W. R. Land Co. v. Peck*, 112 Ill. 408.

⁹⁸ *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 55 S. W. 615.

⁹⁹ *Randolph v. Middleton*, 26 N. J. Eq. 543, rev'g 25 N. J. Eq. 306.

Sometimes, it is stipulated that the trustee "may" declare the bonds due on default in payment of interest, and "must" declare them due on the request of a certain per cent. of the bondholders.¹ Where the mortgage is silent in regard thereto and merely provides that, on default, "at the option of the holders of such bonds," the principal shall become due and payable, the option need not be exercised by all the bondholders.²

Where the holders of a majority in value of the bonds are entitled to elect to mature the principal after six months' default in interest, demand for payment is not necessary to constitute a default.³

While there is authority tending to support the rule that a demand of payment of coupons or interest is necessary to put the mortgagor in default,⁴ it is held in Alabama that a demand for payment of overdue coupons is not a condition precedent to the right to sue to foreclose, but if the corporation has suffered any loss by the failure to present them for payment it must be set up as a defense.⁵

Of course, if the mortgage provides that the principal shall become due on default in payment of interest "after demand," a demand is necessary,⁶ and in such a case the bringing of a suit to foreclose is not equivalent to a demand.⁷ But where the mortgage expressly requires a demand of payment, it has been held no defense that the coupons were not presented for payment, at least where it is not shown that any money was provided for their payment.⁸

Where a mortgage securing instalments provided that if any of them remained sixty days overdue, the whole amount should become payable at the election of the mortgagee, it was held that the mortgagee, if he knew that the mortgagor had an instalment ready at the usual place of payment, must notify the mortgagor if he claimed that payment must be made at the place stipulated in the mortgage.⁹

¹ Colonial Trust Co. v. St. John Lumber Co., 138 La. 1033, 71 So. 147, holding an election of bondholders sufficiently shown otherwise than by an authentic act.

² Atlantic Trust Co. v. Crystal Water Co., 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647.

³ Arnot v. Union Salt Co., 109 N. Y. App. Div. 433, 96 N. Y. Supp. 80, rev'd on other grounds in 186 N. Y. 501, 79 N. E. 719.

⁴ Chicago & V. R. R. Co. v. Fosdick,

106 U. S. 47, 27 L. Ed. 64; Davies v. New York Concert Co., 41 Hun (N. Y.) 492, 5 N. Y. St. Rep. 21.

⁵ Savannah & M. R. Co. v. Lancaster, 62 Ala. 555.

⁶ Potomac Mfg. Co. v. Evans, 84 Va. 717, 6 S. E. 2.

⁷ Potomac Mfg. Co. v. Evans, 84 Va. 717, 6 S. E. 2.

⁸ Security Trust & Safe Deposit Co. v. New Jersey Paper Board & Wall Paper Mfg. Co., 57 N. J. Eq. 603, 42 Atl. 746.

⁹ Union Mut. Life Ins. Co. v. Union

In any event, no demand for payment of the principal is necessary before suing to foreclose where such a demand would be unavailing.¹⁰

§ 1364. — Waiver of default. The right to foreclose for default in payment of taxes and for failure to provide a sinking fund is not waived by a majority of the bondholders agreeing to clip the interest coupons from their bonds for five years, and accept notes of the corporation therefor.¹¹

If a default in paying taxes authorized a foreclosure, a subsequent payment, by whomsoever made, or upon whatever authority, cannot obliterate the default, or divest any right to sell founded thereon.¹²

Of course, the mortgagee may extend the time of payment of the debt, and the extension is binding if based on a sufficient consideration or if something in the transaction amounts to an estoppel.¹³ And where a mortgage provided that, in case of six months' default in payment of interest, if the holders of one-half in value of the bonds should so elect and notify the trustee of such election, the principal should then become immediately due, there is no default where the holder of a majority of the bonds in value consented either before or when the interest came due to an indefinite extension of the time for payment.¹⁴

§ 1365. Time to sue. The question as to what constitutes a default authorizing the bringing of a suit to foreclose has already been noticed.¹⁵

A mortgage provision for entry by the trustee after default for a certain time in payment of interest does not preclude the bringing of a foreclosure suit before the expiration of such time.¹⁶ For instance, a suit to foreclose before the end of six months after a default

Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90.

¹⁰ Shaw v. Bill, 95 U. S. 10, 24 L. Ed. 333, as where mortgagor was insolvent and its want of funds at the place of payment appeared from the allegations of the bill.

¹¹ Las Vegas Railway & Power Co. v. Trust Co. of St. Louis County, 15 N. M. 634, 110 Pac. 856.

¹² Union Trust Co. of Maryland v. Belvedere Bldg. Co., 105 Md. 507, 66 Atl. 450.

¹³ Hauser v. Capital City Brewing

Co. (N. J. Ch.), 58 Atl. 171, 57 Atl. 722, where the consideration and estoppel were the purchase by a third person of stock in the company and paying the corporation therefor.

¹⁴ Arnot v. Union Salt Co., 186 N. Y. 501, 79 N. E. 719, rev'g 111 N. Y. App. Div. 912, 96 N. Y. Supp. 80, 109 N. Y. App. Div. 433, 96 N. Y. Supp. 80.

¹⁵ See §§ 1362-1364, *supra*.

¹⁶ Central Trust Co. v. New York City & N. R. Co., 33 Hun (N. Y.) 513.

is not barred by a provision in the mortgage prohibiting the trustees from entering and taking possession until six months after a default.¹⁷ Nor does a provision requiring the trustee to sue when requested by the requisite number of bondholders, after six months' default in interest, interfere with the right of the trustee in his discretion to sue immediately upon default.¹⁸

Waiver by the mortgagor corporation of the mortgage requirement of six months' default before foreclosure is not of itself a fraud on its stockholders.¹⁹

The same statute of limitations applies as in case of other mortgages. In addition, laches in suing may be fatal, under some circumstances.²⁰

§ 1366. Jurisdiction—In general. While at one time, in a few states, a court of equity had no jurisdiction to decree a sale of the mortgaged property,²¹ it is now the rule in all the states that a court of equity has such jurisdiction.²²

In Massachusetts, before 1906, by statute, jurisdiction to foreclose a railroad mortgage was vested exclusively in the Supreme Judicial Court; but since the implied repeal of such statute, it is held that the Superior Court has jurisdiction, under its general equity jurisdiction.²³

§ 1367. — In case of interstate corporation. A federal court of one district, which has jurisdiction of the trustee and the mortgagor, may foreclose a railroad mortgage and order a sale of all the property, although part of it is located in another district.²⁴

¹⁷ *State Trust Co. v. Kansas City, P. & G. R. Co.*, 120 Fed. 398; *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 61 Fed. 543; *Mercantile Trust Co. v. Chicago, P. & St. L. Ry. Co.*, 61 Fed. 372; *Central Trust Co. v. Texas & St. L. Ry. Co.*, 23 Fed. 846.

¹⁸ *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 61 Fed. 543.

¹⁹ *Chicago & S. S. Rapid-Transit R. Co. v. Northern Trust Co.*, 90 Ill. App. 460, *aff'd* 195 Ill. 288, 63 N. E. 136.

²⁰ *Gunnison v. Chicago, M. & St. P. Ry. Co.*, 117 Fed. 629, *aff'd* 130 Fed. 259.

²¹ See *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

²² *Old Colony Trust Co. v. Great White Spirit Co.*, 178 Mass. 92, 59 N. E. 673.

In Pennsylvania, equity has jurisdiction of a bill by a trustee to foreclose a trust deed on the request of a majority of the bondholders, and is not restricted to a *scire facias* at law. *Girard Trust Co. v. Avonmore Land & Improvement Co.*, 221 Pa. 52, 70 Atl. 266.

²³ *Federal Trust Co. v. Bristol County St. R. Co.*, 218 Mass. 367, 105 N. E. 1064.

²⁴ *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Farmers' Loan & Trust*

A state court has jurisdiction to foreclose in its entirety a mortgage on a railroad and its franchises, although part of the road is outside the state,²⁵ or to compel the trustee to make the sale under the power in the mortgage.²⁶

However, it has been held that while the court may act upon the person of defendant so as to compel it to make conveyances or releases, yet where it has not done so, the mere foreclosure decree does not bar a suit in the other state to foreclose.²⁷

§ 1368. — Of federal courts. Suits to foreclose corporate mortgages are generally brought in the federal courts, if possible, at least in cases where the mortgaged property is located in more than one state, such as in case of many railroad foreclosures. Ordinarily, the only debatable question arising is whether, in a particular case, there is such diverse citizenship as will confer jurisdiction on the federal court. In regard to this matter, the general rules applicable to all actions govern the question of jurisdiction.²⁸

If the suit is brought by bondholders, they must be citizens of different states than the mortgagor corporation.²⁹

If one of the bondholders who sues is a citizen of the same state as any defendant, it has been held that the bill may be dismissed as to them and proceed as to the others,³⁰ although in a later case

Co. v. Chicago & A. Ry. Co., 27 Fed. 146.

If the aid of a federal court in another state is desired, it must be invoked by an independent suit rather than an "ancillary bill." Mercantile Trust Co. v. Kanawha & O. Ry. Co., 39 Fed. 337.

²⁵ Woodbury v. Allegheny & K. R. Co., 72 Fed. 371; McTighe v. Macon Const. Co., 94 Ga. 306, 32 L. R. A. 208, 47 Am. St. Rep. 153, 21 S. E. 701; Craft v. Indiana, D. & W. R. Co., 166 Ill. 580, 46 N. E. 1132.

²⁶ Craft v. Indiana, D. & W. R. Co., 166 Ill. 580, 46 N. E. 1132.

Where all of a railroad which runs through several states is mortgaged, the courts of the state having jurisdiction over the trustee can authorize and compel him to sell and convey

whatever interest of the railway company will pass under the terms of the mortgage, both within and without the state. McElrath v. Pittsburgh & S. R. Co., 55 Pa. St. 189.

²⁷ Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. 993; Farmers' Loan & Trust Co. v. Postal Tel. Co., 55 Conn. 334, 3 Am. St. Rep. 53, 11 Atl. 184. See also Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co., 44 Hun (N. Y.) 400, 9 N. Y. St. Rep. 347, aff'd 109 N. Y. 342, 16 N. E. 539.

²⁸ See Foster's Fed. Pr.

²⁹ Nebraska City Nat. Bank v. Nebraska City Hydraulic Gaslight & Coke Co., 14 Fed. 763.

³⁰ Nebraska City Nat. Bank v. Nebraska City Hydraulic Gaslight & Coke Co., 14 Fed. 763.

where intervening bondholders were citizens of the same state as the mortgagor, the court dismissed the bill as a whole.³¹

The fact that the trustee who is made a defendant is a citizen of the same state as the complainant does not oust the court of jurisdiction, since the trustee is merely a nominal party and no relief is sought against him,³² but if the mortgagor and the trustee joined as defendant are citizens of the same state, the court has no jurisdiction,³³ except that where the foreclosure suit brought by a bondholder and to which the trustee is made a defendant is filed to procure a decree excluding all other bondholders from the equal benefits of the mortgage, the trustee, for the purposes of diversity of citizenship, is to be classed on the same side as the other defendants, although ordinarily the trustee will, in such cases, for jurisdictional purposes, be classed as a complainant.³⁴

If the action to foreclose is brought by the trustee, then there must be diversity of citizenship as between him or it and the mortgagor. If there are two or more trustees of the mortgage and they sue, the federal court has no jurisdiction if one of them is a citizen of the same state as the mortgagor, notwithstanding the bondholders are residents of other states.³⁵

Where a federal court has obtained possession of the mortgaged property by its receiver, pursuant to a creditor's suit or otherwise, then it may entertain a subsequent foreclosure suit, or a cross-bill to foreclose, without regard to the citizenship of the parties.³⁶

Where two corporations of the same name, chartered by different states, exist and there has been no merger, the corporations are separate legal persons; but a federal court may, on a question of jurisdiction based on diverse citizenship, where the circumstances justify it, look beyond the formal and corporate differences, and regard substantial rights rather than the mere matter of organization.³⁷

³¹ *Mangels v. Donau Brewing Co.*, 53 Fed. 513.

³² *Pacific R. R. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Barry v. Missouri, K. & T. Ry. Co.*, 27 Fed. 1.

³³ *Allen-West Commission Co. v. Brashear*, 176 Fed. 119; *Shipp v. Williams*, 62 Fed. 4. *Contra*, *Reinach v. Atlantic & G. W. R. Co.*, 58 Fed. 33.

³⁴ *First Nat. Bank of Chattanooga, Tennessee, v. Radford Trust Co.*, 80 Fed. 569.

³⁵ *Coal Co. v. Blatchford*, 11 Wall. (U. S.) 172, 20 L. Ed. 179.

³⁶ *Metropolitan Trust Co. of New York v. Columbus, S. & H. R. Co.*, 93 Fed. 689; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642, *aff'd* 95 Fed. 497; *Park v. New York, L. E. & W. R. Co.*, 70 Fed. 641; *Compton v. Jesup*, 68 Fed. 263.

³⁷ *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 198 U. S. 188, 49 L. Ed. 1008, *rev'g* 127 Fed. 497.

On a proceeding by a single bondholder to foreclose for failure to pay interest, the amount in controversy is not only the unpaid coupons, but the amount of plaintiff's bonds, the security of which is alleged to be in great danger.³⁸

Removal of foreclosure suits from a state court to a federal court are governed by the general rules relating to removal of causes, irrespective of the nature of the action.³⁹

§ 1369. — Concurrent jurisdiction. It is well settled that suits to foreclose may be brought at the same time in both the federal and state courts, and that the pendency of an action in one court is no bar to a suit in the other court.⁴⁰ For instance, a suit by a trustee in a state court to foreclose is no bar to a suit by bondholders to foreclose in a federal court.⁴¹ And in like manner, a mortgagee may sue to foreclose in a federal court, notwithstanding a general creditor has sued in a state court for the appointment of a receiver.⁴²

Persons not parties to a foreclosure suit in a federal court may enforce their claims in a state court and, upon obtaining judgment, may levy an execution upon the property in the hands of the foreclosure purchaser, where the judgment is entitled to priority over the mortgage.⁴³

The fact that the decree of foreclosure of a railroad was rendered in a federal court does not deprive a state court of jurisdiction of an action by a municipality against the purchaser at the foreclosure sale to enforce an obligation to maintain offices, shops, etc., in the municipality, as per a contract between the mortgagor and the municipality.⁴⁴

However, the court which first obtains jurisdiction and takes possession of the property may retain possession and the other court has no right to disturb such possession.⁴⁵ This rule that the court first acquiring the lawful jurisdiction of specific property may retain control necessary to effectuate its final decree confers power on a federal court in which a mortgage foreclosure suit has been brought and the decree in which has reserved to such court exclusive juris-

³⁸ Lowenthal v. Georgia Coast & P. R. Co., 233 Fed. 1010.

³⁹ See Foster's Fed. Pr.

⁴⁰ Woodbury v. Allegheny & K. R. Co., 72 Fed. 371.

⁴¹ Brooks v. Vermont Cent. R. Co., 14 Blatchf. (U. S.) 463, Fed. Cas. No. 1,964.

⁴² State Trust Co. of New York v.

National Land Improvement & Manufacturing Co., 72 Fed. 575.

⁴³ Trust Co. of America v. Norfolk & S. Ry. Co., 183 Fed. 803, aff'd 190 Fed. 737.

⁴⁴ International & G. N. Ry. Co. v. Anderson County, — Tex. Civ. App. —, 174 S. W. 305.

⁴⁵ Chapter on Receivers, *infra*.

diction to determine what claims filed in the case were superior to the lien of the mortgage and should be paid by the purchaser, to enjoin a suit in a state court to enforce a claim alleged to be superior to the mortgage.⁴⁶

§ 1370. Parties—Scope of treatment. It is not within the scope of this work to go into details in regard to the rules as to parties in suits in equity⁴⁷ nor to restate the general rules as to parties in suits to foreclose mortgages, without regard to whether or not the mortgagor is a corporation.⁴⁸

§ 1371. — Plaintiff or plaintiffs. While ordinarily the proper person to sue is the trustee or mortgagee, if the trustee refuses to sue, the suit may be instituted by one or more bondholders.⁴⁹

Bondholders cannot join with the trustees as plaintiffs,⁵⁰ and need not be joined as orators, although the mortgage provides for foreclosure by the trustee only at the request of a majority of the bondholders.⁵¹

If the suit is by bondholders, it is immaterial that all the bondholders are not made parties.⁵²

Where a deed of trust was never delivered to the trustee nor the bonds issued, but it was delivered to a corporate creditor as security for a note, the creditor is the proper plaintiff in a foreclosure suit, rather than the trustee.⁵³

Where the mortgage is made directly to the persons holding the bonds, who are named and their several interests described, all the bondholders should be joined as complainants.⁵⁴

If a mortgage is given to secure the separate debts of several persons as mortgagees, one of the mortgagees may sue to foreclose without joining the others, where they are no longer interested in the property.⁵⁵

⁴⁶ *Lang v. Choctaw, O. & G. R. Co.*, 160 Fed. 355.

⁴⁷ General rules; see *Whitehouse Eq. Pr.* §§ 42-77, and other textbooks relating to equity practice.

⁴⁸ See standard textbooks relating to mortgages.

⁴⁹ See § 1327, *supra*.

⁵⁰ *Consolidated Water Co. v. San Diego*, 92 Fed. 759.

⁵¹ *Grand Trunk Ry. Co. v. Central*

Vermont R. Co., 88 Fed. 622.

⁵² *Wilmer v. Atlanta & R. Air Line R. Co.*, 2 Woods (U. S.) 447, Fed. Cas. No. 17,776, and see § 1327, *supra*.

⁵³ *Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14.

⁵⁴ *Nashville & D. R. Co. v. Orr*, 18 Wall. (U. S.) 471, 21 L. Ed. 810.

⁵⁵ *Tyler v. Yreka Water Co.*, 14 Cal. 212.

If one of the trustees is a director of the mortgagor corporation, the other trustee may sue alone to foreclose, making the co-trustee a defendant, without alleging that he requested the co-trustee to join as plaintiff.⁵⁶

But it has been held that if there are two trustees, and they disagree as to the exercise of the discretionary power to foreclose or not foreclose for overdue interest, one trustee cannot sue to foreclose because of nonpayment of such interest, by making his co-trustee a party defendant.⁵⁷

Where the suit is brought by several co-trustees, it does not abate by the death of one of the trustees, but is only postponed until the survivors, in the exercise of their power, fill the vacancy.⁵⁸

The heirs of some of the deceased trustees are not necessary parties.⁵⁹

§ 1372. — Defendant or defendants. Certain rules applicable to all mortgage foreclosure suits, as far as parties are concerned, are equally applicable to suits to foreclose corporate mortgages, among which may be mentioned the rule that the mortgagor is a necessary defendant unless it has transferred all its interest in the property, in which case it may be joined but need not be joined; that subsequent purchasers of the mortgaged property need not be joined as defendants but may be joined;⁶⁰ that prior mortgagees or other lienholders are proper but not necessary parties;⁶¹ that subsequent

⁵⁶ *Cumming v. Middletown, W. & W. G. R. Co.*, 147 N. Y. App. Div. 105, 131 N. Y. Supp. 710.

⁵⁷ *Farmers' Loan & Trust Co. v. Lake St. El. R. Co.*, 122 Fed. 914.

⁵⁸ *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162, 175.

⁵⁹ *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673.

⁶⁰ The owner of the equity of redemption, by transfer from the mortgagor, and its lessee, are proper parties. *Beekman v. Hudson River West Shore Ry. Co.*, 35 Fed. 3.

⁶¹ Prior mortgagees are not necessary parties. *Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466; *Grand Trunk Ry. Co. v. Central Vermont R. Co.*, 88 Fed. 622; *Wright v. Bundy*, 11 Ind. 398, 403.

"The first mortgagee is not a necessary, but he is a proper party, especially wherever a sale is prayed for, as it is certainly desirable that the property should bring a full and fair price, which cannot be if there is any uncertainty as to what title the purchaser will take—free or incumbered." *Woods v. Pittsburgh, O. & St. L. Ry. Co.*, 99 Pa. St. 101.

If a first mortgagee is made a defendant in a suit to foreclose a second mortgage, he may bring in additional parties by a cross-bill or a bill in the nature of a cross-bill. *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 70 Fed. 518.

In a suit to foreclose a mortgage given by a consolidated corporation, a prior mortgagee of one of the constituent companies is a proper defend-

or junior mortgagees, grantees, lienholders, etc., are proper but not necessary parties;⁶² although if they are not joined, their interests or rights are not cut off;⁶³ that unsecured creditors having no judgment or other lien upon the property are neither necessary nor proper parties;⁶⁴ that a guarantor or indorser of the bonds is not a necessary defendant⁶⁵ and not even a proper defendant, except under particular statutes authorizing the joinder of persons personally liable for the mortgage debt; that where a final decision cannot be made without affecting the rights of third persons not before the court, they are necessary parties;⁶⁶ etc.

Bondholders are not necessary parties, where the foreclosure suit is brought by the trustee,⁶⁷ and are not even proper parties, under ordinary circumstances.⁶⁸

A bondholders' committee and its depository, where citizens of

ant although the mortgage being foreclosed does not cover the property covered by such prior mortgage. *Olyphant v. St. Louis Ore & Steel Co.*, 23 Fed. 465.

⁶² Junior incumbrancers are not necessary parties. *Forrest's Ex'rs v. Luddington*, 68 Ala. 1.

Incumbrancers pendente lite are not necessary parties. *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

A judgment creditor whose lien is subsequent to the mortgage is a proper defendant. *Jenkins v. John Good Cordage & Machine Co.*, 56 N. Y. App. Div. 573, 68 N. Y. Supp. 239.

A subsequent mortgagee is not even a proper party where the making him a party hinders and delays the suit. *Richards v. Chesapeake & O. R. Co.*, 1 Hughes (U. S.) 28, Fed. Cas. No. 11,771.

⁶³ If the junior mortgagee is not made a party, he is not bound by the decree but may foreclose and sell the equity of redemption, and the purchaser at that sale will be entitled to be let into possession and to redeem the first mortgage. *Memphis & L. R. Ry. Co. v. State*, 37 Ark. 632.

⁶⁴ *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 84 Fed. 539;

McMurty v. Montgomery Masonic Temple Co., 86 Ky. 206, 211, 5 S. W. 570, holding that such creditors are not necessary parties.

⁶⁵ *Columbia Finance & Trust Co. v. Kentucky Union Ry. Co.*, 60 Fed. 794; *Owen v. Potter*, 115 Mich. 556, 571, 73 N. W. 977.

The state which is an indorser of the bonds is not a necessary party. *Young v. Montgomery & E. R. Co.*, 2 Woods (U. S.) 606, Fed. Cas. No. 18,166.

⁶⁶ *Ex parte Equitable Trust Co. of New York*, 231 Fed. 571.

⁶⁷ *Nowell v. International Trust Co.*, 169 Fed. 497; *Alton Water Co. v. Brown*, 166 Fed. 840, holding this rule applicable in Illinois notwithstanding a general statute as to "unknown owners"; *Campbell v. Texas & N. O. R. Co.*, 2 Woods (U. S.) 263, Fed. Cas. No. 2,369; *Kerp v. Michigan L. S. R. Co.*, Fed. Cas. No. 7,727; *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541; *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162; *McElrath v. Pittsburg & S. R. Co.*, 68 Pa. St. 37, 28 Leg. Int. 197.

⁶⁸ *Coe v. Columbus, P. & L. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

other districts, are not necessary defendants to a bill for the appointment of a receiver for the purpose of foreclosing the equity of bondholders in the mortgaged property, where an attempt to join them would imperil the proceedings.⁶⁹

If the action is brought by a bondholder on the refusal of the trustee to sue, the latter is a necessary defendant.⁷⁰

But in the federal courts, the trustee is not a necessary defendant where a citizen of another state and not found in the district.⁷¹

Where first mortgage bondholders who are also holders of a second mortgage on part of the road sue to foreclose, the trustee under the second mortgage is a necessary party.⁷²

The stockholders of the mortgagor are not necessary defendants,⁷³ and the same rule applies to the officers of the mortgagor.⁷⁴

The lessor of the mortgaged property need not be joined,⁷⁵ nor need the holders of unsecured bonds issued by the state in aid of a railroad company and guaranteed by the company.⁷⁶

Receivers in possession of the mortgaged property need not be joined as defendants.⁷⁷

In a suit to foreclose a first mortgage, where there has been a foreclosure sale under a junior mortgage and the property is still in the hands of a receiver under the control of the same court, the foreclosure purchaser may be made a defendant.⁷⁸

⁶⁹ *Lowenthal v. Georgia Coast & P. R. Co.*, 233 Fed. 1016.

⁷⁰ *First Nat. Bank of Chattanooga, Tennessee v. Radford Trust Co.*, 80 Fed. 569.

The same rule applies where an income bondholder sues the mortgagor corporation for an accounting and an injunction. *Morgan v. Kansas Pac. Ry. Co.*, 21 Blatchf. (U. S.) 134, 15 Fed. 55.

In Texas, however, it is held that the "trustee in such a mortgage as this does not take the legal title, and is not a necessary party to a suit to foreclose it." *Hammond v. Tarver*, 89 Tex. 290, 34 S. W. 729, 32 S. W. 511.

⁷¹ *Lowenthal v. Georgia Coast & P. R. Co.*, 233 Fed. 1010.

⁷² *Mercantile Trust Co. v. Portland & O. R. Co.*, 10 Fed. 604.

⁷³ *Godechaux v. Morris*, 121 Fed. 482; *Gunderson v. Illinois Trust & Savings Bank*, 199 Ill. 422, 428, 65 N. E. 326, aff'g 100 Ill. App. 461.

⁷⁴ The president of the mortgagor is not a necessary defendant, although he has possession of some of the bonds and is borrowing money on them for corporate purposes. *Unity Co. v. Equitable Trust Co.*, 204 Ill. 595, 68 N. E. 654, aff'g 107 Ill. App. 449.

⁷⁵ *Grand Trunk R. Co. v. Central Vermont R. Co.*, 88 Fed. 622.

⁷⁶ *McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 38 L. Ed. 518.

⁷⁷ *Grand Trunk R. Co. v. Central Vermont R. Co.*, 88 Fed. 622; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642.

⁷⁸ *Farmers' Loan & Trust Co. v. Houston & T. C. Ry. Co.*, 44 Fed. 115.

In a suit to foreclose a mortgage on one part of a railroad, the mortgagee under another mortgage on another part of the road to secure the debts of different creditors, is not a necessary party.⁷⁹

Where the trustee sues at the request and for the benefit of a company which held all the bonds, such company, although joined as a codefendant, will be regarded as really the plaintiff.⁸⁰

§ 1373. Intervention—General rules. In a proper case, in order to do justice, a court of equity has inherent power to permit persons not parties to the foreclosure suit to intervene. However, ordinarily, no person has an absolute right to intervene. Generally, the court is vested with a certain amount of discretion in determining whether to permit intervention, at least where it is merely sought to raise collateral issues.⁸¹

Statutes relating to intervention in actions at law have no application to suits in equity.⁸²

Under the Kentucky statutes, any person claiming an interest in the proceeds of the foreclosure sale may, before payment over of the proceeds, intervene by filing a verified petition.⁸³

An order denying an application to intervene has been held not appealable under the federal practice.⁸⁴

§ 1374. — Bondholders. Inasmuch as the trustee represents the bondholders in a foreclosure suit, they are not ordinarily entitled to intervene unless the trustee is not acting in good faith for the protection of their interests.⁸⁵ However, in a proper case, bondholders may be allowed to intervene.⁸⁶

Whether bondholders shall be permitted to intervene is ordinarily

⁷⁹ *Bronson v. La Crosse & M. R. Co.*, 2 Black (U. S.) 524, 17 L. Ed. 259.

⁸⁰ *Chamberlain v. Connecticut Cent. R. Co.*, 54 Conn. 472, 9 Atl. 244.

⁸¹ *Lisman v. Knickerbocker Trust Co.*, 211 Fed. 413.

⁸² *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.*, 8 N. M. 327, 43 Pac. 701.

⁸³ *Central Home Telephone & Telegraph Co. v. Fidelity & Columbia Trust Co.*, 168 Ky. 483, 182 S. W. 618.

⁸⁴ *Lisman v. Knickerbocker Trust Co.*, 211 Fed. 413; *Land Title & Trust*

Co. v. Asphalt Co. of America, 127 Fed. 1.

⁸⁵ *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182; *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 245, 55 S. W. 615.

⁸⁶ *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813; *Dows v. Chicago & S. W. Ry. Co.*, Fed. Cas. No. 4,048, aff'd 94 U. S. 444, 24 L. Ed. 207; *Williamson & Upton v. New Jersey S. R. Co.*, 25 N. J. Eq. 13, 23; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 410, 75 Am. Dec. 518.

within the discretion of the court, which must take into consideration the facts and circumstances surrounding the case, including the object and purpose of the intervening petition as shown by its prayer.⁸⁷ Intervention by a bondholder may be refused because of his laches.⁸⁸

Bondholders may intervene where the trustee has been derelict in the discharge of his duty to them, as where he is negligent, incompetent or guilty of improper conduct.⁸⁹ So bondholders may, it seems, intervene where there appears to be a question as to the validity of a prior mortgage, which they desire to contest, and the trustee neglects or refuses to raise such question.⁹⁰ And bondholders who have not deposited their bonds with a protective committee should be allowed to intervene where the attitude of the trustee is ambiguous and the interest of the protective committee is opposed to that of the applicants.⁹¹

Committees representing different bondholders may intervene where differences of opinion exist between them so that no order of sale agreeable to all can be made.⁹²

Of course where the action is brought by one or more bondholders on behalf of all, any bondholders may intervene;⁹³ and if minority bondholders sue to foreclose, majority bondholders may intervene, where they claim that under the mortgage there can be no foreclosure without their permission.⁹⁴

On the other hand, a bondholder cannot intervene to challenge the validity of the substitution of the trustee who is complainant, pursuant to a provision in the mortgage for such substitution;⁹⁵ and whether a substituted trustee who is the complainant is a fit trustee because of its relation to certain bondholders cannot be raised by per-

⁸⁷ *Bowling Green Trust Co. v. Virginia Passenger & Power Co.*, 132 Fed. 921.

⁸⁸ *Central Trust Co. v. Texas & St. L. Ry. Co.*, 24 Fed. 153, where a petition to intervene on the ground that there had been no default was made sixteen months after the appointment of a receiver.

⁸⁹ *Bowling Green Trust Co. v. Virginia Passenger & Power Co.*, 164 Fed. 753.

⁹⁰ *Bowling Green Trust Co. v. Virginia Passenger & Power Co.*, 164 Fed. 753.

⁹¹ *Central Trust Co. of New York v. Chicago, R. I. & P. R. Co.*, 218 Fed. 336.

⁹² *Farmers' Loan & Trust Co. v. Cape Fear & Y. V. Ry. Co.*, 71 Fed. 38.

⁹³ *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 251, 55 S. W. 615.

⁹⁴ *Toler v. East Tennessee, V. & G. Ry. Co.*, 67 Fed. 168.

⁹⁵ *Bowling Green Trust Co. v. Virginia Passenger & Power Co.*, 132 Fed. 921, 923.

mitting a bondholder to intervene, where the mere relationship does not make the trustee ineligible and where no complaint is made as to its past acts, but only as to what it may do.⁹⁶

In regard to the right of a minority bondholder to intervene in order to attack the acts of majority bondholders, the courts generally refuse the application where the effect will be to delay the sale and prolong a receivership and where all his rights against other bondholders are preserved by permitting him to assert his claim against the proceeds arising from the sale of the property and contest the claims of other bondholders secured by the same mortgage.⁹⁷ Thus, a minority bondholder should not be allowed to intervene, at a time when a decree of foreclosure is about to be entered, to prevent a sale under a reorganization plan approved of by over nine-tenths of the bondholders, where the effect will be to delay the sale and prolong the receivership, and where the petitioner's rights as against the proceeds of sale may be fully protected by proceedings after the sale.⁹⁸

A bondholder cannot intervene merely to litigate questions with a bondholders' committee.⁹⁹

The fact that certain bondholders have combined as a reorganization committee and expect probably to purchase at foreclosure sale and transfer the property to a new corporation is no ground for permitting intervention by bondholders who are unwilling to join the combination.¹

Although the court may take cognizance of a pending reorganization plan, in connection with the price bid at the sale, to ascertain whether the security holder is obtaining a just and fair return out of the property sold, it cannot shift its function to foreclose and sell the property to any affirmative duty to pass upon the quality of the reorganization plan, much less to endeavor to settle collateral controversies arising between security holders; and hence, after one sale and before a resale, a minority bondholder should not be allowed to intervene to restrain a reorganization committee from again bidding because of the breach of an alleged trust obligation owed to the petitioner.²

Where a deed of trust was foreclosed in two states simultaneously,

⁹⁶ *Bowling Green Trust Co. v. Virginia Passenger & Power Co.*, 132 Fed. 921.

⁹⁷ *Trust Co. of America v. Norfolk & S. Ry. Co.*, 174 Fed. 269.

⁹⁸ *Trust Co. of America v. Norfolk & S. Ry. Co.*, 174 Fed. 269.

⁹⁹ *Land Title & Trust Co. v. Asphalt Co. of America*, 121 Fed. 587.

¹ *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600.

² *Investment Registry v. Chicago & M. Elec. R. Co.*, 213 Fed. 492.

the acts of the trustee in seeking a confirmation of the sales, pursuant to the wishes of ninety per cent. of the bondholders, and in withdrawing the application in one suit after denial of a like application in the other suit in another state, are not available to a dissenting bondholder, when a resale is ordered, as a permanent badge of bad faith and partiality, so as to warrant allowing a minority bondholder to intervene.³

Minority bondholders cannot intervene merely because the default of the corporation was a collusive act as between the officers of the corporation and the majority bondholders who demanded the foreclosure in order to reorganize the corporation; and the fact that the trustee has complied with the demands of the majority and brought suit to foreclose, as required by the deed of trust, does not show partiality.⁴

Minority bondholders cannot intervene in order to better the security for their claims, already preferred, over the general creditors by alleging that members of the bondholders' committee and depositing bondholders are holders of unpaid stock in the mortgagor company, and seeking to set off the amounts so due for unpaid stock against the bonds held by such delinquent holders of stock.⁵

It is proper to refuse to allow a bondholder to intervene to raise collateral issues not concluded by the foreclosure decree.⁶

After the decree, an alleged bondholder cannot intervene in order to question a finding as to the ownership of certain of the bonds.⁷

A bondholder cannot intervene before the decree merely to litigate a claim for priority over other bondholders, since he can assert superior equities, if any, when the bonds are produced for proof before the master on an application for a decree of distribution.⁸

Intervention, before sale, by a bondholder to litigate questions as to the validity and amount of obligations provable against the fund will not be allowed on the theory that the petitioners will be in a better position to protect themselves at the bidding, especially where such a course would involve a long delay, and the property has been in the hands of a receiver for over three years, and the mortgagor is utterly insolvent and the bondholder is making the application after a delay

³ Investment Registry v. Chicago & M. Elec. R. Co., 213 Fed. 492.

⁴ Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co., 200 Fed. 600.

⁵ Fidelity Trust Co. v. Washington-Oregon Corporation, 217 Fed. 588.

⁶ Lisman v. Knickerbocker Trust Co., 211 Fed. 413.

⁷ Las Vegas Railway & Power Co. v. Trust Co. of St. Louis County, 17 N. M. 286, 126 Pac. 1009.

⁸ Mercantile Trust Co. v. United States Shipbuilding Co., 130 Fed. 725.

of nearly two years.⁹ Nor should a bondholder be allowed to intervene before sale to contest the validity of corporate notes secured by bonds held by other persons and within the mortgage, especially where the holders of such notes are not parties.¹⁰

The allegation that bonds held by members of the bondholders' committee and other majority bondholders were issued without consideration and are invalid does not warrant the staying of foreclosure proceedings until the amount and validity of the outstanding bonds have been determined, and interveners should not be allowed, against objection, to litigate this question until after the decree of foreclosure.¹¹ However, it has been held that a bondholder has a right to intervene for the purpose of contesting the validity of certain of the bonds.¹²

Where the trustee in both the first and second mortgages is the same, and it forecloses the two mortgages together, representative bondholders under each mortgage should be permitted to intervene to litigate the disputed question as to what property is covered by each mortgage.¹³

Where there is the same trustee in each of several mortgages, and it is a question just what property each mortgage covers, and the interests of the bondholders under the different mortgages are somewhat hostile, it is proper to permit bondholders representing each conflicting interest to intervene.¹⁴

The fact that the mortgage provides that bondholders shall have no right "to institute any suit, action or proceeding, in equity or at law, for the foreclosure of this indenture," etc., without first requesting the trustee to sue, does not preclude permitting a bondholder to intervene in a foreclosure suit.¹⁵ Nor does a provision in the mortgage conferring power upon majority bondholders to remove the

⁹Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co., 169 Fed. 466.

¹⁰Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co., 169 Fed. 466.

¹¹Fidelity Trust Co. v. Washington-Oregon Corporation, 217 Fed. 588.

¹²Central Trust Co. of New York v. California & N. R. Co., 110 Fed. 70, *aff'd* 128 Fed. 882.

¹³Grand Trunk R. Co. v. Central Vermont R. Co., 88 Fed. 622.

¹⁴Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 70 Fed. 423, 66 Fed. 169. But see *Clyde v. Richmond & D. R. Co.*, 55 Fed. 445, where intervention was refused notwithstanding the trustee was acting as such under twelve different mortgages, on the ground that no reason was shown why all the bondholders would not be fully protected.

¹⁵Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 66 Fed. 169.

trustee limit or control the powers of a court of equity to permit bondholders to intervene to protect their rights.¹⁶

Where a bondholder seeks to intervene on the ground that the trustee was disqualified to sue because of acts adverse to the interests of the bondholders, the practice or procedure by which the court shall ascertain the facts is wholly discretionary, and it may consider not only the matters appearing on the face of the petition, but also the facts relating to the trustee as they are offered to be shown in response to the rule to show cause.¹⁷

A petition for intervention by bondholders, based upon hostility or partiality of the trustee, must approach the same degree of definiteness and certainty as is required in a bill seeking to remove a trustee or to correct his administration of the trust; it is not sufficient merely to state conclusions of law without setting up the facts.¹⁸

§ 1375. — Stockholders. Stockholders may intervene in a proper case,¹⁹ but not unless for good cause,²⁰ nor unless their status as such is clearly established.²¹ Ordinarily, they cannot intervene except by showing the existence of a defense which the corporation neglects and refuses to make.²² For instance, stockholders should be allowed to

¹⁶ *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 66 Fed. 169.

¹⁷ *Investment Registry v. Chicago & M. Elec. R. Co.*, 213 Fed. 492.

¹⁸ *Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co.*, 200 Fed. 600.

¹⁹ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423; *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813; *Drake v. New York Suburban Water Co.*, 36 N. Y. App. Div. 275, 55 N. Y. Supp. 225.

²⁰ *Central Trust Co. of New York v. Marietta & N. G. R. Co.*, 48 Fed. 14; *Phillips v. Southern Division C. & O. R. Co.*, 110 Ky. 33, 54, 22 Ky. L. Rep. 1530, 60 S. W. 941.

²¹ *Atlantic Trust Co. v. New York City Suburban Water Co.*, 75 N. Y. App. Div. 354, 78 N. Y. Supp. 120.

²² "Of the various ways by which the assets of corporations are appropriated and the stockholders are de-

frauded of their legal rights, one of the most frequent is the mortgage on the corporate property and its foreclosure. It is the oldest and most common device of unscrupulous corporate officers to defraud the corporation and its stockholders, and the mortgage is generally expected to appear and be followed by a foreclosure, as a prelude to reorganization. Upon a showing that a fraud is being practiced by that method, it is the duty of a court of equity to permit stockholders to intervene on behalf of themselves and the other stockholders, and set up the defense that the corporation and its officers were in duty bound to make." *Gunderson v. Illinois Trust & Savings Bank*, 199 Ill. 422, 429, 65 N. E. 326, aff'g 100 Ill. App. 461.

In such a case, if the intervening stockholders file an answer, it should be filed in their own names and not in the name of the company. *Bron-*

intervene where the directors, in order to sacrifice the interests of the stockholders, refuse to defend.²³ And they may intervene in a foreclosure suit, where the corporation has refused to defend or it is shown that the officers should not be intrusted with the defense, as where the officers have refused to urge the defense that the mortgage was fraudulent to the knowledge of the mortgagee.²⁴

But ordinarily a stockholder cannot intervene on the ground that the rights of the corporation are being sacrificed through unnecessary default, unless he shows his unavailing efforts to secure action on the part of the directors and trustee, either to prevent the default complained of or to relieve from the necessary consequences ensuing therefrom.²⁵

A stockholder is not entitled to intervene merely because the suit to foreclose was commenced by the trustee at the request of a reorganization committee representing a majority of the bondholders and stockholders.²⁶

Minority stockholders cannot intervene to object to ratification of the foreclosure sale where there are no facts to show any ultra vires, fraudulent or illegal act.²⁷ Likewise, stockholders cannot intervene to set up acts having nothing to do with the validity of the bonds or the trust deed, such as frauds of the officers in giving away capital stock as a bonus with the bonds, and by fraudulent schemes securing control of the corporation.²⁸

A stockholder should not be permitted to intervene, where the corporation is insolvent and in the hands of receivers, in order to require the trustee to enforce the liability of the stockholders for the amount unpaid on their stock instead of foreclosing the mortgage.²⁹

If stockholders intervene, they do so, not as individuals, but as stockholders, in the assertion of rights common to the stockholders which the corporation itself has declined to protect;³⁰ and if stockholders intervene to contest the validity of the mortgage, they can

son v. La Crosse & M. R. R. Co., 2 Wall. (U. S.) 283, 303, 17 L. Ed. 725.

²³ Guarantee Trust & Safe-Deposit Co. v. Duluth & W. R. Co., 70 Fed. 803.

²⁴ Investors' Syndicate v. North American Coal & Mining Co., 31 N. D. 259, 153 N. W. 472, holding also that the right to intervene was not barred by laches or limitations.

²⁵ Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co., 200 Fed. 600.

²⁶ Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1.

²⁷ Bond v. Gray Improvement Co., 102 Md. 426, 62 Atl. 827.

²⁸ Gunderson v. Illinois Trust & Savings Bank, 199 Ill. 422, 65 N. E. 326, aff'g 100 Ill. App. 461.

²⁹ Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1.

³⁰ Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co., 127 Fed. 625.

set up only the defenses which the corporation itself would be entitled to interpose.³¹

The right of a stockholder to intervene may be lost by laches, especially where the rights of innocent third persons have been affected by the delay.³²

§ 1376. — Creditors other than bondholders and other third persons. Simple contract creditors may be permitted to intervene in a proper case,³³ as may holders of alleged prior liens.³⁴ So where the right of an unsecured creditor is judicially determined in a court of law, and such determination carries with it a right superior to that of the mortgagor, the creditor is entitled to intervene in a foreclosure suit where the mortgagor and mortgagee have agreed, so that by equitable proceedings all the rights of the unsecured creditor can be wiped out and the interest of both mortgagor and mortgagee in the property preserved.³⁵ And a general creditor of the mortgagor, having no lien, but having an interest in any surplus that may remain after the mortgage is satisfied, should be granted leave to intervene, "to keep an eye on the proceedings," where the mortgaged property is in the hands of receivers, so as to prevent the creditor from obtaining a judgment.³⁶

Holders of receivers' certificates issued in connection with a receivership in the foreclosure suit may be permitted to intervene to have the validity of the certificates adjudicated.³⁷

³¹ Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co., 127 Fed. 625.

³² Atlantic Trust Co. v. New York City Suburban Water Co., 75 N. Y. App. Div. 354, 78 N. Y. Supp. 120.

The right of a stockholder to intervene may be lost by his laches, where not urged until several years after the foreclosure decree. Central Trust Co. of New York v. Peoria, D. & E. Ry. Co., 104 Fed. 418.

³³ Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. 957.

In New York, however, a mere general creditor cannot intervene. Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340, 12 N. E. 763; Farmers' Loan & Trust Co. v. New Rochelle & P. Ry. Co., 57 Hun (N. Y.) 376, 10 N.

Y. Supp. 810, aff'd without opinion in 126 N. Y. 624, 27 N. E. 410.

³⁴ Central Home Telephone & Telegraph Co. v. Fidelity & Columbia Trust Co., 168 Ky. 483, 182 S. W. 618, under Kentucky statute.

³⁵ Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 674, 684, 43 L. Ed. 1130, rev'g 84 Fed. 539.

³⁶ Savings & Trust Co. of Cleveland v. Bear Valley Irrigation Co., 93 Fed. 339.

³⁷ Central Trust Co. v. Sheffield & B. Coal, Iron & Railway Co., 44 Fed. 526.

Intervention is not premature in such case if the interest on the certificates is due, notwithstanding the principal is not due. Central Trust Co. v. Sheffield & B. Coal, Iron & Railway Co., 44 Fed. 526.

A lien creditor of the mortgagor may intervene in an ancillary suit for foreclosure in a state other than the one where the original foreclosure suit was brought, although he did not file his claim in the original suit, where the mortgagor—a railroad company—is a domestic corporation in both states.³⁸

On the other hand, third persons other than bondholders or stockholders are often refused permission to intervene, at least where they have no lien on the mortgaged property.³⁹ Thus it has been held that a person holding a claim for damages to property against the corporation, but without any lien, cannot intervene in the suit;⁴⁰ that persons holding unexpired contracts with the mortgagor, a public service corporation, cannot intervene;⁴¹ and that the holder of a statutory lien upon the property of the mortgagor cannot intervene for the purpose of having his claim decreed priority over the mortgage debt, where he has an adequate remedy at law.⁴²

Nor can one intervene in order to have the mortgage canceled on the ground that it was issued without authority, where he does not show that he has a lien or has made any attempt to collect his claim or that the corporation is unable to pay his claim.⁴³

Where bonds of another corporation are covered by the mortgage, the obligor is not entitled to intervene in the foreclosure suit to protect itself against liability on such bonds, where at the time the bonds are past due and hence the purchaser would obtain no better title than the mortgagee has.⁴⁴

³⁸ *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Valley R. Co.*, 32 W. Va. 244, 9 S. E. 180.

³⁹ *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569; *Bouden v. Long Acre Square Bldg. Co.*, 92 N. Y. App. Div. 325, 86 N. Y. Supp. 1080; *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 31 Pac. 25, 30 Pac. 741. See *Cutting v. Florida Ry. & Nav. Co.*, 45 Fed. 444.

A simple contract creditor who had joined in an action against the insolvent mortgagor will not be permitted to intervene in a pending foreclosure suit against the insolvent, where he does not allege any defense not set up by the mortgagor. *Grand Trunk Ry. Co. v. Central Vermont R. Co.*, 91 Fed. 569.

Equity has no power to order creditors of the plaintiff to be made parties to the suit. *Union Trust Co. v. Detroit & R. St. C. Ry.*, 127 Mich. 252, 269, 8 Det. L. N. 332, 86 N. W. 788.

⁴⁰ *Williams v. West Asheville & S. S. Ry. Co.*, 126 N. C. 918, 36 S. E. 189.

⁴¹ *Wightman v. Evanston Yaryan Co.*, 217 Ill. 371, 108 Am. St. Rep. 258, 3 Ann. Cas. 1089, 75 N. E. 502, aff'g 118 Ill. App. 379.

⁴² *Van Frank v. St. Louis, C. G. & Ft. S. Ry. Co.*, 93 Mo. App. 412, 67 S. W. 688.

⁴³ *Union Trust & Savings Bank v. Idaho Smelting & Refining Co.*, 24 Idaho 735, 135 Pac. 822.

⁴⁴ *Morton Trust Co. v. Metropolitan St. Ry. Co.*, 168 Fed. 941.

Where, pending a foreclosure suit in a federal court, the property is sold under a foreclosure decree in a state court to one who assented to the appointment of a receiver in the federal court, the persons for whom the property was bought in the state court may be allowed to intervene in the federal court to protect their rights.⁴⁵

The state has no right to intervene in a federal suit in order to have the mortgage declared invalid on the theory that the trustee failed to deposit with the state certain securities.⁴⁶

It has been pointed out that the proper practice, where a foreclosure sale is had before the rights of all intervening parties are determined and the decree reserves full power to hear such matters after the sale, with the right to subject the property and its proceeds to the payment of claims finally adjudged to be prior to the lien of the mortgage, is for the foreclosure purchaser, upon a confirmation of the sale, to make himself a party by filing a supplemental bill or petition of intervention, setting forth his purchase.⁴⁷

§ 1377. Defenses—In general. Leaving out of consideration what constitutes a defense to a foreclosure suit, where in no way peculiar to foreclosure suits but applicable to all kinds of actions against corporations,⁴⁸ and also whether certain acts set up as defenses are lawful acts, it is necessary in this connection to refer to some of the defenses more or less peculiar to foreclosure suits against a corporation. Generally, the defenses are the same that may be interposed in an action on the bonds or the original debt which the mortgage is given to secure. Of course, so far as the trustee represents bona fide holders, or where the suit is brought by bona fide holders of the bonds, the defenses are limited to those which could be set up against bona fide holders of negotiable paper as distinguished from persons who are not such bona fide holders, provided the bonds are negotiable.⁴⁹

As against bona fide purchasers for value, the defenses are limited to those that might be raised in an action at law upon the bonds.⁵⁰ Thus, equities which the mortgagor corporation has against the construction company for breach of the construction contract cannot be set up as a defense in a foreclosure suit, as against innocent

⁴⁵ *Farmers' Loan & Trust Co. v. Texas Western Ry. Co.*, 32 Fed. 359.

⁴⁶ *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 68 Fed. 412.

⁴⁷ *Fitzgerald v. Evans*, 49 Fed. 426.

⁴⁸ See chapter on Actions by and

Against Corporations, *infra*.

⁴⁹ See *Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 37 L. Ed. 755.

⁵⁰ *Atlantic Trust Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647.

holders of the bonds which have been parted with by the construction company.⁵¹

It is no defense that a third person has agreed to pay the debt,⁵² or that the mortgagor has leased the property to others, where it was done without the consent of the mortgagee,⁵³ and it is held that a corporation which has received the benefits of the mortgage cannot set up as a defense that the amount of bonds issued was in excess of the charter or statutory limit.⁵⁴

A statutory provision that a corporation which fails to file a certified copy of its articles of incorporation with the county clerk of every county in the state "in which it holds any property" shall not maintain any action in relation to such property, "its rents, issues or profits," does not apply to a foreclosure suit, where, under the law of the state, the mortgage passes no estate in the land but merely creates a lien.⁵⁵

The motives inducing the trustee or the bondholders to foreclose are immaterial and constitute no defense.⁵⁶ So where the suit is brought by a bondholder, the motive prompting his purchase is no defense.⁵⁷

It is a defense that the suit was instituted by the trustee on the application of a company which had purchased a majority of the stock and of the bonds of the mortgagor to obtain control and had diverted the income of its business and refused business which would have enabled the mortgagor to pay its interest, with the avowed intent of obtaining entire control of the property to the injury of the minority bondholders.⁵⁸

§ 1378. — Want or failure of consideration. Whether want of consideration is a defense depends, it seems, on whether the bonds are

⁵¹ *Wells v. Northern Trust Co.*, 195 Ill. 288, 63 N. E. 136, aff'g 90 Ill. App. 460; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187, overruling dicta in *Chicago, D. & V. R. Co. v. Loewenthal*, 93 Ill. 433.

⁵² *Foster v. Mansfield, C. & L. M. R. Co.*, 36 Fed. 627.

⁵³ *Hale v. Nashua & L. R. R.*, 60 N. H. 333, 340.

⁵⁴ *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054. See also § 979, *supra*.

⁵⁵ *Savings & Loan Society v. McKoon*, 120 Cal. 177, 52 Pac. 305.

⁵⁶ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423; *Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.*, 109 Fed. 523, where alleged motive was to freeze out minority stockholders; *Toler v. East Tennessee, V. & G. Ry. Co.*, 67 Fed. 168, 176.

⁵⁷ *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 183, 22 Atl. 932.

⁵⁸ *Farmers' Loan & Trust Co. v. New York & N. Ry. Co.*, 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep.

in the hands of the original holders or persons standing in their shoes, or whether they are in the hands of the bona fide holders for value. In the former case, want of consideration is a defense.⁵⁹

It is no defense in an action to foreclose a mortgage given to secure bonds issued to pay for constructing a railroad that the actual cost of construction was much less than the par value of the bonds issued in payment therefor, where there had been no objection to the contract for a long period of time,⁶⁰ at least when there is no charge of fraud in the inception or execution of the contract.⁶¹

§ 1379. — Irregularities connected with execution of mortgage. Mere irregularities in the manner of executing the mortgage are no defense.⁶² The rule is stated by Judge Sanborn as follows: "A corporation which induces lenders or purchasers to loan it money or to buy its bonds by delivering a mortgage, formally executed, which purports to secure them, is thereby estopped from denying its validity on the ground that, in giving its officers authority to make it, it failed to comply with some law or rule of action with which it might have complied, but which it wilfully or carelessly disregarded."⁶³ Accordingly, a corporation which has received the entire consideration thereof cannot dispute the execution of the mortgage because of absence of proof of a formal resolution of the directors,⁶⁴ or because no formal action was taken by the board of directors.⁶⁵ So it is

689, 44 N. E. 1043, rev'g 78 Hun (N. Y.) 213, 28 N. Y. Supp. 933.

⁵⁹ *Atlantic Trust Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647; *Shedden v. Sylvester*, 88 Wash. 348, 151 Pac. 1.

Want of consideration is a defense, at least where set up by the trustee in bankruptcy of the mortgagor, where the bonds are all in the hands of the original holders. *Guarantee Title & Trust Co. v. Dilworth Coal Co.*, 235 Pa. 594, 84 Atl. 516, where bonds were given as bonus to stock subscription.

⁶⁰ *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813.

⁶¹ *Farmers' Loan & Trust Co. v. Rockaway Valley R. Co.*, 69 Fed. 9.

⁶² *Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co.*, 127 Fed. 625.

⁶³ *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124.

⁶⁴ *Earle v. National Metallurgic Co.*, 77 N. J. Eq. 17, 76 Atl. 555; *Reed v. Helois Carbide Specialty Co.*, 64 N. J. Eq. 231, 53 Atl. 1057.

A corporation, after having accepted the benefits of a transaction in which it gave a mortgage for part of the purchase price, cannot rely on the failure of the directors to pass a resolution authorizing such transaction. *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 66 Pac. 317.

⁶⁵ *Auten v. City Elec. St. Ry. Co.*, 104 Fed. 395.

It is no defense that the mortgage was not formally authorized at a meeting of directors, where the corporation has retained the benefits of the mortgage and payments have been

no defense, in favor of the mortgagor, that the mortgage was not in fact authorized by the board of directors or that the person signing as secretary was not the secretary, where the mortgagee had no notice of such defects.⁶⁶

It is no defense that the meeting of the directors at which the mortgage was authorized was held under an irregular notice and at an unauthorized place, where the acts of the directors have never been repudiated,⁶⁷ nor that some of the directors did not reside in the state where the company was incorporated.⁶⁸

A corporation which has received the proceeds of corporate bonds cannot claim that its officers had no authority to make the mortgage a lien on after-acquired property.⁶⁹

It is no defense that some of the provisions of the mortgage are not identical with those contained in the resolution of the board of directors which authorized its execution,⁷⁰ nor that the mortgage as executed was materially different from the form approved by the board of directors, where the corporation negotiated the bonds secured by the mortgage and received and appropriated the funds derived from their sale.⁷¹

Generally, defects relating to calling the stockholders' meeting, where it is necessary that the stockholders authorize the mortgage, are no defense.⁷² Thus, the fact that notice of the stockholders' meeting at which the mortgage was authorized was not given every stockholder, as required by statute, is not a defense to the foreclosure suit where a majority of the stockholders participated in executing the mortgage, for which the company received a valuable consideration.⁷³ Notice of the stockholders' meeting may be waived by them by express agreement or by attendance of all without notice.⁷⁴ And the fact that notice of the stockholders' meeting was not published for the time required by the statute or that by mistake one or two

made thereon with full knowledge of the stockholders. *Fourth Nat. Bank of St. Louis, Missouri v. Camden Lumber Co.*, 142 Fed. 257.

⁶⁶ *Clearwater County State Bank v. Bagley-Ogema Tel. Co.*, 116 Minn. 4, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913 A 622, 133 N. W. 91.

⁶⁷ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

⁶⁸ *Wheelwright v. St. Louis, N. O. & Q. Canal Transp. Co.*, 56 Fed. 164.

⁶⁹ *Shafer v. Spruks*, 225 Fed. 480.

⁷⁰ *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124.

⁷¹ *Beach v. Wakefield*, 107 Iowa 567, 590, 78 N. W. 197, 76 N. W. 688.

⁷² *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

⁷³ *Drewry v. Columbia Amusement Co.*, 87 S. C. 445, 69 S. E. 879.

⁷⁴ *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238.

stockholders did not receive notice of the meeting is no defense where the bonds are in the hands of bona fide purchasers.⁷⁵

§ 1380. — **Matters relating to default in payment.** It is no defense that the default of the corporation in paying interest was due to the fact that its assets were taken away by a receivership.⁷⁶ Nor is it a defense that the unpaid subscriptions to stock, which the corporation has power to collect, would be sufficient to pay the interest and avoid a default.⁷⁷

The fact that the mortgagor corporation consented to a judgment against it on unpaid coupons for the purpose of allowing execution to be returned unsatisfied so as to authorize the trustees, as provided for by the mortgage, to declare the principal and interest due and to foreclose, is no defense, where there were no grounds for defending the action on the coupons.⁷⁸

But it is a defense in favor of the mortgagor or its stockholders that the earnings of the mortgagor have been misapplied by the company owning a majority of the bonds and of the stock of the mortgagor, in order to bring about a default and secure control of the property of the mortgagor.⁷⁹

§ 1381. — **Diversion of proceeds.** Misapplication of the proceeds is no defense,⁸⁰ nor is failure to apply the proceeds of the bonds as required by the mortgage.⁸¹ So it is no defense, as against innocent parties, that the proceeds of the bonds were used for a purpose not authorized by the charter, which limited the purpose for which mortgage bonds could be issued.⁸²

§ 1382. — **By persons other than the mortgagor.** Sometimes, certain defenses are personal to the mortgagor. Thus, usury cannot be set up as a defense by third persons.⁸³

⁷⁵ Georgia Granite R. Co. v. Miller, 144 Ga. 665, 87 S. E. 889.

⁷⁶ Penn Mut. Life Ins. Co. v. Walton & Wham Co., 2 Del. 179, 42 Atl. 424.

⁷⁷ Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1.

⁷⁸ Dickerman v. Northern Trust Co., 176 U. S. 181, 44 L. Ed. 423.

⁷⁹ Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689,

44 N. E. 1043, rev'g on this ground 78 Hun (N. Y.) 213, 28 N. Y. Supp. 933.

⁸⁰ See Central Trust Co. of New York v. Wheeling & L. E. R. Co., 211 Fed. 515.

⁸¹ Newport & C. Bridge Co. v. Douglass, 12 Bush (Ky.) 673.

⁸² Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co., 69 N. J. Eq. 718, 61 Atl. 529, aff'd 71 N. J. Eq. 221, 65 Atl. 980.

⁸³ Wright v. Bundy, 11 Ind. 398, 403.

A subsequent lien creditor can attack the mortgage only on the ground of fraud.⁸⁴ Judgment creditors made defendants may set up the defense of fraud in the mortgage.⁸⁵

A subsequent mortgagee cannot set up as a defense or as a set-off or counterclaim a diversion of part of the proceeds of the first mortgage and use of them for an ultra vires purpose, all of which occurred before the execution of such subsequent mortgage.⁸⁶

The receiver of the corporation may set up as a defense that the execution of the mortgage was invalid because given to the wife of the president for land bought at an exorbitant price, as against an assignee of the mortgage.⁸⁷

A purchaser of the mortgaged property at execution sale cannot, by a cross-bill, restrain the trustee from asserting rights to the property and obtain a decree affirming the execution title, but his remedy is to redeem from the foreclosure sale.⁸⁸

§ 1383. Set-off and counterclaim. The general rules as to what may be pleaded as a counterclaim, and the manner of pleading counterclaims, are applicable.⁸⁹

Set-offs or counterclaims available to the mortgagor cannot be urged as a defense by a subsequent mortgagee.⁹⁰

§ 1384. Pleading and evidence. In order to establish a prima facie case, complainant should introduce the mortgage in evidence, prove the default, and show the existence of other conditions precedent to the right to sue to foreclose. It is not necessary to produce the bonds before the court before the entry of a decree of sale.⁹¹ The rule is thus stated by the Supreme Court of the United States: "It

⁸⁴ *Marsters v. Umpqua Valley Oil Co.*, 49 Ore. 374, 12 L. R. A. (N. S.) 825, 90 Pac. 151.

⁸⁵ *North Side Bank of Brooklyn v. John Good Cordage & Machine Co.*, 97 N. Y. App. Div. 79, 89 N. Y. Supp. 656.

⁸⁶ *Crawford v. Washington Northern R. Co.*, 233 Fed. 961, holding that such defenses can be urged only by the immediate parties. *Mississippi Valley Trust Co. v. Washington Northern R. Co.*, 212 Fed. 776.

⁸⁷ *Voorhees v. Nixon*, 77 N. J. Eq. 791, 66 Atl. 192.

⁸⁸ *Morse v. Holland Trust Co.*, 184 Ill. 255, 56 N. E. 369, aff'g 84 Ill. App. 84.

⁸⁹ *Le Clare v. Thibault*, 41 Ore. 601, 69 Atl. 552.

⁹⁰ *Crawford v. Washington Northern R. Co.*, 233 Fed. 961, holding that the corporation has the option whether to assert set-off or counterclaim.

⁹¹ *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423, aff'g 80 Fed. 450; *Toler v. East Tennessee, V. & G. Ry. Co.*, 67 Fed. 168.

The bonds need not all be proved before the decree of foreclosure, but the decree may provide for proof thereof before the master. *Weed v. Gainesville, J. & S. R. Co.*, 119 Ga. 576, 46 S. E. 885.

was sufficient to prove that the bonds were valid and were outstanding obligations of the company, and it was not necessary to show in whose hands they were or to require their production. Indeed, an order to that effect could only result in delaying a decree indefinitely, since in cases of corporate mortgages the bonds are often widely scattered, owned in foreign countries, or by persons totally ignorant that a suit for foreclosure is in progress. Months and even years might be required to produce them all. The practice has been to order a decree for foreclosure and sale without their production."⁹² And where the mortgagor company has defaulted, it is not necessary before a decree for sale that the validity or ownership of every bond secured by it shall be first determined.⁹³

A verified denial of execution and delivery of the bonds does not require complainant to prove such facts otherwise than by the production of the bonds themselves.⁹⁴

Evidence of a demand for payment is ordinarily not necessary,⁹⁵ at least where the insolvency of the corporation and its want of funds at the place designated for payment appears,⁹⁶ unless a demand is provided for in the mortgage, as where it provides that it shall not be enforceable until six months after demand made on default of payment.⁹⁷

The burden is upon the trustee, where he sues to foreclose, if he wishes to avail himself of the rights of a bona fide holder for value, to show that the bondholders he represents were not the original payees;⁹⁸ but where the trustee proves the issue of the bonds and shows that it is the holder thereof, the presumption that it is a bona fide holder for value arises the same as if the action had been brought by the bondholders themselves.⁹⁹

⁹² *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423.

⁹³ "A court has the power to order a sale before the final determination of the validity and amount of bonds held by each holder, and the practice in railroad mortgage bond cases is to postpone the final determination of all such questions." *Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

See also § 1390, *infra*.

⁹⁴ *McCormick v. Unity Co.*, 239 Ill. 306, 87 N. E. 924, *aff'g* 142 Ill. App. 159.

⁹⁵ See *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555.

Demand as condition precedent to action on bonds, see § 1045, *supra*.

⁹⁶ *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

⁹⁷ *Potomac Mfg. Co. v. Evans*, 84 Va. 717, 6 S. E. 2, holding also that bringing suit was not a demand.

⁹⁸ *Atlantic Trust Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647.

⁹⁹ *Atlantic Trust Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647.

§ 1385. Decree—General rules. There is but little law relating to the foreclosure decree which is peculiar to corporate mortgages. Hence, it is necessary to consult general works on the subjects of mortgages and foreclosures for the rules applicable to all mortgage foreclosures.¹ Of course the decree must conform to the pleadings and proof,² and cannot fix and determine the rights of persons not made parties.³ Like other foreclosure decrees, it must state the amount due.⁴

A deficiency decree is not authorized unless provided for by statute or rule of court;⁵ and the equity rule in force in the federal courts permitting a deficiency judgment is not invalid as purporting to give courts of equity jurisdiction over common-law actions and thereby depriving a party of his right to a jury trial.⁶

The court has no power to determine what creditors the mortgagor shall pay with such moneys or property as do not fall within the terms of the mortgage.⁷

A decree is bad where the ownership of the bonds for which the foreclosure is allowed is rendered so indefinite by the terms thereof that those whose duty it will be to distribute the proceeds of sale will be utterly unable to determine who are entitled to it.⁸

¹ A form of decree foreclosing a railroad mortgage is set forth in full in *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. 232.

For a form of parts of a decree of sale of a street railway, see *Guaranty Trust Co. of New York v. Metropolitan St. Ry. Co.*, 177 Fed. 925.

² *Bound v. South Carolina Ry. Co.*, 58 Fed. 473; *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94; *Western Supply & Manufacturing Co. v. United States & M. Trust Co.*, 41 Tex. Civ. App. 478, 92 S. W. 986.

A decree for a sale of the property is proper under a prayer for general relief, where the specific relief sought is a strict foreclosure. *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

³ *Central Trust Co. v. Florida Ry. & Nav. Co.*, 43 Fed. 751; *Union Trust Co. v. St. Louis, I. M. & S. Ry. Co.*, 5 Dill. (U. S.) 1, Fed. Cas. No. 14,403; *Stevens v. Union Trust Co.*, 57 Hun

(N. Y.) 498, 11 N. Y. Supp. 268.

The decree cannot determine the rights of other mortgagees not made parties. *Bronson v. La Crosse & M. R. R. Co.*, 2 Black (U. S.) 283, 17 L. Ed. 725.

⁴ *Rumsey v. People's Ry. Co.*, 144 Mo. 175, 189, 46 S. W. 144.

A decree for the amount represented by all the bonds is proper although not all of the bonds were formally proved, where their existence is not disputed. *Cutter v. Iowa Water Co.*, 128 Fed. 505, rev'd on other grounds in 140 Fed. 986.

⁵ *Welsh v. First Division St. Paul & P. R. Co.*, 25 Minn. 314, 323.

⁶ *Grant v. Winona & S. W. R. Co.*, 85 Minn. 422, 426, 89 N. W. 60.

⁷ *Dow v. Memphis & L. R. R. Co.*, 20 Fed. 768, applying rule to unexpended earnings.

⁸ *Rumsey v. People's R. Co.*, 144 Mo. 175, 46 S. W. 144.

Equity will not order an accounting, or a discovery incidental to the accounting, as original relief, where there is an adequate remedy at law.⁹

Adverse titles to the mortgaged property cannot ordinarily be litigated;¹⁰ but adverse claims may be determined where the only adverse party is in fact an agent of the plaintiff, or where it is charged that the alleged adverse claim was acquired fraudulently for the purpose of defeating the rights of the mortgagee.¹¹

Where claimants of a superior lien intervene, it is proper not to give the claimants a personal judgment against the mortgagor.¹²

A stockholder cannot sue to enjoin the execution of the decree and to reopen a stated account which was the basis of the mortgage debt, because of supposed false charges or overcharges.¹³

The decree is valid although the trustee who joined with the bondholders as plaintiffs was incapable of acting because a foreign corporation, where it had in fact never exercised any powers.¹⁴

It has been said that "a court of equity will never make an interlocutory order for an immediate sale upon terms discharging the lien of a mortgage not yet due, unless it clearly appears not only that in the end there must be a sale of the property, but a sale upon those terms; for otherwise irremediable injury might be done to the parties whose security was thus stricken down *pendente lite*." ¹⁵

The construction of such decrees is governed by the same rules applicable to other decrees.¹⁶

§ 1386. — Where principal not due. Equity has the power so to mold its decree as to order a sale of the mortgaged premises to satisfy that part of the mortgage debt which is due and preserve the

⁹ *New York Trust Co. v. Langeliffe Coal Co.*, 227 Pa. 611, 76 Atl. 729.

¹⁰ *Farmers' Loan & Trust Co. v. Green Bay & M. R. Co.*, 10 Biss. (U. S.) 293, 6 Fed. 100.

¹¹ *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542.

¹² *Tod v. Kentucky Union Ry. Co.*, 52 Fed. 241, 18 L. R. A. 305.

¹³ *Van Kirk v. Adler*, 111 Ala. 104, 20 So. 336.

¹⁴ *Morse v. Holland Trust Co.*, 184 Ill. 255, 56 N. E. 369, *aff'g* 84 Ill. App. 84.

¹⁵ *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 42 Fed. 82, where the court refused, on the request of income bondholders secured by a junior mortgage, to discharge, by an immediate sale, the lien of prior mortgages having twenty years yet to run, while the question of the validity of the lien of such mortgages was still undetermined.

¹⁶ See *Simmons v. Burlington, C. R. & N. R. Co.*, 159 U. S. 278, 40 L. Ed. 150; *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. (U. S.) 510, 17 L. Ed. 900.

lien upon the mortgaged premises in the hands of the purchaser as to the unmatured part of the debt, although it would seem that such a decree ought not to be made except for special reasons and where the equities upon which it is based are clear and prevailing.¹⁷ So it has been held that if the property can be sold in parcels without injury, the decree may order a sale of a parcel.¹⁸ Ordinarily, however, the property cannot be sold in parcels without injury to the parties, or one of them, and in such case the court "may order the whole of it sold, free from the lien of the mortgage, and apply the proceeds on the whole debt, according to its then value."¹⁹

If the principal is not due, the decree can order a sale only in respect to interest due and unpaid.²⁰ In fact, by the general practice, at least in the federal courts, in case the foreclosure is for unpaid interest, and the principal is not due and does not mature because of the failure to pay interest, the decree should require the mortgagor to pay into court the amount of the defaulted interest, with interest from the maturity of each instalment, the payment to be made within a time fixed, and in default of such payment should require a sale of all the property for both the interest and the principal of the debt, the purchase money taking the place of the mortgaged property, and the distribution should be in satisfaction of both principal and interest.²¹

The rule governing in such cases has been laid down by the Supreme Court of the United States as follows: "There can, in fact, be but

¹⁷ *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 48 Fed. 139.

¹⁸ *Farmers' Loan & Trust Co. v. Oregon & C. Ry. Co.*, 24 Fed. 407.

Where the sale is merely to satisfy unpaid interest, a sale of only a part should be ordered in case the property is susceptible of division, but otherwise a sale as an entirety is proper. *Wilmer v. Atlanta & R. Air-Line R. Co.*, 2 Woods (U. S.) 447, Fed. Cas. No. 17,776; *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 81 Am. Dec. 541.

¹⁹ *Farmers' Loan & Trust Co. v. Oregon & C. Ry. Co.*, 24 Fed. 407.

Rule applied to sale of railroad. *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 22 Atl. 932.

²⁰ *Union Trust Co. v. St. Louis, I. M. & S. Ry. Co.*, 5 Dill. (U. S.) 1, Fed. Cas. No. 14,403.

²¹ *Toler v. East Tennessee, V. & G. Ry. Co.*, 67 Fed. 168.

"In respect to the principal of the debt, whether due or not, it was not only proper, but necessary, that the court should have found the amount unpaid, and decreed its payment out of the proceeds of the sale." *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 63 Fed. 891.

The decree, where the principal is not due, must provide for a discontinuance of the proceedings upon payment of interest in arrears, costs, etc. *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 63 Fed. 891.

one decree of foreclosure of the same mortgage on the same property, and it is a necessity of that foreclosure, under the principles of the court of chancery, that all the sums secured by that mortgage must be protected according to their priority lien. * * * For this sum (overdue and unpaid coupons), whatever it may be, he has a right to a decree nisi, according to the chancery practice, a decree which will ascertain the sum so due, and give the company a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but for his principal debt, and it must be provided for in the order distributing the proceeds of the sale. If, however, the company shall pay the sum found due in the decree nisi, no further proceeding can be had until another default of interest or of the principal.”²²

§ 1387. — Provisions as to sale. The decree ordinarily orders a sale of the mortgaged premises²³ and fixes the terms and mode of sale.²⁴

It is sufficient for the decree to direct that all the property described in the mortgage be sold, without describing the property at length,

²² *Howell v. Western R. R. Co.*, 94 U. S. 463, 24 L. Ed. 254, followed in *Chicago & V. R. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47. To the same effect, see *Olcott v. Bynum*, 17 Wall. (U. S.) 44, 21 L. Ed. 570.

“While, therefore, the intention is clear that the bonds were not to become due before the specified date of maturity, the proceeds of sale, after the satisfaction of the accrued amount, were properly applied upon the outstanding liability.” *Ohio Cent. R. Co. v. Central Trust Co.*, 133 U. S. 83, 33 L. Ed. 561.

²³ See *Deck v. Whitman*, 96 Fed. 893, where the history of practice is gone into at length.

As to strict foreclosure, see § 1358, *supra*.

A sale should be ordered although one class of bondholders objects thereto, where the receivership has merely paid expenses for some three years. *Bound v. South Carolina Ry. Co.*, 50 Fed. 853.

²⁴ *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 407, 75 Am. Dec. 518.

The decree, where the foreclosure suit is brought by part but not all of the bondholders, is fatally defective where it orders all the mortgaged property to be sold free from all liens and incumbrances, without making provision for other bondholders, subsequent mortgagees or other creditors. *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 36 L. Ed. 66, *aff'g* 33 Fed. 693.

as it is susceptible of definite ascertainment, except where the fact that some portions of the mortgaged property have been released from the lien of the mortgage or other like circumstances are made to appear.²⁵

The general practice is for the decree, in so far as the mode of sale is concerned, to follow the mode of procedure desired by the parties and as set forth in the mortgage, but the court may in its discretion depart therefrom.²⁶

The decree may order the sale to be made by a special commissioner, where this is not an unusual way to conduct such sales when made under decrees of courts of chancery;²⁷ but the general practice in the federal courts is to direct a sale to be made by a master named in the decree.²⁸

A minute inventory of the personal property of an extensive street railway will not be ordered, since unnecessary to aid prospective bidders.²⁹

The decree need not fix a time within which the mortgagor may redeem, at least in the federal courts.³⁰

A supplemental decree finding that the railroad cannot be sold as an entirety, because it cannot be operated so as even to pay expenses, may order the road torn up and sold as junk.³¹

The decree need not fix a minimum bid to be received, usually called an upset price,³² but it may do so and it is often done, especially in case of railroad mortgages.³³ The upset price is sometimes fixed by

²⁵ Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co., 177 Fed. 854.

²⁶ The court "must, in its discretion, determine from the facts of each case the manner of sale that will subserve all interests, produce the best results for all concerned, and not enhance the value of one class of securities involved at the cost of another which is equally entitled to its care and protection." *Low v. Blackford*, 87 Fed. 392, aff'g 82 Fed. 344.

²⁷ *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 252, 55 S. W. 615.

²⁸ *Deck v. Whitman*, 96 Fed. 873.

²⁹ *Guaranty Trust Co. v. Metropolitan St. Ry. Co.*, 168 Fed. 937.

³⁰ *Provident Life & Trust Co. of*

Philadelphia v. Camden & Trust Ry. Co., 177 Fed. 854.

³¹ *Royal Trust Co. v. Washburn, B. & I. R. Ry. Co.*, 113 Fed. 531.

³² *Provident Life & Trust Co. of Philadelphia v. Camden & Trust Ry. Co.*, 177 Fed. 854; *Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co. (Del.)*, 77 Atl. 828. *Contra*, see *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. 232.

³³ *Equitable Trust Co. of New York v. Western Pac. Ry. Co.*, 233 Fed. 335, where upset price of a railroad was based on the only concrete facts as to value which the court had before it, which were the earning capacity of the road at that time, the value of the unproductive properties, and the bond-

taking the present net earning capacity of the property as indicating its value.³⁴

The court may order a sale of a railroad in the alternative, where it is hopelessly insolvent and there is no chance to operate the road at a profit and where it is necessary in order to realize anything from the property, by fixing an upset price for sale as a going concern at a sum considerably less than an upset price based upon its value as junk.³⁵

It is proper to require bidders to make a deposit, but it has been held that instead of requiring the deposit to be made twenty-four hours before the sale they should be allowed to make it at any time before the sale.³⁶ The decree may require purchasers other than the mortgage trustee to pay at once in cash a part of their bid, as earnest money.³⁷

It is proper, in requiring a deposit on acceptance of a bid, to permit it to be made in the mortgage bonds to which the proceeds of the sale would have to be applied.³⁸

Instead of requiring a deposit of earnest money, it has been held in some states to be the better practice to require the purchaser to execute a bond to comply with the terms of the sale or indemnify the parties for any default on his part.³⁹

The decree may provide that the price may be paid by the bonds secured, to such an amount as they may be proportionately entitled to;⁴⁰ and provisions in the decree authorizing purchasing bondholders to pay in bonds, need not conform to the provisions of the mortgage in regard thereto.⁴¹

ing power of the properties after the proposed sale.

³⁴ *Central Trust Co. of New York v. Washington County R. Co.*, 124 Fed. 813, where railroad valuation was fixed by figuring net earning capacity as four per cent. on two and a half million.

³⁵ *New York Trust Co. v. Portsmouth & E. St. Ry. Co.*, 192 Fed. 728.

³⁶ *Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co. (Del.)*, 77 Atl. 828.

Requiring a deposit by prospective bidders at the sale of a street railway, of fifty thousand dollars, to be made at least twenty-four hours before the sale, is discretionary with the court.

Provident Life & Trust Co. of Philadelphia v. Camden & Trenton Ry. Co., 177 Fed. 854.

³⁷ *Sage v. Central Co.*, 99 U. S. 334, 25 L. Ed. 394.

³⁸ *Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co. (Del.)*, 77 Atl. 828.

³⁹ *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673; *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199, 212, 81 Am. Dec. 541.

⁴⁰ *Farmers' Loan & Trust Co. v. Green Bay & M. R. Co.*, 10 Biss. (U. S.) 203, 6 Fed. 100; *Rumsey v. People's Ry. Co.*, 154 Mo. 215, 251, 55 S. W. 615.

⁴¹ *Farmers' Loan & Trust Co. v.*

The right to pay a bid in bonds should not be limited to a particular bondholder, but should be extended to all bondholders on the same terms.⁴²

The decree sometimes permits the purchaser to pay claims against the receivers as a part of the purchase price.⁴³

Where the property is in the hands of a receiver, it is proper to direct that the sale shall be subject to outstanding obligations of the receiver, where the latter is required to file a detailed statement thereof.⁴⁴

The decree may require the purchaser to pay so much of the purchase price as is necessary to discharge prior claims such as court and receivership expenses when and as they shall be determined and adjusted, and such reservation is equivalent to the reservation of a lien which will bind all subsequent purchasers.⁴⁵

The mode of advertising a sale, as fixed by the mortgage, where applicable only to a sale by the trustee, does not govern a judicial sale nor require the court in its foreclosure decree to conform thereto.⁴⁶

§ 1388. — Ordering sale as entirety and without right of redemption. In many cases it is not only proper but necessary that the decree require a sale of all the mortgaged property as an entirety.⁴⁷

Ordinarily, at least in case of mortgages by public service corporations, the court will order a sale of the whole property as an entirety, and even though the foreclosure is merely to collect unpaid interest, unless the property is susceptible of sale in parcels without injury to it as an entirety.⁴⁸

Where there is a mortgage covering both real and personal property, comprising parts of a single working plant or utility, in which each part is necessary to give value to the others, and where a dismember-

Green Bay & M. R. Co., 10 Biss. (U. S.) 203, 6 Fed. 100, 105.

⁴² American Waterworks Co. of Illinois v. Farmers' Loan & Trust Co., 73 Fed. 956.

⁴³ St. Louis S. W. Ry. Co. v. Jackson, 95 Fed. 560, holding that the loss of funds by the failure of a bank, after payment into court, did not affect the purchaser.

⁴⁴ Bound v. South Carolina Ry. Co., 58 Fed. 473.

⁴⁵ Continental Trust Co. of New York v. American Surety Co., 80 Fed. 180.

⁴⁶ Provident Life & Trust Co. of Philadelphia v. Camden & Trenton Ry. Co., 177 Fed. 854.

⁴⁷ Continental & Commercial Trust & Savings Bank v. North Platte Valley Irrigation Co., 219 Fed. 438. See also § 1386, supra.

Where the line of an extensive street railway is to be sold, the court should direct its sale as a unit and not authorize a sale in parcels. Guaranty Trust Co. v. Metropolitan St. Ry. Co., 168 Fed. 937.

⁴⁸ Branner v. Hardy, 18 La. Ann. 537. See § 1386, supra.

ment of the system would destroy or greatly impair the usefulness or value of its component parts, it is proper to decree a sale as an entirety and without right of redemption.⁴⁹ Thus, ordinarily, part of a railroad cannot be ordered sold,⁵⁰ even where the foreclosure is merely to collect unpaid interest and not the principal.⁵¹ So a sale of a railroad will be ordered as an entirety, if at all practicable, even though it may be subject to partial mortgages.⁵²

In any event, the decree cannot order a portion of the roadbed of a railroad to be sold separate and apart from the franchises of the company.⁵³

It has been said that the decisions are uniform "that where a mortgage covering the franchises and other property, real and personal, of a quasi public corporation, * * * is foreclosed, the sale should be of the property as an entirety, and without right of redemption, notwithstanding statutes giving a right of redemption from foreclosure sales of mortgaged real estate."⁵⁴ This rule is not confined to sales of railroads nor even to the property of public service corporations.⁵⁵ Such a sale has been ordered in the case of the

⁴⁹ Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542.

⁵⁰ Chicago, D. & V. R. Co. v. Loewenthal, 93 Ill. 433; Branner v. Hardy, 18 La. Ann. 537. But see Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, holding that railroad real and personal property should be sold separately.

Railroad property may be sold as an entirety, where it will not be prejudicial to any one, notwithstanding the Constitution provides that rolling stock shall be personal property. Southwestern Arkansas & I. T. R. Co. v. Hays, 63 Ark. 355, 38 S. W. 665.

⁵¹ Section 1386, *supra*.

⁵² Low v. Blackford, 87 Fed. 392, *aff'd* 82 Fed. 344.

A railroad company gave a single mortgage to secure three series of bonds, each series being a first lien on different divisions of the road and a second lien on the other divisions. It was held that the property should be sold as an entirety, and the pro-

ceeds apportioned according to the relative value of the three divisions. Farmers' Loan & Trust Co. v. Cape Fear & Y. V. Ry. Co., 82 Fed. 344, *aff'd* Low v. Blackford, 87 Fed. 392.

⁵³ Connor v. Tennessee Cent. Ry. Co., 109 Fed. 931, 54 L. R. A. 687.

⁵⁴ Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913 A 622, 133 N. W. 91.

The right of redemption and right to a sale in separate parcels, as conferred by a state statute, does not extend, at least in the federal courts, to the real estate of a public service corporation which is mortgaged with its franchise, and the chief value of which depends upon its unity and its use for and appropriation to public purposes. Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America, 82 Fed. 124; American Loan & Trust Co. v. Union Depot Co., 80 Fed. 36.

⁵⁵ Title Insurance & Trust Co. v.

property of a water company,⁵⁶ of a telegraph company,⁵⁷ of an irrigation system,⁵⁸ and the property of a fishing and canning plant.⁵⁹

But where the corporate property ordered to be sold is subject to divisional mortgages, each of which is a first lien on part and a subordinate lien on other parts, the parts should be ordered sold separately, and then as an entirety, and the best bid accepted; and, in either case, the separate bids fix the relative value of the parcels for the purpose of distributing the proceeds.⁶⁰

In Arkansas, it has been held that the selling officer may offer the property of a railroad as an entirety and then, if there are no bidders, offer the real and personal estate separately, where the decree merely directs him to sell "all of said property."⁶¹

§ 1389. — Giving time to pay. The decree, ordinarily, should not order an immediate sale, but should fix a time within which the corporate mortgagor may prevent a foreclosure by paying the amount due;⁶² and especially is this so where there is no right to redeem after the confirmation of the foreclosure sale.

The time to be allowed to pay the mortgage after the entry of the foreclosure decree is within the discretion of the court, but the time given to redeem should be a reasonable time.⁶³

Two months are usually allowed, in ordinary cases, it has been said, in railroad foreclosures;⁶⁴ and the allowance of four months has been upheld.⁶⁵

California Development Co., 171 Cal. 173, 152 Pac. 542.

⁵⁶ Farmers' Loan & Trust Co. v. Iowa Water Co., 78 Fed. 881.

⁵⁷ Clearwater County State Bank v. Bagley-Ogema Tel. Co., 116 Minn. 4, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913 A 622, 133 N. W. 91.

⁵⁸ Continental & Commercial Trust & Savings Bank v. Covey Bros. Const. Co., 208 Fed. 976.

⁵⁹ Pacific Northwest Packing Co. v. Allen, 116 Fed. 312.

⁶⁰ Harris v. Youngstown Bridge Co., 90 Fed. 322.

⁶¹ Southwestern Arkansas & I. T. R. Co. v. Hays, 63 Ark. 355, 38 S. W. 665.

⁶² Statutes forbidding a sale of railroad property until six months after the foreclosure decree are binding on

a federal court. *Benedict v. St. Joseph & W. R. Co.*, 19 Fed. 173, Kansas statute.

In the state courts, the decree is not erroneous because it does not fix a short day for redemption before sale, upon the payment of the amount found to be due with costs. *Rumsey v. People's R. Co.*, 144 Mo. 175, 190, 46 S. W. 144.

⁶³ Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co. (Del.), 77 Atl. 828, where time for redeeming from railroad foreclosure was extended from five days to a month.

⁶⁴ Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co. (Del.), 77 Atl. 828.

⁶⁵ Columbia Finance & Trust Co. v. Kentucky Union Ry. Co., 60 Fed. 794.

Error, if any, in giving only ten days to redeem from a sale of a street railway, is harmless where the sale was not made for nearly three months after the decree, and was not confirmed until three months later, inasmuch as the equity of the mortgagor remains until the confirmation of the sale.⁶⁶

If all arrears on the mortgage can properly be paid from the profits of the company in the hands of a receiver, in the course of a short time, such as a year or so, the court may delay a sale for eighteen months even.⁶⁷

§ 1390. — Reservation of questions as to priorities and rights of parties. The decree ordering a sale need not include, nor be preceded by, an adjustment of priorities and rights of the parties in the proceeds,⁶⁸ but the court, in its discretion, may decree a sale in advance of settling the rights and priorities of the parties, where by proper reservation it preserves and protects the rights of the parties for future consideration.⁶⁹ However, a sale of part of the mortgaged property, consisting of land not necessary for any of the corporate purposes of the company, will not be permitted, pending a receivership, unless all the lienholders consent thereto, where the equities of the various lienholders have not yet been determined.⁷⁰

The court may subject property mortgaged to foreclosure and retain the bill for the enforcement of further liens which may thereafter be proved and established.⁷¹ Thus, the decree may reserve

⁶⁶ Wells v. Northern Trust Co., 195 Ill. 288, 63 N. E. 136, aff'g 90 Ill. App. 460.

⁶⁷ American Loan & Trust Co. v. Union Depot Co., 80 Fed. 36.

⁶⁸ Turner v. Indianapolis, B. & W. Ry. Co., 8 Biss. (U. S.) 380, Fed. Cas. No. 14,259.

A sale may be ordered before the interests of individual creditors have been adjusted. Hand v. Savannah & C. R. Co., 13 S. C. 467, 474.

A sale may be ordered, where the property is in the hands of a receiver under other proceedings, where it is for the interest of all concerned that a speedy sale be made, although a suit to foreclose a first mortgage is pending. Middleton v. New Jersey W. L.

R. Co., 26 N. J. Eq. 269, rev'd 27 N. J. Eq. 557.

⁶⁹ Bowling Green Trust Co. v. Virginia Passenger & Power Co., 164 Fed. 753.

Saving clause not necessary. Compton v. Jesup, 68 Fed. 263.

Where the holder of equipment bonds was held to have a prior lien on that part of a railroad located in Ohio and the road was sold subject to his rights, he is entitled to a resale of the property situated in Ohio, if his claim is not paid by the purchaser. Compton v. Jesup, 167 U. S. 1, 42 L. Ed. 55.

⁷⁰ Bound v. South Carolina Ry. Co., 46 Fed. 315.

⁷¹ Langdon v. Vermont & C. R. Co., 54 Vt. 593.

the right to impose liens on the property, after its sale, to pay obligations and claims against the receiver.⁷²

A sale may be ordered before the conflicting rights of bondholders under different mortgages are determined, where the property is depreciating while in the hands of a receiver and where the adjustment of claims can be made as well after as before the sale.⁷³

Where receivers under two mortgages, one covering only a part of the property, have made expenditures on various portions of the street railway, the decree in each case properly reserves the question of a lien for such expenditures.⁷⁴ And the decree of sale need not be stayed to determine the question as to whether some of the bonds were legally issued, but this may be determined on a reference to the master after the making of the decree of sale.⁷⁵

The decree need not await the determination of all the claims in a creditor's suit, although the federal court acquired jurisdiction of the foreclosure suit as ancillary to the pending creditor's suit.⁷⁶

Where a railway mortgage is a first lien, with the exception of some unpaid taxes, and the property is clearly defined and belongs to a single company and not to several companies, there is no justification for a reference to a master to ascertain the extent of any prior liens.⁷⁷

Where part or all of the bonds are pledged by the corporation, the question as to whether the capacity in which the bonds are held may be made an issue, prior to decree and sale, as affecting the amount for which foreclosure may be had, is not settled, although it would seem that it should be answered in the affirmative.⁷⁸

§ 1391. — Including attorney's fees. Statutes as to attorney's fees in foreclosure proceedings are in no wise peculiar to corporate mortgages. But statutes fixing the attorney's fees in suits to foreclose real estate mortgages are sometimes held not applicable to the foreclosure of a railroad mortgage.⁷⁹

⁷² Guaranty Trust Co. of New York v. Metropolitan St. Ry. Co., 166 Fed. 569.

⁷³ First Nat. Bank of Cleveland v. Shedd, 121 U. S. 74, 30 L. Ed. 877.

⁷⁴ Morton Trust Co. v. Metropolitan St. Ry. Co., 170 Fed. 336.

⁷⁵ Guaranty Trust Co. of New York v. Atlantic Coast Elec. R. Co., 132 Fed. 68.

⁷⁶ Toledo, St. L. & K. C. R. Co. v.

Continental Trust Co., 95 Fed. 497, modifying 86 Fed. 929.

⁷⁷ Real Estate Trust Co. of Philadelphia v. Wilmington & N. C. Elec. Ry. Co. (Del.), 77 Atl. 828.

⁷⁸ Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co., 228 Fed. 516.

⁷⁹ Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 65, 59 N. W. 826

The amount of the attorney's fees as stipulated in the mortgage may be included in the decree,⁸⁰ providing such a provision is authorized by the governing law.⁸¹

The decree properly fixes the compensation of the trustee and his attorney's fees and also the priority of the lien therefor on the proceeds of sale, where the mortgage expressly provides that on foreclosure the mortgagor will pay reasonable attorney's fees and personal compensation to the trustee.⁸²

Provisions in a mortgage for the payment of attorney's fees "in the event of the nonpayment of said bonds or any one of them at their maturity," means merely that the mortgagor shall pay such fees in case the employment of an attorney is made necessary by default in any of the payments; and hence where the mortgagor has not defaulted, there is no liability for such fees.⁸³

The amount to be allowed attorneys for the trustees is largely discretionary with the court.⁸⁴

§ 1392. — Effect as res judicata or bar. The effect of the decree as a bar or res judicata is governed by the same general rules applicable to all decrees.⁸⁵ It ends the rights of both stockholders and bondholders in the property just as effectually as if they had been made formal parties to the suit.⁸⁶ It is res judicata as to the parties as to the amount due on the mortgage debt,⁸⁷ and is binding on purchasers or incumbrancers pendente lite.⁸⁸

⁸⁰ *Firestone Coal Co. v. McKissick*, 24 Colo. App. 294, 134 Pac. 147.

⁸¹ Counsel fees of complainant cannot be allowed where the provision therefor in the mortgage was not authorized by a resolution of the directors. *Schallard v. Eel River Steam Nav. Co.*, 70 Cal. 144, 11 Pac. 590.

⁸² *Orient Trust Co. v. St. Louis Union Trust Co.*, 59 Tex. Civ. App. 193, 126 S. W. 310.

⁸³ *H. Abraham & Son v. New Orleans Brewing Ass'n*, 110 La. 1012, 35 So. 268.

⁸⁴ *Phinizy v. Augusta & K. R. Co.*, 98 Fed. 776; *Easton v. Houston & T. C. Ry. Co.*, 40 Fed. 189.

⁸⁵ *Brown v. Pennsylvania Canal Co.*, 229 Fed. 444; *Morgan's Louisiana & T. R. & S. S. Co. v. Moran*, 91 Fed. 22; *Compton v. Jesup*, 68 Fed. 263;

Wilmer v. Atlanta & R. Air-Line R. Co., 2 Woods (U. S.) 447, Fed. Cas. No. 17,776.

"And nothing is determined which is not expressly determined, or which is not impliedly settled by the terms of the decree in fact entered." *Simmons v. Taylor*, 23 Fed. 849.

A right presented by bill or cross-bill and unnoticed in the decree and not absolutely necessary for determination is not res judicata merely because the party presenting it is in court. *Simmons v. Taylor*, 23 Fed. 849.

⁸⁶ *Sullivan v. Applebaum*, 164 Mich. 432, 460, 129 N. W. 866.

⁸⁷ *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 94 Fed. 454.

⁸⁸ *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

In so far as it adjudges the mortgage lien superior to the adverse claim of one joined as a defendant, it is conclusive as to the latter, where he failed to object to his joinder at the trial;⁸⁹ and in so far as it awards a priority to the claims of certain general creditors of the corporation, the decree is binding on all the bondholders, at least where the suit was brought at the request of the majority of the bondholders, although the bondholders were not parties to the suit.⁹⁰ So a decree canceling a trust deed, in a suit to which the trustee is made a party, is binding on the bondholders although they were not parties to the suit.⁹¹ But one holding a claim against the mortgagor corporation for property taken by the corporation for its railroad, and whose claim is entitled to priority over the mortgage, is not bound by the foreclosure decree, rendered in a suit to which he was not a party, reserving jurisdiction to adjudicate all pending and undetermined claims presented.⁹² Moreover, a foreclosure decree in a federal court does not bar a subsequent suit by stockholders to have the purchaser under the decree declared a trustee of the property for their benefit.⁹³

Where the trustee consents to a decree giving junior bondholders priority over senior bondholders, the decree is not binding on the latter, but they are entitled to be heard on the question of priority after the decree is rendered.⁹⁴ And a decree directing a sale of property and giving priority to a certain lien "to the extent that it shall be established" does not determine the validity of such lien which was an issue under the pleadings.⁹⁵

§ 1393. — Amendment or modification. The decree may be amended or modified, subject to the same rules governing other decrees. Thus, the decree may be amended, even at a subsequent term, as to the mode of sale.⁹⁶ And it may be modified after the term by inserting a requirement that the sale shall be made for gold coin only, in place of a provision that the sale shall be for cash.⁹⁷

⁸⁹ Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co. (Iowa), 144 N. W. 54.

⁹⁰ Manhattan Trust Co. of New York v. Seattle Coal & Iron Co., 19 Wash. 493, 53 Pac. 951.

⁹¹ Beals v. Illinois, M. & T. R. Co., 133 U. S. 290, 33 L. Ed. 608; Woods v. Woodson, 100 Fed. 515.

⁹² Zimmerman v. Kansas City N. W. R. Co., 144 Fed. 622.

⁹³ MacArdell v. Oleott, 104 N. Y. App. Div. 263, 93 N. Y. Supp. 799.

⁹⁴ Howard v. Shinn, 190 Fed. 940.

⁹⁵ Ferguson Contracting Co. v. Manhattan Trust Co., 118 Fed. 791.

⁹⁶ Turner v. Indianapolis, B. & W. Ry. Co., 8 Biss. (U. S.) 380, Fed. Cas. No. 14,259.

⁹⁷ Farmers' Loan Co. v. Oregon Pac. R. Co., 28 Ore. 44, 61-69, 40 Pac. 1089.

A foreclosure decree requiring the purchaser to pay all claims incurred by the receiver if presented within six months after confirmation of the sale may be, and is, modified as to the six months provision by a decree confirming the sale and providing that the deed shall recite that the purchaser takes subject to all claims incurred by the receiver.⁹⁸

But a decree will not ordinarily be amended nearly a year and a half after its entry.⁹⁹

§ 1394. — Vacating or setting aside. The foreclosure decree may be opened or vacated for good cause,¹ such as fraud.²

However, the decree, in so far as it gives a priority to an intervening creditor, is final and cannot be vacated by the court of its own motion after the expiration of the term at which it was granted.³

Laches may bar a suit or motion to set aside the decree.⁴

Subsequent creditors cannot have the decree set aside unless it is shown that the foreclosure proceedings were fraudulent and collusive.⁵

If the directors or managing officers of the corporation refuse to sue to set the decree aside, stockholders may sue;⁶ and it cannot be claimed that the remedy is by motion in the court in which the foreclosure decree was rendered, where it is alleged that the decree was obtained by collusion, and that complainants were defeated in their

⁹⁸ "It was within the discretion of the court to abrogate the six months' limitation, the fund being substantially a fund in court." *Olcott v. Headrick*, 141 U. S. 543, 35 L. Ed. 851.

⁹⁹ *Duncan v. Atlantic, M. & O. R. Co.*, 88 Fed. 840.

¹ A consent decree, where without fraud, will not be set aside, at the instance of some of the stockholders, merely because the principal of one of the mortgages is not due, where foreclosure barring the stockholders of all their equity is inevitable. *Carey v. Houston & T. C. Ry. Co.*, 52 Fed. 671, aff'g 45 Fed. 438.

In a proper case, the mortgagor corporation may obtain a vacation of the foreclosure decree, the grounds being the same as in the case of other

decrees in equity in general. *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

² *Leavenworth County v. Chicago, R. I. & P. R. Co.*, 25 Fed. 219.

The mortgagor corporation may sue to set aside the decree for fraud. *Ex-Mission Land & Water Co. v. Flash Co.*, 97 Cal. 610, 32 Pac. 600.

³ *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 34 L. Ed. 97.

⁴ *Carey v. Houston & T. C. Ry. Co.*, 52 Fed. 671; *Foster v. Mansfield, C. & L. M. R. Co.*, 36 Fed. 627.

⁵ *Anderson v. Bullock County Bank*, 122 Ala. 275, 25 So. 523.

⁶ *Foster v. Mansfield, C. & L. M. R. Co.*, 36 Fed. 627; *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346.

motion to vacate the decree by the false statements of a defendant which have since been conclusively ascertained to be false.⁷

The corporation is the only necessary or proper plaintiff in a suit to vacate the foreclosure decree, although it is practically a one-man corporation.⁸

A corporation dissolved at the time the decree was rendered against it cannot sue to set aside the decree on that ground where its existence has not been revived.⁹

§ 1395. Sale—In general. Ordinarily, the sale must be a public one.¹⁰

Statutes relating to judicial or foreclosure sales in general are often held not applicable to sales of corporate property, especially where the corporation is a quasi public one. For instance, statutes providing that mortgage sales of real property shall be on notice published in the county or counties where the property is located, and that no sale shall be made except in such county or counties, do not apply to a sale of a railroad, including its equipment and franchises.¹¹ Nor is a statute requiring an appraisalment as a prerequisite to a judicial sale of "real estate" applicable to a foreclosure sale of railroad franchises and property as an entirety.¹²

The fact that a statute requires the sale to be made by a certain officer does not invalidate a sale made by another appointed by order of the court.¹³

A sale of all the property of a railroad company includes rolling stock placed on the railroad by the receiver,¹⁴ but a sale does not pass the surplus earnings in the hands of a receiver, unless the decree expressly so provides.¹⁵

A decree ordering a sale of a railroad includes the entire property of the company connected with the use and purpose of the road.¹⁶

⁷ *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346, holding also that failure to appeal from the denial of the motion was not a bar where the proof of the falsity of the statements was not discovered until after the time to appeal had expired.

⁸ *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815.

⁹ *Muscatine Turn Verein v. Funck*, 18 Iowa 469, 473.

¹⁰ *Bound v. South Carolina Ry. Co.*, 46 Fed. 315; *In re Philip*, 95 N. Y. Misc. 709, 160 N. Y. Supp. 49.

¹¹ *Craft v. Indiana, D. & W. R. Co.*, 166 Ill. 580, 46 N. E. 1132.

¹² *Columbia Finance & Trust Co. v. Kentucky Union Ry. Co.*, 60 Fed. 794.

¹³ *Rome & D. R. Co. v. Sibert*, 97 Ala. 393, 397, 12 So. 69.

¹⁴ *Strang v. Montgomery & E. R. Co.*, 3 Woods (U. S.) 613, Fed. Cas. No. 13,523.

¹⁵ *Strang v. Montgomery & E. R. Co.*, 3 Woods (U. S.) 613, Fed. Cas. No. 13,523.

¹⁶ *Knevals v. Florida Cent. & P. R. Co.*, 66 Fed. 224.

In a proper case, a sale may be enjoined.¹⁷

The notice of sale must clearly describe the property to be sold.¹⁸ If the notice is directed to be published in a specified paper, it is sufficient to publish it in a paper in which the specified paper is merged, where its identity remains.¹⁹

The sale of all the property of a railroad corporation forfeits its right thereafter to build and operate the road.²⁰

§ 1396. — Who may purchase. Generally any one may purchase unless his interests as a purchaser are inconsistent with his duties in connection with the mortgage.²¹

Either party to the mortgage may bid,²² and a sale to the mortgagee is valid.²³

A majority stockholder of the mortgagor, who is not in control of the property, may purchase the property at foreclosure sale, where there is no fraud, and he is not accountable to any other stockholder for the property so purchased.²⁴

In a subsequent chapter, the power of a director or other officer to purchase the property of the corporation for his individual benefit at a forced sale is considered at length.²⁵

Suffice it to state in this place that the general tendency of the later decisions is to uphold purchases by directors or other officers at a foreclosure sale, where there has been no unfair conduct and the officer has not been instrumental in bringing about the sale.²⁶ So a

¹⁷ See *Floore v. Morgan*, — Tex. Civ. App. —, 175 S. W. 737.

¹⁸ *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.*, 20 Wis. 174, 88 Am. Dec. 740.

¹⁹ *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

²⁰ *Sodus Bay & C. R. Co. v. Lapham*, 43 Hun (N. Y.) 314, 6 N. Y. St. Rep. 159.

²¹ A foreign railroad corporation may purchase where the statute expressly authorizes a purchase by "any railroad company." *Boston, C. & M. R. R. v. Boston & L. R. R.*, 65 N. H. 393, 23 Atl. 529.

²² *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. Ed. 732.

²³ *Pewabic Min. Co. v. Mason*, 145 U. S. 349, 36 L. Ed. 732.

This rule applies to a sale by a trustee under a power. *Easton v. German-American Bank*, 127 U. S. 532, 32 L. Ed. 210.

²⁴ *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476.

²⁵ Chap. 42.

²⁶ If the purchase is by the president of the mortgagor, bondholders cannot treat him as a trustee of the property purchased. *Credit Co. v. Arkansas Cent. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. 46.

A sale will not ordinarily be set aside because the purchaser was an officer of the corporation. *In re New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

A director who owns or holds se-

stockholder and director who is also the mortgagee may purchase at the sale.²⁷

As far as the right of the trustee to purchase is concerned, it is well established that he has implied power to bid for the protection of the bondholders to an amount equal to the principal and interest due on the mortgage,²⁸ where the property is worth that much or more,²⁹ and that he may be authorized by the foreclosure decree to purchase. Thus, the decree may order the property sold to the highest and best bidder, and that the trustee be directed to bid as trustee at least the amount of principal and interest of the bonds secured, where the mortgage itself expressly authorizes a purchase by the trustee on the request of majority bondholders.³⁰ Furthermore statutes sometimes expressly authorize purchases by trustees,³¹ and corporation mortgages often provide specifically for the purchase by the trustee at foreclosure sale, in the interest of the bondholders, and such a provision is valid.³²

On the other hand, trustees are under no duty to bid where not requested so to do by bondholders nor so directed by the decree or

cured bonds may purchase at the foreclosure sale, where the sale has become necessary through no fault or design of such director. In re New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

One who is trustee and general manager of the corporation may purchase where, at the time of the sale, he exercised no control over the property of the corporation, inasmuch as it was in the hands of a receiver, and when he had done all that he could to prevent or delay foreclosure. *Buchler v. Black*, 226 Fed. 703.

In Kentucky, however, where the purchase was in behalf of a director of the mortgagor, it was held that the corporation, where not consenting thereto, was entitled to a surrender of the property on placing the purchaser in statu quo. *Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush (Ky.) 468.

²⁷ *Lucas v. Friant*, 111 Mich. 426, 436, 69 N. W. 735.

²⁸ *James v. Cowing*, 82 N. Y. 449.

²⁹ *Nay Aug Lumber Co. v. Scranton Trust Co.*, 240 Pa. 500, Ann. Cas. 1915 A 235, 87 Atl. 843.

³⁰ *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

³¹ If by statute the purchase by the trustee is voidable but not void, the sale cannot be set aside by junior incumbrancers without tendering the amount of the prior mortgage which was foreclosed. *Cunningham v. Maccon & D. R. Co.*, 156 U. S. 400, 39 L. Ed. 471.

Where the consent of all the bondholders was, by statute, made necessary to authorize a foreclosure and purchase by the trustee for the bondholders, consent of minority bondholders may be inferred from their silence during the time when a company was acting in their behalf. *Barnes v. Chicago, M. & St. P. R. Co.*, 122 U. S. 1, 30 L. Ed. 1128.

³² *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32.

mortgage.³⁵ Furthermore, as against the parties to the mortgage, the trustee cannot purchase, except as their representative, unless authorized by the terms of the mortgage.³⁴

If the trustee attempts to purchase for himself at the foreclosure sale, he cannot hold title to the disadvantage in any way of the bondholders.³⁵ So the attorneys for the trustee and for the receiver cannot purchase for their own benefit,³⁶ although it is held that the purchase of railroad property by the attorney for the mortgagor is not necessarily invalid but that it will be closely scrutinized.³⁷

If the purchaser is a corporation, it is immaterial that the trustees under the mortgage were stockholders and directors of such corporation.³⁸ A sale by a trustee to an association of which the trustee is a shareholder is voidable but not void.³⁹

If the trustee buys in the property at foreclosure sale, he undoubtedly has the right to sell it to the best advantage.⁴⁰

Where the trustee has purchased the property at foreclosure sale on the request of a majority of the bondholders, pursuant to a provision in the mortgage authorizing such a purchase and the organization of a new company for the benefit of the bondholders, the trustee cannot sell the property for a small sum at auction on the request of a majority of the bondholders.⁴¹

Trustees who purchase at the foreclosure sale of a railroad, as directed by the foreclosure decree, and who operate the road, are not receivers, but are themselves liable as common carriers.⁴²

³³ Frishmuth v. Farmers' Loan & Trust Co., 95 Fed. 5.

³⁴ Racine & M. R. Co. v. Farmers' Loan & Trust Co., 49 Ill. 331, 95 Am. Dec. 595. To the same effect, see Washington, A. & G. R. Co. v. Alexandria & W. R. Co., 19 Gratt. (Va.) 592, 619, 100 Am. Dec. 710.

In such a case, however, it seems that the sale is not void but only voidable, and that while the mortgagor may redeem, the sale is otherwise good. Copsey v. Sacramento Bank, 133 Cal. 659, 661, 85 Am. St. Rep. 238, 66 Pac. 7, 204; Allen v. Ranson, 44 Mo. 263, 267, 100 Am. Dec. 282.

³⁵ Nay Aug Lumber Co. v. Scranton Trust Co., 240 Pa. 500, Ann. Cas. 1915 A 235, 87 Atl. 843.

³⁶ Kreitzer v. Crovatt, 94 Ga. 694, 21 S. E. 585.

³⁷ Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. Ed. 932.

³⁸ Herbert Kraft Co. v. Bryan, 140 Cal. 73, 79, 73 Pac. 745; Copsey v. Sacramento Bank, 133 Cal. 659, 661, 85 Am. St. Rep. 238, 66 Pac. 7, 204.

³⁹ Kitchen v. St. Louis, K. C. & N. Ry. Co., 69 Mo. 224.

⁴⁰ Nay Aug Lumber Co. v. Scranton Trust Co., 240 Pa. 500, Ann. Cas. 1915 A 235, 87 Atl. 843.

⁴¹ James v. Cowing, 82 N. Y. 449, 454.

⁴² Rogers v. Wheeler, 43 N. Y. 598, 2 Lans. (N. Y.) 486.

Of course, a bondholder, or two or more in combination, may purchase, provided nothing is done to mislead or injure other bondholders. Ordinarily a purchase by bondholders is for reorganization purposes; and it is well settled that bondholders, all or a part, may purchase, either personally or by a committee, for the purpose of reorganizing the corporation.⁴³

§ 1397. — Bids. The holders of preferred stock which is a second lien cannot use it to make up their bid, since this would be in effect a distribution of the assets among the stockholders and prejudicial to those creditors whose claims are not to be paid under the decree of sale.⁴⁴

Bonds should not be received from any purchaser in payment of his bid at their par value, but only "for such proportion of the sum bid as the purchaser, on a distribution of the purchase money, shall be entitled to receive, out of the purchase price, on account of the bonds by him held and tendered in payment of his bid."⁴⁵

An extension of the time to complete the purchase will not be granted in order to afford time to search the title and ascertain liens, to catalogue the property, or to form a corporation to take over the railroad.⁴⁶

A bidder whose bid is accepted assumes the same liabilities as in case of other judicial sales.

§ 1398. — Agreements to prevent competition in bidding. The general rule is that the public shall be free to bid for property offered at a judicial sale, and the law prohibits the making of any bargain or the doing of anything which takes from any part of the public this liberty of action;⁴⁷ but the term "general public," as here used, does not include persons who, by virtue of lien or ownership or otherwise, have an existing interest in the property to be sold, and such persons may combine together for the protection of their interests, and even agree not to bid against each other.⁴⁸ Thus, bond-

⁴³ Chapter on Reorganization, *infra*.

⁴⁴ *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 86 Fed. 929, 950, *aff'd* 95 Fed. 497.

⁴⁵ *American Waterworks Co. v. Farmers' Loan & Trust Co.*, 73 Fed. 956.

⁴⁶ *In re Philip*, 95 N. Y. Misc. 709, 160 N. Y. Supp. 49, where statute

gave individual purchaser six months in which to operate before forming a corporation.

⁴⁷ *Investment Registry v. Chicago & M. Elec. R. Co.*, 206 Fed. 488.

⁴⁸ *Investment Registry v. Chicago & M. Elec. R. Co.*, 212 Fed. 594, *aff'g* 206 Fed. 488.

holders may combine together for the protection of their interests, as such, unless the agreement keeps away from the sale persons who, while having an actual interest in the property as holder of bonds, are in reality so circumstanced as to be classed with the general public.⁴⁹

§ 1399. — Postponement of sale. The sale may be postponed in a proper case. Thus, the court may postpone the sale until certain litigation is settled, where no bids were made because thereof; and this may be done even after the end of the term of court at which the order of sale was made, where the receivership in the case has not been wound up.⁵⁰

If no bids are made under a foreclosure sale of part of a street railway, the sale is properly postponed to the date of the sale of the balance of the property under a second mortgage.⁵¹

But the death of a small bondholder who was unnecessarily joined as a defendant in the foreclosure suit, especially where he was represented by a bondholders' committee which was given full powers, is not ground for either postponing the sale or for vacating it.⁵²

The sale of a railroad should not be postponed because of its increased prosperity, where the accrued interest could not be paid in less than ten years of such prosperity.⁵³

An application for a postponement not made until two days before the time fixed for the sale has been denied, as too late, in the absence of a tender of the debt.⁵⁴

§ 1400. — Confirmation of sale. Under the general practice, the sale must be confirmed by the court.

A definite offer of a higher bid at a resale, obtained subsequent to the sale, or mere inadequacy of price, is no ground for refusing to confirm the sale; and especially is this so where the purchase was made by a bondholders' committee representing ninety-five per cent.

⁴⁹ *Investment Registry v. Chicago & M. Elec. R. Co.*, 212 Fed. 594, aff'g 206 Fed. 488, holding, in the particular case, where several groups of bondholders were involved, that there was an invalid combination in restraint of bidding.

⁵⁰ *United States & M. Trust Co. v. Young*, 46 Tex. Civ. App. 117, 101 S. W. 1045.

⁵¹ *Morton Trust Co. v. Metropolitan St. Ry. Co.*, 179 Fed. 1010.

⁵² *Middendorf v. Baltimore Refrigerating & Heating Co. of Baltimore City*, 117 Md. 443, 84 Atl. 150.

⁵³ *Duncan v. Atlantic, M. & O. R. Co.*, 88 Fed. 840.

⁵⁴ *Duncan v. Atlantic, M. & O. R. Co.*, 88 Fed. 840.

of the bonds, and the bondholder objecting to confirmation owns only five per cent.⁵⁵

Objections to the confirmation of the sale cannot raise questions relating to the validity of the foreclosure decree,⁵⁶ and cannot be urged by a stockholder of the mortgagor where no injury or wrong is shown.⁵⁷

The court may take into consideration, where it has actual notice thereof, the fact that the reorganization purchasers have adopted a plan to use the property in a way in violation of statutes or constitutional provisions or the public policy of the state.⁵⁸

If more property is sold than is ordered, a confirmation of the sale does not validate it as to property improperly included.⁵⁹

If the decree confirming the sale provides for the filing of claims before the master, a claimant who files his claim but fails to bring it to the notice of the court is without remedy, after distribution, unless the claim is one which by the decree was imposed upon, and subject to which the purchasers acquired title to, the property.⁶⁰

An order of a state court confirming the foreclosure sale is res judicata in the federal courts where the same questions are involved.⁶¹

Where the decree confirming the sale reserved the right to make further orders respecting claims, rights or interests in or liens upon the property, the proper remedy, on afterwards awarding a priority to an intervener, has been held to be an order directing the whole property to be sold without annulling the former sale or the confirmation thereof, in case of nonpayment of the claim, instead of an order setting aside the confirmation of the sale.⁶²

§ 1401. — Reopening sale. If the purchaser fails to comply with the conditions of the sale, the officer should resell,⁶³ but in some states a resale cannot be had without reposting and readvertising.⁶⁴

If a director bids in the property but is unable to pay the bid, he may be held liable for the difference on a resale, although on the

⁵⁵ Central Trust & Savings Co. v. Chester County Elec. Co. (Del.), 77 Atl. 771.

⁵⁶ Central Trust Co. of New York v. Peoria, D. & E. Ry. Co., 118 Fed. 30.

⁵⁷ Central Trust Co. of New York v. Peoria, D. & E. Ry. Co., 118 Fed. 30.

⁵⁸ Investment Registry v. Chicago & M. Elec. R. Co., 212 Fed. 594, aff'g 206 Fed. 488.

⁵⁹ Milwaukee & M. R. Co. v. Soutter, 2 Wall. (U. S.) 609, 17 L. Ed. 886.

⁶⁰ Anderson v. Condict, 93 Fed. 349.

⁶¹ Buchler v. Black, 213 Fed. 880.

⁶² Farmers' Loan & Trust Co. v. Newman, 127 U. S. 649, 32 L. Ed. 303.

⁶³ Branner v. Hardy, 18 La. Ann. 537, 543.

⁶⁴ In re Philip, 95 N. Y. Misc. 709, 160 N. Y. Supp. 49.

resale the referee refused to accept his bid, where the resale took place at once and nothing had occurred to change the financial ability of the director.⁶⁵

On ordering a resale, after the purchaser has failed to comply with his bid, the court may provide that the resale shall be subject to any contracts made by the receivers of the mortgagor.⁶⁶

§ 1402. — Setting sale aside. The foreclosure sale may be set aside where good cause therefor is shown⁶⁷ but not otherwise.⁶⁸

The grounds for vacating the sale, such as failure to sell at the time advertised;⁶⁹ fraud,⁷⁰ including a deceptive notice of sale setting forth the mortgage debt at about ten times the real debt, and calculated to destroy all competition among bidders;⁷¹ collusion between bidders to prevent bids or procure a sale for less than the property would otherwise have brought;⁷² etc., are governed by the same rules applicable to all judicial sales.⁷³

The sale will be set aside for errors committed in executing the decree and not for errors in the decree or prior to the decree.⁷⁴

⁶⁵ *Leslie v. Saratoga Brewing Co.*, 31 N. Y. Misc. 129, 64 N. Y. Supp. 1069.

⁶⁶ *Middendorf v. Baltimore Refrigerating & Heating Co. of Baltimore City*, 117 Md. 17, 82 Atl. 1047.

⁶⁷ Form of complaint held sufficient to charge fraud, in action to set aside a foreclosure sale, see *Price v. Utah & P. V. Ry. Co.*, 4 Utah 72, 94, 6 Pac. 528.

If no fraud is alleged, the proper remedy of second mortgage bondholders if any legal injury is sustained by them from a decree foreclosing the first mortgage, is to move to set aside the decree or the sale in the court in which the foreclosure took place. *Robinson v. Iron R. Co.*, 135 U. S. 522, 34 L. Ed. 276.

⁶⁸ *Robinson v. Iron R. Co.*, 135 U. S. 522, 34 L. Ed. 276.

⁶⁹ *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32.

⁷⁰ *James v. Milwaukee & M. R. Co.*, 6 Wall. (U. S.) 752, 18 L. Ed. 885.

⁷¹ *James v. Milwaukee & M. R. Co.*,

6 Wall. (U. S.) 752, 18 L. Ed. 885.

⁷² *Investment Registry v. Chicago & M. E. R. Co.*, 212 Fed. 594, aff'g 206 Fed. 488; *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32.

The sale should be vacated where there was an agreement between the trustee, temporary receivers, and certain third persons, to prevent bidding at the sale by others than one who was to, and did, purchase for such third persons. *Atkins v. Judson*, 33 N. Y. App. Div. 42, 53 N. Y. Supp. 504.

The fact that bondholders were known to have authorized a committee to bid up to a certain sum and that this deterred others from bidding is not ground where the property sold for only a little over half such sum. *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 54 Fed. 26.

⁷³ *Etna Coal & Iron Co. v. Marting Iron & Steel Co.*, 127 Fed. 32.

⁷⁴ *Meyer v. Utah & P. V. Ry. Co.*, 3 Utah 280, 291, 3 Pac. 393.

Bondholders who attacked the sale for inadequacy of price, whereupon the court permitted further bidding conditioned on the offer of a better bid by them, cannot, where the final bid is made by the original purchasers, after their participation in the bidding, raise the objection that the sale should have been readvertised.⁷⁵

The well-settled rule that a judicial sale will not be set aside for inadequacy of price unless it be so gross as to shock the conscience, or unless there are additional circumstances which would make it inequitable to allow the sale to stand, applies to foreclosure sales of corporate property.⁷⁶

Where the purchase, especially in railroad foreclosures, is by or in behalf of a reorganization committee representing bondholders, and nonassenting bondholders seek to have the sale set aside because of inadequacy of price, the court must, as has been well stated, be "vigilant to see, on the one hand, that a dissenter be not permitted to create a maneuvering value in his bonds by opposing confirmation, and, on the other that the majority does not use its power, unique in sales of this class, to oppress a helpless minority."⁷⁷

Laches in suing or moving to set aside a sale may be fatal,⁷⁸ especially where the complaining party bought defaulted junior mortgage securities for a nominal sum, without inquiry, for purposes of litigation.⁷⁹

If the application is made by a person not a party to the record, such as a bondholder not joined as a party, it must be by action rather than a motion.⁸⁰

The foreclosure purchaser is a necessary defendant in a suit to set aside the sale.⁸¹

Junior bondholders cannot set aside a foreclosure sale under a prior

⁷⁵ *Blanks v. Farmers' Loan & Trust Co.*, 122 Fed. 849.

⁷⁶ *Blanks v. Farmers' Loan & Trust Co.*, 122 Fed. 849; *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 54 Fed. 26; *Turner v. Indianapolis, B. & W. Ry. Co.*, 8 Biss. (U. S.) 380, Fed. Cas. No. 14,259; *Las Vegas Railway & Power Co. v. Trust Co. of St. Louis County*, 15 N. M. 634, 110 Pac. 856; *Wesson v. Chapman*, 76 Hun (N. Y.) 592, 28 N. Y. Supp. 192; *Farmers' Loan Co. v. Oregon Pac. R. Co.*, 28 Ore. 44, 69, 40 Pac. 1089.

⁷⁷ *Investment Registry v. Chicago &*

M. E. R. Co., 212 Fed. 594, aff'g 206 Fed. 488. See also chapter on Reorganization, *infra*.

⁷⁸ *Buchler v. Black*, 226 Fed. 703; *Raphael v. Rio Grande Western Ry. Co.*, 132 Fed. 12, where nearly twenty years elapsed; *Credit Co. v. Arkansas Cent. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. 46.

⁷⁹ *Raphael v. Rio Grande Western Ry. Co.*, 132 Fed. 12.

⁸⁰ *Meyer v. Utah & P. V. Ry. Co.*, 3 Utah 280, 292, 3 Pac. 393.

⁸¹ *Wenger v. Chicago & E. R. Co.*, 114 Fed. 34.

mortgage, on the ground of disqualification of the purchaser, without reimbursement of the amount of the first mortgage.⁸²

In the federal courts, if the sale is set aside and increased bids offered by others, it is within the discretion of the court to receive competitive bids in open court or to order a resale.⁸³

Where minority bondholders obtained a vacation of the sale because of inadequacy of the bid, and on a second sale a much larger bid was obtained, they were nevertheless not entitled to counsel fees out of the fund, where the property was bought by the majority bondholders who paid their bid by surrendering an equal amount of the bonds.⁸⁴

§ 1403. Title, rights and liabilities of purchaser—In general. The purchaser's title is complete when the sale is confirmed and a deed executed to him. His rights and liabilities are governed by the same rules applicable to purchasers at any judicial sale, unless there is a statute to the contrary.⁸⁵

Generally, the decree, to some extent at least, fixes his liabilities and rights. In such a case, so far as it goes, it is the measure of the purchaser's rights,⁸⁶ and is conclusive against him as far as it relates to his rights and liabilities.⁸⁷

Whether the purchaser at the foreclosure sale had the power, as a corporation, to make the purchase, cannot be questioned by the mortgagor or subsequent judgment creditors, but only by the state.⁸⁸

The rights and liabilities of purchasing bondholders, who purchase for the purpose of reorganization and of the reorganized corporation are considered in a subsequent chapter.⁸⁹

⁸² *Cunningham v. Macon & D. R. Co.*, 156 U. S. 400, 39 L. Ed. 471.

⁸³ *Investment Registry v. Chicago & M. E. R. Co.*, 212 Fed. 594, aff'g 206 Fed. 488.

⁸⁴ *Las Vegas Railway & Power Co. v. Trust Co. of St. Louis County*, 17 N. M. 286, 126 Pac. 1009.

⁸⁵ The possession of the receiver after the sale may be as agent for the purchaser. *Houston & T. C. R. Co. v. Bath*, 17 Tex. Civ. App. 697, 44 S. W. 595.

A purchaser for the benefit of bondholders cannot be charged as trustee for the benefit of stockholders. *Mac-*

Ardell v. Olcott, 104 N. Y. App. Div. 263, 93 N. Y. Supp. 799.

⁸⁶ *Central Trust Co. v. Wabash St. L. & P. Ry. Co.*, 30 Fed. 332.

⁸⁷ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 772.

⁸⁸ *Julian v. Central Trust Co. of New York*, 115 Fed. 956, aff'd 193 U. S. 93, 48 L. Ed. 629.

The power of a railroad company to purchase at foreclosure sale can be questioned only by the state. *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476.

⁸⁹ Chapter on Reorganization, *infra*.

§ 1404. — Liability for debts and claims. The purchaser is not liable for the general debts of the mortgagor⁹⁰ nor for judgments against the mortgagor,⁹¹ at least where it is not merely a reorganization of the mortgagor company,⁹² unless the decree so provides⁹³ or liability is imposed by statute. So, generally, the purchaser takes the property free from claims against the receiver arising out of the operation of the property, where the decree ordering the sale does not impose such liability as a part of the consideration for the purchase.⁹⁴

Ordinarily, the purchaser takes the property and its secondary franchises free from any liability which the mortgagor may create after the sale.⁹⁵

The purchaser does not take subject to junior judgment liens, the mortgagee not having been made a party to the action resulting in such judgment, merely because he purchases with knowledge of the adjudged lien on the property.⁹⁶

After all the property of a railroad company has been sold, a judgment thereafter recovered against it is not a lien on the property in the hands of the purchaser.⁹⁷

A statute providing that no railroad company shall have power to give a mortgage valid against judgments for materials, labor or damages from the operation of the road, creates no lien in favor of such claims, and hence the foreclosure purchaser takes free therefrom,

90 United States. Hoard v. Chesapeake & O. Ry. Co., 123 U. S. 222, 31 L. Ed. 130.

Michigan. Cook v. Detroit, G. H. & M. R. Co., 43 Mich. 349, 5 N. W. 390.

Nebraska. Lincoln Tp. v. Kansas City & O. R. Co., 77 Neb. 79, 108 N. W. 140.

New York. Ferguson v. Toledo, A. A. & N. M. R. Co., 85 App. Div. 352, 83 N. Y. Supp. 283; Holmes v. Northern Pac. Ry. Co., 36 Misc. 266, 73 N. Y. Supp. 332.

Texas. Bigham Bros. v. Port Arthur Canal & Dock Co., 59 Tex. Civ. App. 367, 126 S. W. 324.

Wisconsin. Smith v. Chicago & N. W. Ry. Co., 18 Wis. 17.

Statute so provides. Cook v. Detroit, G. H. & M. R. Co., 43 Mich. 349, 5 N. W. 390.

91 Houston, E. & W. T. Ry. Co. v.

Keller, 8 Tex. Civ. App. 537, 28 S. W. 724; Gilman v. Sheboygan & F. R. Co., 37 Wis. 317.

92 New Orleans, M. & C. R. Co. v. Carter, 107 Miss. 1, 64 So. 842.

93 See § 1405, *infra*.

94 Atchison, T. & S. F. Ry. Co. v. Young, 3 Indian T. 60, 53 S. W. 481; Houston & T. C. R. Co. v. Crawford, 88 Tex. 277, 279, 28 L. R. A. 761, 53 Am. St. Rep. 752, 31 S. W. 176; Houston Elec. St. Ry. Co. v. Bell (Tex. Civ. App.), 42 S. W. 772.

95 Central Trust Co. of New York v. Western North Carolina R. Co., 112 Fed. 471.

96 National Foundry & Pipe Works v. Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125, *aff'd* 183 U. S. 216, 46 L. Ed. 157.

97 Baltimore Trust & Guarantee Co. v. Höfsetetter, 85 Fed. 75.

where no judgment is obtained until after the purchaser has gone into possession.⁹⁸

On the other hand, the purchaser takes subject to prior liens and incumbrances.⁹⁹ The rule of caveat emptor applies, as far as existing incumbrances or tax liens are concerned.¹ So purchasers take subject to a debt created by order of the court for purchasing rolling stock, even where the order was made after the foreclosure sale, where the property remained in the hands of receivers for many years.²

The purchaser takes subject to claims of persons whose lands were taken by the mortgagor by condemnation but not paid for.³ However, if land which the mortgagor railroad company had appropriated without paying therefor is largely lost by caving into the river before the foreclosure sale, the foreclosure purchaser is not subject to a judgment for the full value of the land taken, but such a judgment is properly made a lien only to the amount of the value of the land actually received.⁴

§ 1405. — Claims imposed by decree. The duties of the purchaser to pay claims inferior to the mortgage, or any other claims, as imposed by the foreclosure decree depend, of course, upon the terms of the particular decree.⁵

Oftentimes the decree ordering the foreclosure sale, especially in case of railroads, provides that the purchaser shall pay certain claims not otherwise entitled to priority, or that the purchase shall be subject to such claims. Thus, the purchase may be expressly subject to claims against the receiver⁶ or all claims thereafter adjudged to be prior to

⁹⁸ *Baltimore Trust & Guarantee Co. v. Hofstetter*, 85 Fed. 75, construing Tennessee statute.

⁹⁹ *Fidelity Title & Trust Co. v. Schenley Park & H. Ry. Co.*, 189 Pa. St. 363, 69 Am. St. Rep. 815, 42 Atl. 140.

¹ *Terre Haute & L. Ry. Co. v. Harrison*, 96 Fed. 907.

² *Vilas v. Page*, 106 N. Y. 439, 452, 13 N. E. 743.

³ *New York & G. L. Ry. Co. v. Stanley's Heirs*, 35 N. J. Eq. 283, 288; *Rio Grande & E. P. Ry. Co. v. Ortiz*, 75 Tex. 602, 12 S. W. 1129.

⁴ *Lang v. Choctaw, O. & G. R. Co.*, 198 Fed. 38.

⁵ *Atchison, T. & S. F. Ry. Co. v. Osborn*, 148 Fed. 606.

⁶ *Central Trust Co. of New York v. Denver & R. G. R. Co.*, 97 Fed. 239; *Farmers' Loan & Trust Co. v. Central R. Co.*, 5 McCrary (U. S.) 421, 17 Fed. 758; *Atchison, T. & S. F. Ry. Co. v. Cunningham*, 59 Kan. 722, 54 Pac. 1055. See also *Farmers' Loan & Trust Co. v. Central R. R. of Iowa*, 2 McCrary (U. S.) 181, 7 Fed. 537.

A foreclosure purchaser is not subrogated, on paying such claims, to the rights of the holders of the claims so paid. *Morgan's Louisiana & T. R. & S. S. Co. v. Moran*, 91 Fed. 22.

Where so provided by the deed and decree, the purchaser may be liable for damages arising from the negligence of the receiver. *Memphis & C.*

the mortgage.⁷ In such a case the purchaser knows the terms of the decree before making his purchase, and cannot afterwards complain of the decree or question its terms.⁸ Such a provision, however, leaves

R. Co. v. Glover, 78 Miss. 467, 29 So. 89.

If the foreclosure decree provides that the purchaser shall assume liability for all claims in tort, arising during the receivership and not paid or discharged by the receivers at the time of the sale, the purchaser cannot compel the receivers to set aside out of the moneys in their hands a fund for settling and discharging such tort claims, on the theory that the personal injuries are operating expenses incurred by the receiver. *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 772, 194 Fed. 546.

A decree providing that the purchaser shall be liable for all debts contracted by the receiver in the operation of the railroad, imposes liability for injuries to an employee of the road, although such liability is contested by the purchaser and the decree provides that "the purchaser shall pay any of the claims * * * which are established or unquestioned, and any disputed claims when allowed by the master, without objection or by the court, and they shall pay to the master or into court the moneys required to discharge the same from time to time as the court may direct." In so holding, the court said: "It will not be presumed, in construing a decree directing a sale by receivers, that the federal court intended to relieve railroad property from a lawful and just claim growing out of the operation of the railroad while in their hands." *Jones v. Chicago Great Western R. Co.*, 97 Neb. 306, 149 N. W. 813.

Where the decree provides that the purchaser shall assume all pending and not fully executed contracts of the receivers, but shall not be personally

liable for any unpaid indebtedness of the receiver, the purchaser is not liable for alleged unpaid royalties where the contract was broken and the obligation to respond in damages for its breach was incurred by the receivers long before the foreclosure sale. *Pennsylvania Steel Co. v. New York City Ry. Co.*, 204 Fed. 136.

⁷ *Central Indiana Ry. Co. v. Grantham*, 143 Fed. 43; *Mercantile Trust Co. v. St. Louis & S. F. Ry. Co.*, 99 Fed. 485; *Central Trust Co. of New York v. Georgia Pac. Ry. Co.*, 87 Fed. 288.

Where a committee representing nearly all the bondholders and stockholders takes full charge of the affairs of the insolvent company, and thereafter a sale negotiated by the committee is consummated by a friendly foreclosure suit wherein the decree requires the purchasers to pay any claims adjudged prior in equity to the mortgage, indebtedness incurred by the committee in operating the railroad was entitled to priority over the mortgage and must be paid by the purchaser. *Scott v. Queen Anne's R. Co.*, 162 Fed. 828, aff'g 148 Fed. 41.

Where the purchase is expressly made subject to such operation and maintenance expenses incurred by the railroad company prior to the receivership as the court should find entitled to priority over the mortgage debt, the purchaser is liable for interest on the claims awarded priority, from the date of his purchase. *Moore v. Donahoo*, 217 Fed. 177.

⁸ *Campbell v. Pittsburgh & W. Ry. Co.*, 137 Pa. 574, 27 Wkly. Notes Cas. 79, 20 Atl. 949.

If the foreclosure decree expressly provides that the sale shall be subject to all current liabilities of the re-

it open to the purchaser to contest upon the merits any claims allowed after the purchase.⁹

If the purchase is made under a decree providing for payment into court of additional sums if necessary to meet claims adjudged to be superior liens, the purchaser cannot set up against such claims a title subsequently acquired at a judicial sale to enforce a lien claimed to be superior to the mortgage and such other claims.¹⁰

The decree may be so worded as to require the purchaser to pay taxes, sums due on leases, etc., although part of the sums due accrued before the receivership was terminated.¹¹

Where the decree provides that the sale shall be subject to all taxes and assessments and liens prior to the lien of the mortgage, it includes only such taxes as had been imposed and were a lien prior to the foreclosure sale.¹²

If the decree ordering the sale provides that the purchaser shall take subject to the payment of such claims as may be established before the court within a specified time, he does not take subject to any claims not so presented and allowed.¹³ But where the decree requires the purchaser to pay any debts or liabilities which should be adjudged priority over the mortgage and were not paid by the receivers, a subsequent order requiring all claims to be presented within a fixed time and barring all claims not presented within such time does not include claims then being sued on in the same court.¹⁴

The court ordering the foreclosure, after the property has been sold under the decree and transferred, and where the time fixed by the decree for presentation of claims against the mortgagor has expired, has no jurisdiction to require the purchaser to pay a claim not so presented.¹⁵

Where the decree requires payment partly in cash to be applied to certain claims, and partly in interest coupons, and the purchaser

ceiver, the purchaser takes subject to such condition without regard to the question of priority between such liabilities and the mortgage lien. *Anderson v. Condict*, 94 Fed. 716.

⁹ *Southern R. Co. v. Carnegie Steel Co.*, 176 U. S. 257, 44 L. Ed. 458.

¹⁰ *Baltimore Trust & Guarantee Co. v. Hofstetter*, 85 Fed. 75.

¹¹ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 195 Fed. 614.

¹² *People v. Lynch*, 163 N. Y. App. Div. 547, 148 N. Y. Supp. 632.

¹³ *Houston & T. C. R. Co. v. Crawford*, 88 Tex. 277, 280, 28 L. R. A. 761, 53 Am. St. Rep. 752, 31 S. W. 176.

One who fails to have his claim allowed within the time fixed by the decree has no rights against the purchaser. *Houston & T. C. R. Co. v. Crawford*, 88 Tex. 277, 28 L. R. A. 761, 53 Am. St. Rep. 752, 31 S. W. 176.

¹⁴ *Southern Ry. Co. v. Townsend*, 161 Fed. 310.

¹⁵ *Grand Trunk Ry. Co. v. Central Vermont R. Co.*, 103 Fed. 740.

pays his bid in full, the court has no power, after confirmation of the sale, to direct the purchaser to pay a claim against the receiver.¹⁶

If the sale is subject to all valid claims against the receiver, the purchaser may be made the sole defendant in an action on such a claim after the receiver has been discharged.¹⁷

§ 1406. — Duties of purchaser. The purchaser is subject to the duties imposed on the mortgagor corporation by statute.¹⁸ So a decree commanding a railroad company and its successors and assigns to operate a certain portion of its line is binding on a foreclosure purchaser of such property.¹⁹

The purchaser may also be liable for the continuation of a nuisance created by the receiver.²⁰

§ 1407. — Contracts as binding on purchaser. Contracts made with the mortgagor are sometimes binding on the purchaser,²¹ as where the decree expressly so provides.²²

¹⁶ "The sale, when confirmed by the court, and its conditions met by the purchaser, created, in effect, a contract between the court and the purchaser, and the court could no more impose an additional term or condition upon that contract than could an individual." *Chicago & O. R. R. Co. v. McCammon*, 61 Fed. 772.

¹⁷ *Thompson v. Northern Pac. Ry. Co.*, 93 Fed. 384; *Howe v. Harper*, 127 N. C. 356, 37 S. E. 505.

¹⁸ *New York & G. L. R. Co. v. State*, 53 N. J. L. 244, 23 Atl. 168, aff'g 50 N. J. L. 303; *Montclair v. New York & G. L. Ry. Co.*, 45 N. J. Eq. 436, 18 Atl. 242.

The purchaser of the corporate franchise and property of a railroad company at foreclosure sale succeeds to all its statutory and common-law duties to the public. Thus, a contract with the county, in consideration of certain railroad aid bonds, to maintain its general offices, shops, etc., in a certain city, is enforceable against the foreclosure purchaser of the railroad,—the statute providing that the location of such offices, shops, etc., shall be at a place fixed

by contract. *International & G. N. Ry. Co. v. Anderson County*, 106 Tex. 60, 156 S. W. 499, aff'g — *Tex. Civ. App.* —, 150 S. W. 239.

Where a statute provides that the purchasers shall succeed to all the rights and franchises of the mortgagor railroad company and shall perform all the duties of the old company, the purchaser may be required to build a new highway in place of a public highway, where such duty rested upon the old company. *Norfolk & W. R. Co. v. Board Sup'rs Carroll Co.*, 110 Va. 95, 65 S. E. 531.

¹⁹ *State v. Iowa Cent. Ry. Co.*, 83 Iowa 720, 50 N. W. 280.

²⁰ *George v. Wabash Western Ry. Co.*, 40 Mo. App. 433.

²¹ *State of Tennessee v. Quintard*, 80 Fed. 829.

The purchaser sometimes is held to take subject to obligations provided for by an amendment of a statute made after the mortgage was executed. *Union Pac. R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, 50 L. Ed. 134, aff'g 128 Fed. 230.

²² *Southern Ry. Co. v. Franklin &*

Ordinarily, however, the purchaser is not bound to perform contracts made by the mortgagor,²³ at least where mere personal obligations.²⁴ This applies also to leases made by the mortgagor.²⁵

On the other hand, of course the purchaser is bound by covenants running with the land.²⁶ Thus, the purchaser of a railroad right of way is bound by covenants or conditions imposed at the time the right of way was obtained,²⁷ such as agreements to fence,²⁸ or construct necessary passageways,²⁹ or to maintain cattle passes.³⁰

P. R. Co., 96 Va. 693, 702, 44 L. R. A. 297, 32 S. E. 485.

²³ **Iowa.** *Amsden v. Dubuque & S. C. R. Co.*, 13 Iowa 132. See also *Hunter v. Burlington, C. R. & N. Ry. Co.*, 76 Iowa 490, 494, 41 N. W. 305.

Kentucky. *Newport & C. Bridge Co. v. Douglass*, 12 Bush 673.

Massachusetts. *Aldridge v. Fore River Ship Bldg. Co.*, 201 Mass. 131, 87 N. E. 485.

New York. *Martindale v. Western New York & P. Ry. Co.*, 45 App. Div. 328, 60 N. Y. Supp. 1026.

Virginia. *Sherwood v. Atlantic & D. Ry. Co.*, 94 Va. 291, 26 S. E. 943.

An agreement between a street railway company and a steam railroad company whereby the former agrees to bear the expense of constructing and maintaining a crossing in consideration of the latter permitting the crossing, is not binding upon a purchaser of the property of the street railway at foreclosure sale, where he had no notice thereof and the mortgage antedated the agreement. *Evansville & S. I. Traction Co. v. Evansville Belt R. Co.*, 44 Ind. App. 155, 87 N. E. 21.

The purchaser of a railroad does not assume the liability of the mortgagor to keep a bridge in repair, under a contract with a municipality executed after the mortgage, where it had no notice thereof and the decree does not so provide. *Port Jervis v. Erie R. Co.*, 111 N. Y. Supp. 851.

The purchaser cannot be sued in equity by the holder of bonds guar-

anteed by the mortgagor, at least until the remedies at law against the mortgagor have been exhausted. *Sawyer v. Atchison, T. & S. F. R. Co.*, 129 Fed. 100, aff'g 119 Fed. 252.

²⁴ *Gulf, C. & S. F. Ry. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788, 11 S. W. 342, agreement to maintain depot in certain place; *Kansas City, M. & O. Ry. Co. of Texas v. Cole*, — Tex. Civ. App. —, 145 S. W. 1094, agreement to maintain railroad office and shops in certain place. But see later Texas cases § 1406, *supra*, where duty considered a statutory duty.

²⁵ The terms of the mortgage and of a lease, construed together, may be such as to give a foreclosure purchaser title free from the lease. *Louisville & N. R. Co. v. Schmidt*, 21 Ky. L. Rep. 556, 566, 52 S. W. 835.

²⁶ See *Pittsburgh, C. & St. L. Ry. Co. v. Bosworth*, 46 Ohio St. 81, 2 L. R. A. 199, 18 N. E. 533, aff'g 1 Ohio Cir. Ct. 69.

²⁷ *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. Rep. 189, 24 N. E. 756.

²⁸ *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 77; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. Rep. 189, 24 N. E. 756; *Kelly v. Nypano R. Co.*, 200 Pa. 229, 86 Am. St. Rep. 715, 49 Atl. 779.

²⁹ *Baltimore & O. S. W. R. Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523.

³⁰ *Munro v. Syracuse, L. S. & N. R. Co.*, 128 N. Y. App. Div. 388, 112 N. Y. Supp. 938.

Crossing rights, acquired on granting a right of way to a railroad company, are binding on the purchaser where the claimant is and was in possession of the crossing so as to give notice of his rights.³¹

Of course, contracts of the mortgagor may be ratified by the purchaser,³² and if the purchaser claims contract rights of the mortgagor, it is bound by the conditions of the contract.³³

If the purchaser of a railroad uses a part of a road which had been leased by the mortgagor, he is liable for the use and occupation thereof.³⁴

Sometimes the decree provides that the purchaser may abandon or disclaim any lease or other contract entered into by the mortgagor after the commencement of the foreclosure proceeding.³⁵

§ 1408. — Statutory liability. Statutes in some states make the property liable in favor of some claimants who would otherwise have no claim against the property in the hands of a foreclosure purchaser. Thus, in North Carolina the statute provides that mortgages of corporations shall not exempt the property of the corporation from execution on domestic judgments against the corporation "for labor performed, nor torts committed by such corporation whereby any person is killed or any person or property injured";³⁶ and it is

³¹ Crossings "are in the nature of easements, which go with the land, unaffected with the change of title." *Swan v. Burlington, C. R. & N. Ry. Co.*, 72 Iowa 650, 652, 34 N. W. 457.

³² *Chicago & E. R. Co. v. Towle*, 10 Ind. App. 540, 37 N. E. 358.

³³ *St. Joseph Union Depot Co. v. Chicago, R. I. & P. Ry. Co.*, 89 Fed. 648.

The purchaser, by continuing a contract made with the receiver, does not adopt an option clause therein not known to the purchaser. *Sloss Iron & Steel Co. v. South Carolina & G. R. Co.*, 85 Fed. 133.

³⁴ *Jacksonville, L. & St. L. Ry. Co. v. Louisville & N. R. Co.*, 150 Ill. 480, 37 N. E. 924, aff'g 47 Ill. App. 414; *Frank v. New York, L. E. & W. R. Co.*, 122 N. Y. 197, 25 N. E. 332; *South Carolina R. Co. v. Wilmington, C. & A. R. Co.*, 7 Rich. (S. C.) 410.

³⁵ *Farmers' Loan & Trust Co. of New York v. Chicago & A. Ry. Co.*, 44 Fed. 653.

A decree permitting the purchaser, within ten days after the sale, to disavow "any contract or lease, or the rights thereunder, which are recited herein as a part of the property to be sold under and pursuant to this judgment" does not apply to a personal privilege, such as an annual pass, agreed to be furnished for life in consideration of a right of way. *Munro v. Syracuse, L. S. & N. R. Co.*, 128 N. Y. App. Div. 388, 112 N. Y. Supp. 938.

³⁶ *Clement v. King*, 152 N. C. 456, 67 S. E. 1023, holding four months' rule in bankruptcy proceedings not applicable to judgment obtained within such four months against the corporation for its tort; *Howe v. Harper*, 127 N. C. 356, 37 S. E. 505, where action was brought directly against

immaterial that the judgment is not recovered until after the mortgaged property has passed into the hands of a purchaser at the foreclosure sale.³⁷

A statute in Texas providing that in case of any sale of the property and franchises of a railroad company the purchaser shall be subject to the payment of all subsisting liabilities and claims for loss or damage to property sustained in the operation of the railroad by the mortgagor or its receiver is to be strictly construed and does not embrace a liability not directly connected with such operation; and hence it does not include the liability of the mortgagor for damages occurring on the line of a connecting carrier as imposed by statute.³⁸

Statutes providing that when any railroad company shall purchase any railroad from any other railroad company, the purchaser shall take subject to all the debts and liabilities of the seller, have been held to apply only to private or voluntary sales and not to judicial sales.³⁹

A statute requiring the foreclosure decree to provide that the purchaser shall pay all claims owing to any "servant or employee" does not include a secretary.⁴⁰

§ 1409. — Title and rights of purchaser. The purchaser succeeds to the rights of the mortgagor,⁴¹ but does not become vested with corporate capacity unless a statute so provides.⁴²

Under some statutes, the purchaser of railroad property at foreclosure sale becomes vested with all the powers with reference to the property possessed by the mortgagor, including the power to lease it.⁴³

The title of the purchaser relates back to the time the mortgage became effectual.⁴⁴

foreclosure purchaser; *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

The 1897 amendment omitted the words "nor for materials furnished." *Cheesborough v. Asheville Sanatorium*, 134 N. C. 245, 46 S. E. 494.

³⁷ *Williams v. West Asheville & S. S. Ry. Co.*, 126 N. C. 918, 36 S. E. 189; *Wilmington & W. R. Co. v. Burnett*, 123 N. C. 210, 31 S. E. 602.

³⁸ *Hudgins v. International & G. N. Ry. Co.*, — Tex. Civ. App. —, 162 S. W. 1016.

³⁹ *Kansas City Southern R. Co. v.*

King, 74 Ark. 366, 85 S. W. 1131.

⁴⁰ *Wells v. Southern Minnesota Ry. Co.*, 1 McCrary (U. S.) 18, 1 Fed. 270.

⁴¹ *Barker v. Southern R. Co.*, 137 N. C. 214, 49 S. E. 115; *Crouch v. Dakota, W. & M. R. R. Co.*, 18 S. D. 540, 101 N. W. 722; *Acres v. Moyne*, 59 Tex. 623; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452.

⁴² See § 1410, *infra*.

⁴³ *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299.

⁴⁴ *In re New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

The property which passes to the purchaser is, of course, no more extensive than that embraced in the mortgage,⁴⁵ and property purchased by the mortgagor without power to do so does not pass.⁴⁶ Money in the hands of the receiver does not pass unless so expressly stated in the decree.⁴⁷ Moreover, the purchaser takes title only to the property described in the deed.⁴⁸ A right of way, where a mere easement, passes to the purchaser.⁴⁹ The purchaser is not entitled to the earnings of the mortgagor after confirmation of the sale where he has persistently delayed compliance with his bid as to payments.⁵⁰

The purchaser acquires no interest whatever in the debt secured, and hence he cannot sue for injuries from wrongful impairment of the security.⁵¹

The purchaser of a railroad may, as against the state, dismantle it where it cannot be operated except at a loss, and where the power given by the charter of the mortgagor was in terms permissive to build the railroad and not mandatory to maintain it.⁵²

The purchaser may intervene in a suit to enforce an unencumbered lien and assert his rights and equities.⁵³

If the sale is set aside, the purchaser may be entitled to reimbursement for reconstructing and repairing the mortgaged railroad.⁵⁴

The assignee of the purchaser cannot question any part of the decree of foreclosure under which it obtained its title.⁵⁵

The rights of the purchaser of a railroad are strictly analogous to those of purchasers at ordinary foreclosure sales.⁵⁶

The purchaser, of course, may convey whatever title he has,⁵⁷ and

⁴⁵ *Pere Marquette R. Co. v. Graham*, 136 Mich. 444, 11 Det. L. N. 69, 99 N. W. 408; *Aldridge v. Pardee*, 24 Tex. Civ. App. 254, 60 S. W. 789, *aff'd* 189 U. S. 429, 47 L. Ed. 883.

A foreclosure sale of all the property of a railroad has been held not to pass land owned by the railroad but in no way connected with the operation of the road. *National Bank of Commerce of Seattle v. Lock*, 17 Wash. 528, 61 Am. St. Rep. 923, 50 Pac. 478.

⁴⁶ *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

⁴⁷ *Washington Irrigation Co. v. California Safe Deposit & Trust Co.*, 115 Fed. 20.

⁴⁸ *Brackett v. McClure*, 24 Colo. App. 524, 135 Pac. 1110.

⁴⁹ *Columbus, H. & G. Ry. Co. v. Braden*, 110 Ind. 558, 11 N. E. 357.

⁵⁰ *Boyle v. Farmers' Loan & Trust Co.*, 88 Fed. 930.

⁵¹ *McCaleb v. Goodwin & Swift*, 114 Ala. 615, 21 So. 967.

⁵² *State of South Carolina v. Jack*, 145 Fed. 281, *aff'g* 113 Fed. 823.

⁵³ *Connor v. Tennessee Cent. Ry. Co.*, 109 Fed. 931, 54 L. R. A. 687.

⁵⁴ *Jackson v. Ludeling*, 99 U. S. 513, 25 L. Ed. 460.

⁵⁵ *Baltimore Trust & Guarantee Co. v. Hofstetter*, 85 Fed. 75.

⁵⁶ *Ingalls v. Byers*, 94 Ind. 134.

⁵⁷ *Jack v. Williams*, 106 Fed. 259.

if the purchaser is an individual which cannot exercise the franchise he may transfer his title to a corporation which is so authorized.⁵⁸

If the purchaser acts for others and at once transfers title, he cannot thereafter litigate questions with the receiver.⁵⁹

A special statutory exemption or privilege contained in the charter, such as immunity from taxation⁶⁰ or a right to fix and determine rates of fare,⁶¹ does not pass to the foreclosure purchaser, unless the statute so provides, notwithstanding a statute or the charter of the purchaser provides that it shall succeed to all the rights, privileges and immunities of the mortgagor.

One who purchases at foreclosure sale with notice that a third person claims an interest in the property is not a bona fide purchaser.⁶² And the purchaser at a sale under a foreclosure decree in a federal court is chargeable with notice of a pending suit in a state court, filed on leave of the federal court, to enforce a vendor's lien on the property.⁶³ If persons intervene in the foreclosure suit and set up their claims, the purchaser is entitled to assume that such claims are no greater or broader than set forth therein.⁶⁴

Where a mortgage covers all after-acquired property, the proceedings or conveyance need not describe what land was after-acquired in order to pass title.⁶⁵

§ 1410. — Franchises as included. The franchise to exist as a corporation does not pass by the sale. The purchaser does not become vested with corporate capacity⁶⁶ though sometimes, by statute, the

⁵⁸ *Parker v. Elmira, C. & N. R. Co.*, 165 N. Y. 274, 59 N. E. 81, aff'g 27 N. Y. App. Div. 383, 49 N. Y. Supp. 1127.

⁵⁹ *Boyle v. Farmers' Loan & Trust Co.*, 101 Fed. 184.

⁶⁰ *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121.

⁶¹ *Matthews v. Board Corporation Com'rs of North Carolina*, 97 Fed. 400.

⁶² *Western U. Tel. Co. v. Burlington & S. W. Ry. Co.*, 3 McCrary (U. S.) 130, 11 Fed. 1.

⁶³ *Loomis v. Davenport & St. P. R. Co.*, 17 Fed. 301.

⁶⁴ *Hale, Ayer & Co. v. Burlington, C. R. & N. R. Co.*, 2 McCrary (U. S.) 558, 13 Fed. 203.

⁶⁵ "Had the provision as to after-

acquired real estate not been general, but confined to such after-acquired property as should be used in the operation of the railroad, or as appurtenant to what was then owned, there might be some force in the claim that, under such a provision, the proceedings in foreclosure should specify what after-acquired property came within the provision; but in the mortgage in question there was a general description, covering all after-acquired real estate, and parol evidence is admissible to point out the property covered by the description 'may hereafter be acquired.' " *Lang v. Choc-taw, O. & G. R. Co.*, 198 Fed. 38.

⁶⁶ *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21.

purchasers become a corporation upon the execution and delivery of a deed to them.⁶⁷

On the other hand, where franchise rights have been conveyed by the mortgage, all such franchise rights pass to the purchaser at the foreclosure sale, except the mere right to be a corporation.⁶⁸ Thus, the purchaser of the property of a railroad company ordinarily acquires all the franchises and privileges of the mortgagor in regard to the right to use the streets of municipalities.⁶⁹

But the purchaser takes subject to the conditions of the franchise.⁷⁰ Thus, the foreclosure purchaser of the property of a public service corporation, such as a lighting corporation, succeeds to the franchise rights of the mortgagor and hence it must bear the burdens imposed by the franchises, at least where the purchaser is merely an agent of the mortgagee corporation.⁷¹

The purchaser of the property and rights of a water company takes its contract right to collect the rates specified in the contract between the mortgagor and the municipality.⁷²

Where the mortgagor and mortgagee unite in a modification of the original franchise or right to operate the street railroad which has been sold on foreclosure and the purchaser buys with full knowledge thereof, he takes subject to such modification.⁷³

The purchaser of a franchise, under some statutes, holds it as a

⁶⁷ *Holland v. Lee*, 71 Md. 338, 18 Atl. 661, holding, however, that the creation of the corporation did not discharge obligations which the purchasers, as purchasers, gave, nor release the individuals; *Com. v. Central Passenger R. Co.*, 52 Pa. St. 506.

Provision may be made by statute that upon a sale of its property by a corporation, the purchaser shall be deemed a corporation which shall succeed to the franchises and be charged with the duties of the original corporation. *Guardian Trust & Deposit Co. v. Greensboro Water Supply Co.*, 115 Fed. 184.

⁶⁸ *State v. Roach*, 267 Mo. 300, 184 S. W. 969.

⁶⁹ *Union Pac. R. Co. v. Lincoln*, 97 Neb. 436, 149 N. W. 419; *Denison & S. R. Co. v. St. Louis S. W. R. Co. of Texas*, 96 Tex. 233, 72 S. W. 161,

201, aff'g 30 Tex. Civ. App. 474, 72 S. W. 201.

The franchise to operate and use railroad property is vested in the purchaser. *Julian v. Central Trust Co. of New York*, 115 Fed. 956, aff'd 193 U. S. 93, 48 L. Ed. 629.

⁷⁰ *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, 605, 5 N. W. 1039.

⁷¹ *Flemming v. Taylor Fuel, Light & Power Co.*, 90 Kan. 763, 136 Pac. 228.

⁷² *Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, where the court said: "While the right of a corporation to exist may not be mortgaged or sold, all its contract rights with other corporations and with individuals may be."

⁷³ *Public Service Commission v. Westchester St. R. Co.*, 206 N. Y. 209, 219, 99 N. E. 536.

body politic and corporate, and has no power as an individual to convey it.⁷⁴

§ 1411. — Suits by purchaser. The foreclosure purchaser may bring proper actions to protect his rights or to obtain possession of the property sold. Thus, he may maintain ejectment.⁷⁵

The purchaser at a foreclosure sale in a federal court, where that court by its decree retained jurisdiction to settle all liens and claims upon the property, may restrain in the same court the holders of judgments obtained in the state courts against the mortgagor, in actions to which the purchaser was not a party, from selling the property under executions.⁷⁶

A supplemental bill by the purchaser at the foreclosure sale is proper to restrain stockholders who are attempting in a state court to nullify the foreclosure decree rendered in a federal court.⁷⁷

§ 1412. — Effect of sale. After the sale on foreclosure, there is no title left in the mortgagor, provided of course there is no equity of redemption.⁷⁸

The sale does not terminate the corporate existence of the mortgagor,⁷⁹ even where all the secondary franchises are included.⁸⁰

§ 1413. Redemption. Even where the decree of sale is silent in regard thereto, the mortgagor, as a matter of fact, has the right to redeem, at least until a sale has been made under the decree,⁸¹ and, according to the federal courts, not only until the sale has been confirmed, but also until the deed has been actually delivered.⁸² Generally, however, at least in the federal courts, a certain length of time is fixed by the decree before the sale is ordered, within which the mortgagor may pay up and avoid a foreclosure.⁸³

An important question which has several times arisen in the federal

⁷⁴ *McCarter v. Vineland Light & Power Co.*, 73 N. J. Eq. 703, 70 Atl. 177.

⁷⁵ *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

⁷⁶ *Julian v. Central Trust Co. of New York*, 193 U. S. 93, 48 L. Ed. 629, *aff'd* 115 Fed. 956.

⁷⁷ *Central Trust Co. of New York v. Western N. C. R. Co.*, 89 Fed. 24.

⁷⁸ *Julian v. Central Trust Co. of New York*, 115 Fed. 956, *aff'd* 193 U. S. 93, 48 L. Ed. 629.

⁷⁹ *James v. Western North Carolina R. Co.*, 121 N. C. 523, 46 L. R. A. 306, 28 S. E. 537.

⁸⁰ *Williard v. Spartanburg, U. & C. R. Co.*, 124 Fed. 796.

⁸¹ *Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co.*, 177 Fed. 854.

⁸² *Chicago & V. R. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47; *Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co.*, 177 Fed. 854.

⁸³ See § 1389, *supra*.

courts is whether state statutes authorizing redemption are applicable. As to this matter it has been said: "That a state law conferring the right of redemption under a decree to enforce the lien of a mortgage or trust deed is binding upon federal courts, as to lands within the state in which said court is sitting, is settled beyond dispute by repeated decisions of the Supreme Court of the United States."⁸⁴ However, state statutes requiring mortgage foreclosure sales of land to be subject to redemption do not apply, at least in the federal courts, to sales of all the property, real and personal, of a public service company,⁸⁵ such as a railroad company,⁸⁶ for the reason that, if such statutes were held applicable, then the personalty and the franchise must be sold without redemption, while the realty would be subject to redemption, which would result in the practical destruction of the value of the whole.⁸⁷

Junior mortgagees, where joined as defendants in a suit to foreclose a prior mortgage, cannot redeem, where the right of the debtor to redeem is expressly barred by the decree, although it makes no reference to the junior mortgagees.⁸⁸

Where there is a statutory right to redeem, the time, terms and conditions depend of course upon the wording of the particular statute.⁸⁹ The right of stockholders to redeem is limited in some states to two years.⁹⁰

Attaching creditors of a corporation are entitled to redeem.⁹¹

A railroad corporation and its stockholders cannot join as co-complainants in a bill to redeem the road from a mortgage, where there

⁸⁴ *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. 881. Same rule, *Brine v. Hartford Fire Ins. Co.*, 96 U. S. 627, 24 L. Ed. 858.

⁸⁵ *Pacific Northwest Packing Co. v. Allen*, 116 Fed. 312; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124; *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. 881, construing Iowa statute; *McKenzie v. Bismark Water Co.*, 6 N. D. 361, 379, 71 N. W. 608.

⁸⁶ *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111, construing Illinois statute; *Columbia Finance & Trust Co. v. Kentucky Union Ry. Co.*, 60 Fed. 794, construing

Kentucky statute; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

⁸⁷ *Simmons v. Taylor*, 38 Fed. 682, approved in *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. 881.

⁸⁸ *Simmons v. Burlington, C. R. & N. R. Co.*, 159 U. S. 278, 40 L. Ed. 150, rev'g sub nom. *The Bordentown*, 40 Fed. 682.

⁸⁹ See *McLester v. Woodlawn Cemetery*, 165 Ala. 213, 51 So. 793.

⁹⁰ *McLester v. Woodlawn Cemetery*, 165 Ala. 213, 51 So. 793, holding the time not extended by a breach of agreement or collusion in no way misleading the stockholders.

⁹¹ *Whitney v. Metallic Window Screen Mfg. Co.*, 187 Mass. 557, 73 N. E. 663.

is no allegation that the corporation has been guilty of any violation of its trust.⁹²

All who have been so connected with the mortgaged property sought to be redeemed, as to render them liable for income under it, should be joined as defendants.⁹³

IX. DISTRIBUTION OF PROCEEDS; PRIORITIES

§ 1414. Application of proceeds—General rules. The decree itself often fixes the order in which the proceeds of the sale shall be applied,⁹⁴ and sometimes the mortgage itself specifically provides in regard thereto, in which case of course it governs.⁹⁵ Generally the proceeds are applied first to claims, if any, prior to the mortgage, then ratably to the bonds, then to junior liens and incumbrances, and finally what is left, if anything, is paid to the corporation. The proceeds must be administered according to legal priorities.⁹⁶

If the sale is made subject to a prior mortgage, such mortgagee is not entitled to be paid out of the proceeds of the sale.⁹⁷

The foreclosure purchaser of railroad property cannot insist that claims for right of way used by the mortgagor be paid from the proceeds of the sale, since he takes subject to any defects of title to lands used for right of way purposes.⁹⁸

⁹² *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173.

⁹³ *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173.

⁹⁴ *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co.*, 106 Fed. 565; *Clews & Co. v. First Mortgage Bondholders*, 51 Ga. 131.

Where the mortgage provides that on a sale by the trustee, after satisfying the costs and expenses of the sale and of the trust, the proceeds shall be applied in a certain way, the claim of the trustee for services in executing the bonds is superior to the rights of the bondholders. *Smith's Ex'x v. Washington City, V. M. & G. R. Co.*, 33 Gratt. (Va.) 617.

General creditors cannot object to a provision in the decree that property held by the mortgagor under a conditional sale, and partly paid for, should be first paid for from the proceeds of the sale; but the vendor who

has intervened in the foreclosure suit has no right to insist upon a sale independently and solely for its benefit, although it may remove or sell the subject of the conditional sale in case of default in payments thereon. *Washington Trust Co. City of New York v. Morse Iron Works & Dry Dock Co.*, 187 N. Y. 307, 79 N. E. 1022, modifying 106 N. Y. App. Div. 195, 94 N. Y. Supp. 495.

⁹⁵ *Low v. Blackford*, 87 Fed. 392.

⁹⁶ *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 69 Fed. 658, holding this true although fact that the railroad extends into different states requires resort to equity. See also *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 62 Fed. 205.

⁹⁷ *Woodworth v. Blair*, 112 U. S. 8, 28 L. Ed. 615.

⁹⁸ *First Nat. Bank of Houston v. Ewing*, 103 Fed. 168.

It is sometimes permissible to allow the trustee to retain a part of the proceeds, until final settlement, in order to meet contingent expenses.⁹⁹

Of course bondholders are entitled to be paid their claims before any of the fund is distributed among stockholders under ordinary circumstances.¹ The mortgagor corporation cannot be allowed to withdraw any of the proceeds of the sale until all bondholders are paid in full.²

Where the bondholders are all paid, and the controversy is between the bona fide execution purchasers of the property and the mortgagor, the occupant should be allowed compensation for fixtures he put on the property, before any of the fund is paid to the corporation, although the mortgage by its terms covered after-acquired property.³

Where there is a surplus, the attorney for a bondholder which as trustee was the holder of all the bonds secured by the mortgage sought to be foreclosed, the bondholder being joined as a defendant because holding a subordinate lien, is not entitled to have his fee paid out of the fund.⁴

Where a director knowingly made a contract which imposed upon the corporation a liability in excess of the corporate limit of indebtedness, he is not entitled to a priority for the amount due thereon, out of the proceeds of a foreclosure sale, as against stockholders.⁵

Holders of scrip certificates convertible into bonds who intervene in the foreclosure suit but make no demand for an exchange of bonds

⁹⁹ Real Estate Trust Co. v. Union Trust Co., 102 Md. 41, 61 Atl. 228.

¹ The rights of stockholders are subordinate to the rights of bondholders, and hence part of the fund cannot by indirection be applied to the benefit of the stockholders by appropriating it to pay their attorneys who represented them in stockholders' suits prior to the foreclosure suit. Trimble & Bell v. Acme Mills & Elevator Co., 151 Ky. 570, 152 S. W. 561.

² Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 117 Ky. 325, 25 Ky. L. Rep. 1739, 78 S. W. 113.

The surplus belongs to the corporation rather than the stockholders, and becomes a fund in trust for the benefit of creditors. Chicago, R. I. & P. R.

Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. Ed. 117.

³ Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 117 Ky. 325, 25 Ky. L. Rep. 1739, 78 S. W. 113, holding that compensation should be made to the execution purchaser who purchased prior to the foreclosure sale, to the extent that the price which the property brought at the latter sale was enhanced by the betterments placed thereon by the execution purchaser.

⁴ Farmers' Loan & Trust Co. v. New York Rys. Co., 215 Fed. 712.

⁵ Croninger v. Bethel Grove Camp Ground Ass'n, 156 Ky. 356, 161 S. W. 230.

for scrip cannot participate in the fund as if the exchange had been made.⁶

Where distribution is ordered on surrender of bonds for cancellation, but a small per cent. of the face value of the bonds, and some of the fund is unclaimed after the lapse of over ten years, the court should order a redistribution, either to other bondholders who had not been paid in full or to general creditors, if any, and, if none, to the stockholders.⁷

Where mechanics' liens are superior to the lien of the trust deed only in as far as the former attached to a part but not all of the mortgaged property, and the property is sold as a whole at foreclosure sale, the proceeds should be divided among the bondholders and the holders of the mechanics' liens in the same proportion as the value of the property upon which the lien claimants have a superior lien, considered as a part of the whole system of the mortgagor, bears to the total value of the mortgaged property, diminished by the value of the property subject to the superior lien; but in order to determine the value of the property and of the part subject to the mechanics' liens, in a complicated case involving an irrigation system, it is not proper to appoint appraisers, thereby permitting an ex parte appraisal, but a hearing should be had by the court or by a master at which the parties may furnish evidence and argument to support their theories.⁸

§ 1415. — As between bondholders. Where the mortgage security is insufficient to pay the entire amount of bonds secured, each bondholder is entitled to share in the distribution of the proceeds in the proportion which his holdings bear to the whole amount secured;⁹ and this is true in favor of reissued bonds so as to authorize the holders of such bonds to participate equally with other holders.¹⁰ Furthermore, bondholders who have entered into a reorganization agreement are entitled to their share of the proceeds of the sale in the same

⁶ Girard Trust Co. v. Summit Branch Coal Co., 22 Pa. Super. Ct. 495.

⁷ American Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775.

⁸ Continental & Commercial Trust & Savings Bank v. North Platte Valley Irrigation Co., 219 Fed. 438.

⁹ Barry v. Missouri, K. & T. Ry. Co., 34 Fed. 829; Pinkard v. Allen's Adm'r, 75 Ala. 73.

¹⁰ Barry v. Missouri, K. & T. Ry. Co., 34 Fed. 829; Clafin v. South Carolina R. Co., 8 Fed. 118. But see Crawford v. Washington Northern R. Co., 233 Fed. 961; Mississippi Valley Trust Co. v. Washington Northern R. Co., 212 Fed. 776.

manner as bondholders who did not join in such agreement, where the former have not agreed to surrender all claims of every kind upon their bonds in case they should become the purchasers nor to take in full satisfaction the bonds of the new company.¹¹

On the other hand, where a large part of the bonds authorized by the mortgage are not issued, the security inures to the benefit of each bondholder in the proportion which his bond holdings under the mortgage bear to the entire amount actually issued and intended to be issued, rather than the whole amount originally contemplated to be issued, but which were not in point of fact issued.¹²

It is well settled that "any holder of such bonds who presents them for a dividend out of the proceeds of sale may challenge the claim of any other when the allowance will diminish his own share in the fund."¹³

Holders of notes agreeing to issue to the holders certain mortgage bonds as soon as a further issue of bonds under the mortgage should be authorized by the railroad commission, are not equitable bondholders so as to be entitled to share in the proceeds, where the commission did not afterwards grant authority to issue such bonds.¹⁴

Where the court requires each bondholder affirmatively to prove his bona fide title before receiving any part of the proceeds of sale, it is not necessary for each bondholder to appear in person and to prove his claim by his own testimony, but such evidence may come from

¹¹ *Freeman v. Watson*, 215 Fed. 852.

¹² *Badger v. Sutton*, 30 N. Y. App. Div. 294, 52 N. Y. Supp. 16; *East Tennessee Coal Co. v. London & N. Y. Land Co.*, 106 Tenn. 41, 60 S. W. 502, criticising contrary statement in 5 *Thompson on Corporations*, § 6229.

Bonds retained by the corporation in its treasury instead of being sold are not entitled to participate in the proceeds. *Trust Co. of America v. United Boxboard Co.*, 213 N. Y. 334, 107 N. E. 574, rev'g 162 N. Y. App. Div. 855, 148 N. Y. Supp. 100.

Where the corporation mortgagor comes into possession of its own bonds, after a pledge thereof, or part of the bonds secured have never been issued but are still in its hands, it cannot share in the proceeds of the fore-

closure sale as a bondholder, where the proceeds are insufficient to pay in full the other outstanding bonds and coupons. *New York Security & Trust Co. v. Equitable Mortg. Co.*, 77 Fed. 64.

Where the corporation mortgagor merely assigned to a third person all its right, title and interest in un-issued bonds and coupons, not delivered to the assignee, the latter cannot share in the proceeds of the sale. *New York Security & Trust Co. v. Equitable Mortg. Co.*, 77 Fed. 64.

¹³ *Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co.*, 169 Fed. 466.

¹⁴ *Augusta Trust Co. v. Federal Trust Co.*, 140 Fed. 930.

other persons and he may rely upon the title of a former bona fide holder for value without notice.¹⁵

Amounts due for unpaid stock cannot be set off against bonds held by such delinquent holders of stock, in distributing the proceeds of a foreclosure sale.¹⁶

§ 1416. — Where bonds are pledged. Bonds pledged for loans are bonds issued; but the holders are admitted as creditors on the basis of the amount loaned on them rather than their face value;¹⁷ and bonds pledged should be paid to the extent necessary to satisfy the debts for which they are held as collateral and no further.¹⁸

Where a pledge of certain bonds was procured by fraud in regard to the price of materials furnished, the holders may be permitted to share in the proceeds to the extent of their equitable claim.¹⁹

§ 1417. Priorities as between interest and principal. If the principal is not due and nonpayment of interest does not accelerate the maturity of the bonds, the proceeds should first be applied to the arrears of interest and then, if there is a surplus, to the mortgage debt.²⁰

In other cases, unless otherwise provided, interest on the bonds has

¹⁵ Freeman v. Watson, 215 Fed. 852.

¹⁶ Fidelity Trust Co. v. Washington-Oregon Corporation, 217 Fed. 588. See also *infra*, chapters on Stock and Stockholders and on Insolvency.

¹⁷ Kelly v. Wellsburg & B. Val. Co., 74 W. Va. 130, 81 S. E. 712.

In Texas, however, it is held that holders of bonds pledged as collateral security are entitled to participate in the proceeds of the sale until their primary indebtedness is paid, on the basis of the bonds, and not on the basis of the debt. Western Supply & Manufacturing Co. v. United States & Mexican Trust Co., 41 Tex. Civ. App. 478, 92 S. W. 986.

¹⁸ Newport & C. Bridge Co. v. Douglass, 12 Bush (Ky.) 673; Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523; Western Supply & Manufacturing Co. v. United States & M. Trust

Co., 41 Tex. Civ. App. 478, 92 S. W. 986.

Holders of bonds are entitled to share, as against each other, according to the number of bonds held; but if the debt secured by a pledge is paid in full by so applying the proceeds of the sale, the balance of the proceeds of the bonds secured by such pledge goes to pay off other bonds not paid in full. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 117 Ky. 325, 25-Ky. L. Rep. 1739, 78 S. W. 113.

¹⁹ Detroit Trust Co. v. Detroit, F. & S. Ry., 159 Mich. 442, 459, 124 N. W. 45.

²⁰ Ohio Cent. R. Co. v. Central Trust Co., 133 U. S. 83, 33 L. Ed. 561; Chicago & V. R. R. Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47.

no priority over the principal, and vice versa, but the principal and interest are entitled to share ratably in the proceeds of the sale.²¹

Severed coupons are not entitled to priority over the bonds²² nor over coupons subsequently maturing,²³ unless it is so provided in the mortgage. However, mortgages often give the amount due for interest a priority over the principal of the bond,²⁴ and where coupons are entitled to priority over the bonds, the preference extends to the interest on detached coupons.²⁵

Where coupons are expressly declared to be entitled to priority over the bonds, the priority is not affected by the holders of coupons surrendering them and receiving in their stead certificates of indebtedness.²⁶ So where arrears of interest on the bonds are given a preference by the terms of the mortgage, the holder of detached coupons who is not a holder of the bond has a priority over the holders of the bonds, notwithstanding the mortgage reads that the proceeds shall first be applied "to the holders of unpaid bonds * * * of all arrears of interest remaining unpaid on such bonds."²⁷ But a provision in the mortgage that accrued interest on the bonds should be entitled to priority over the principal, does not apply to overdue coupons detached by the mortgagor before selling the bonds.²⁸

§ 1418. Priorities between bonds of same issue. Bonds of the same issue and secured by the same mortgage ordinarily are entitled to no priority as against each other,²⁹ and this is so without regard

²¹ Real Estate Trust Co. v. Union Trust Co., 102 Md. 41, 61 Atl. 228.

²² Ketchum v. Duncan, 96 U. S. 659, 24 L. Ed. 868, aff'g 3 Woods (U. S.) 567, Fed. Cas. No. 4,138; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782; State v. Spartanburg & U. R. Co., 8 Rich. (S. C.) 129, 161. Compare Stevens v. New York & O. M. R. Co., 13 Blatchf. (U. S.) 412, Fed. Cas. No. 13,406; Sewall v. Brainard, 38 Vt. 364.

²³ Ketchum v. Duncan, 96 U. S. 659, 24 L. Ed. 868, aff'g 3 Woods (U. S.) 567, Fed. Cas. No. 4,138.

²⁴ West End Trust Co. v. Wetherill, 77 N. J. Eq. 590, 78 Atl. 756, construing mortgage as so providing.

²⁵ Rea v. Pennsylvania Canal Co., 249 Pa. 239, 94 Atl. 833.

²⁶ Virginia v. Chesapeake & O. Canal Co., 35 Md. 1.

²⁷ Real Estate Trust Co. v. Pennsylvania Sugar Refining Co., 237 Pa. 311, 43 L. R. A. (N. S.) 82, 85 Atl. 365.

²⁸ Holland Trust Co. v. Thomson-Houston Elec. Co., 62 N. Y. App. Div. 299, 71 N. Y. Supp. 51, aff'd 170 N. Y. 68, 62 N. E. 1090.

²⁹ Dunham v. Cincinnati, P. & C. R. Co., 1 Wall. (U. S.) 254, 17 L. Ed. 584; Bound v. South Carolina Ry. Co., 71 Fed. 53; Morton & Bliss v. New Orleans & S. Ry. Co. & Immigration Ass'n, 79 Ala. 590; Lincoln v. Lincoln St. Ry. Co., 67 Neb. 469, 93 N. W. 766; Murray v. Farmville & P. R. Co., 101 Va. 262, 43 S. E. 553.

to when particular bonds of the issue were first sold or transferred,³⁰ since they are conclusively presumed to have been issued on the date of the recordation of the mortgage.³¹

Where bonds are numbered, the lower numbers have no priority as against higher numbers.³²

Bonds on which interest has not been paid have no priority over bonds on which the interest has been paid.³³

So far as other bondholders are concerned, it is immaterial that a bondholder obtained his bonds by gift from a holder, where the bonds were lawfully issued by the corporation.³⁴

Holders of bonds issued under a contract are estopped to claim that other bonds issued under the same contract are invalid because of the illegality of the contract, where they are attempting to enforce their own bonds.³⁵ But persons obtaining bonds with knowledge of the want of authority in the mortgagor to put them on the market to the prejudice of the holder of bonds previously issued, pursuant to an agreement, takes subject to the priority of the other bonds.³⁶

§ 1419. Priorities between different mortgages or bond issues—In general. Corporate mortgages generally rank in the order in which they have become liens,³⁷ in the absence of special circumstances.³⁸ So a mortgage covering after-acquired property generally has priority over a subsequent mortgage on the same property³⁹ unless the junior lien is given priority by statute.⁴⁰ Likewise, generally, bonds of a

³⁰ *Pittsburgh, C., C. & St. L. Ry. Co. v. Lynde*, 55 Ohio St. 23, 44 N. E. 596; *Broomall v. North American Steel Co.*, 70 W. Va. 591, 74 S. E. 863.

³¹ *Pittsburgh, C., C. & St. L. Ry. Co. v. Lynde*, 55 Ohio St. 23, 59, 44 N. E. 596; *Kelly v. Wellsburg & B. Val. Co.*, 74 W. Va. 130, 81 S. E. 712.

³² *Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 523, Fed. Cas. No. 13,297.

³³ *Humphreys v. Morton*, 100 Ill. 592.

³⁴ *Broomall v. North American Steel Co.*, 70 W. Va. 591, 74 S. E. 863.

³⁵ *Farmers' Loan & Trust Co. v. Madison Mfg. Co.*, 153 Fed. 310.

³⁶ *McMurray v. Moran*, 134 U. S. 150, 33 L. Ed. 814.

³⁷ *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673.

The fact that part of a railroad was entirely built with moneys raised on a fourth mortgage does not give such mortgage priority over the other mortgages even on that portion of the road. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199.

³⁸ See *Campbell v. Texas & N. O. R. Co.*, 2 Woods (U. S.) 263, Fed. Cas. No. 2,369.

³⁹ *Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 37 L. Ed. 755; *Thompson v. White Water Valley R. Co.*, 132 U. S. 68, 33 L. Ed. 256.

⁴⁰ *Randolph v. Wilmington & R. R. Co.*, 11 Phila. (Pa.) 502, Fed. Cas. No. 11,563.

prior issue are entitled to priority over bonds of a subsequent issue⁴¹ unless it is otherwise provided by statute.⁴²

Bonds secured by a first mortgage, although issued after a second one, are entitled to preference.⁴³ But bonds not secured by mortgage are not a lien upon the property of the corporation, and are inferior to secured bonds.⁴⁴

Income bonds expressly made subordinate to such other bonds "as shall be from time to time outstanding" are inferior, not only to the first mortgage bonds issued before the income bonds, but also to any other bonds issued after the income bonds were issued.⁴⁵

Where the majority holder of first mortgage bonds conditionally waives his priority in favor of new bonds, his priority is not lost where the conditions are not fulfilled, even as against bona fide holders of the new bonds.⁴⁶

Where a corporation executes and records a first mortgage to its secretary, he is not estopped by his silence to assert the priority of such mortgage by the fact that in his official capacity he signed bonds secured by a later mortgage on the same property, even though the bonds were headed "First Mortgage Bonds" and "Second Mortgage Bonds," where the bonds did not state there was no other mortgage on the property.⁴⁷

Of course, a junior mortgagee cannot deny the priority of other mortgages and bonds issued thereunder, where such priority is expressly recognized in his mortgage.⁴⁸

Where a second mortgage is, in express terms, made subject to the lien of the first mortgage, and the fund for distribution is the proceeds of personal property included in both mortgages but on which neither was a lien as against execution creditors and there is a surplus after paying the execution creditors, the bondholders under the first mortgage are entitled to the surplus.⁴⁹

⁴¹ *Kneeland v. Lawrence*, 140 U. S. 209, 35 L. Ed. 492; *Hand v. Savannah & C. R. Co.*, 17 S. C. 219.

⁴² *Gibbes v. Greenville & C. R. Co.*, 13 S. C. 228.

⁴³ *Kelly v. Wellsburg & B. Val. Co.*, 74 W. Va. 130, 81 S. E. 712.

⁴⁴ *Brunswick & A. R. Co. v. Hughes*, 52 Ga. 557.

⁴⁵ *Yazoo & M. Val. R. Co. v. Martin*, 94 Miss. 700, 48 So. 739, 47 So. 667.

⁴⁶ *Central Trust Co. v. New York*

& W. Water Co., 68 N. Y. App. Div. 640, 74 N. Y. Supp. 135.

⁴⁷ *Farmers' Bank & Trust Co. v. Southern Granite Co.*, 96 S. C. 106, 79 S. E. 985.

⁴⁸ *Crawford v. Washington Northern R. Co.*, 233 Fed. 961; *Mississippi Valley Trust Co. v. Washington Northern R. Co.*, 212 Fed. 776.

⁴⁹ *Klaus v. Majestic Apartment House Co.*, 250 Pa. 194, 95 Atl. 451.

§ 1420. — In case of overissue. Where by mistake the mortgagor issued and sold more bonds than provided for in the mortgage, and the holders of the extra bonds bought them in ignorance of the over-issue, such holders are entitled to an equitable lien superior to the lien given by unrecorded income bonds subsequently issued, but inferior to the lien of a subsequently recorded mortgage.⁵⁰

On the other hand, if the mortgage purports to be made to secure bonds of certain descriptions, not exceeding in the aggregate a specified sum, and recites other bond indebtedness secured by prior liens and that the new bonds were to be substituted for the old, surplus bonds not needed to take up old bonds, where the whole issue does not exceed the specified sum, are secured by the mortgage and take precedence over second mortgage bonds.⁵¹

Notwithstanding an issue of bonds secured by mortgage is greatly in excess of the amount authorized by the charter, and thereafter the corporation becomes insolvent and the property mortgaged to secure the bonds has been sold, the bondholders are nevertheless entitled to a preference in the proceeds, as against subsequent general creditors with full notice of the mortgage and as against the corporation.⁵²

§ 1421. Priorities as between mortgage and other liens or claims—
In general. Other things being equal, the priority of a corporate mortgage as against other liens depends on the time when the various liens came into existence, the first in point of time being entitled to priority.⁵³

In other words, liens attaching before any mortgage is created or any bonds are issued are superior to a recorded mortgage held by the trustee,⁵⁴ while liens attaching after the lien of the mortgage is created

⁵⁰ *Stephens v. Benton*, 62 Ky. 112.

⁵¹ *Claffin v. South Carolina R. Co.*, 8 Fed. 118.

⁵² *Fidelity Insurance, Trust & Safe-Deposit Co. v. West Penn & S. C. R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911, 21 Atl. 21.

⁵³ *United States v. American Loan & Trust Co.*, 120 Fed. 843; *In re Columbus, S. & H. R. Co.'s Appeal*, 109 Fed. 177.

⁵⁴ *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593.

A vendor's lien is superior to a sub-

sequent mortgage. *Wheeling Bridge & Terminal Ry. Co. v. Reymann Brewing Co.*, 90 Fed. 189.

Where a bondholder took his bonds and mortgage direct from the company to secure advances which he made to the company, not only after mechanics' liens had attached and after he knew the facts, but also after he knew that the company was insolvent, the bondholder's lien is inferior to the mechanics' liens. *Porch v. Agnew Co.*, 70 N. J. Eq. 328, 61 Atl. 721.

are inferior to the mortgage.⁵⁵ For instance, the mortgage is superior to subsequent liens acquired by attachment or execution.⁵⁶

Judgments against the corporation are inferior to existing mortgages;⁵⁷ and the fact that a judgment against the mortgagor is for money lent for payment of interest and taxes does not give the creditor any added rights as against a prior mortgagee.⁵⁸

The lien of bonds, as against other liens, dates from the recording of the mortgage, although the bonds are not issued until after the other liens have attached.⁵⁹ Thus, if a mortgage is recorded, but thereafter and before the bonds are issued, the property is attached, the lien of the bonds afterwards issued for bona fide loans is entitled to priority over the attachment.⁶⁰ However, it has been held that where only part of the bonds have been issued at the time the mortgaged property is attached, the mortgage has priority to the

⁵⁵ Even though the mortgagee is the general manager of the mortgagor, a mining company, the recorded mortgage is superior to subsequent labor liens for labor performed with the knowledge or at the request of the manager. *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889.

A railroad mortgage is superior to the lien of a vendor under an agreement with the vendee railroad company to pay as a part of the purchase price any judgment for personal injuries which might be rendered against the vendor, as far as rights of bona fide holders of the bonds are concerned. *Ingram v. Cincinnati, F. & S. E. R. Co.*, 127 Ky. 638, 107 S. W. 239.

⁵⁶ *Hatch v. Johnson Loan & Trust Co.*, 79 Fed. 828; *First Nat. Bank v. Anderson*, 75 Va. 250.

⁵⁷ *Seaboard Air Line Ry. v. Knickerbocker Trust Co.*, 125 Ga. 463, 54 S. E. 138.

A judgment for damages rendered prior to the appointment of a receiver cannot be preferred over a prior mortgage. *Front St. Cable Ry. Co. v. Drake*, 84 Fed. 257.

A judgment creditor of a railroad company, whose claim originated in

the negligent act of a servant of the company, is not entitled to be paid in preference to a prior mortgage. *Farmers' Loan & Trust Co. v. Longworth*, 83 Fed. 336.

Failure to observe certain statutory requirements before executing a mortgage does not invalidate the mortgage, in equity, as against junior judgment creditors. *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 615, aff'g 17 N. Y. App. Div. 152, 45 N. Y. Supp. 141.

⁵⁸ *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

⁵⁹ *Central Trust Co. of New York v. Bodwell Water Power Co.*, 181 Fed. 735, disapproving *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593; *Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807; *Kelly v. Wellsburg & B. Val. Co.*, 74 W. Va. 130, 81 S. E. 712.

The lien of a mortgage securing bonds dates from its execution and delivery, regardless of the time when part of the bonds are transferred. *Central Trust Co. of New York v. Louisville, St. L. & T. Ry. Co.*, 70 Fed. 282.

⁶⁰ *In re Sunflower State Refining Co.*, 183 Fed. 834.

extent of the money already advanced upon the bonds, but as to sums thereafter advanced, the attachments take precedence.⁶¹

Equitable liens are ordinarily inferior to mortgage liens.⁶²

Where a new corporation was organized by a creditor of the old corporation for the purpose of purchasing the property of the old corporation, and he purchased at the foreclosure sale and transferred the property to the new corporation which thereafter executed a mortgage and bonds to take up the bonds of the old company, a lien of said creditor which was held superior to the old bonds in the foreclosure suit is discharged by the foreclosure sale and not entitled to priority as against the new mortgage, regardless of any agreement in regard thereto between the creditor and the new corporation of which the bondholders had no notice.⁶³

The priority of a lien on railroad property in favor of a state or municipality to secure it for issuing or indorsing railroad bonds is generally determined by the statutes relating thereto.⁶⁴

Whether receiver's certificates are prior liens is considered in a subsequent chapter.⁶⁵

§ 1422. — What constitutes lien. Where one claims a lien superior to that of the mortgage, the question often resolves itself into whether the claimant really has any lien of any kind.⁶⁶

⁶¹ *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

⁶² *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. 232.

⁶³ *Venner v. Farmers' Loan & Trust Co. of New York*, 90 Fed. 348.

⁶⁴ *United States. Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999, aff'g 4 Dill. 87n, Fed. Cas. No. 7,740, 4 Dill. 78, Fed. Cas. No. 7,739; *Tompkins v. Little Rock & Ft. S. Ry. Co.*, 15 Fed. 6; *Union Pac. Ry. Co. v. United States*, 13 Ct. Cl. 401.

Alabama. Tennessee & C. R. Co. v. East Alabama Ry. Co., 73 Ala. 426; *Colt v. Barnes*, 64 Ala. 108.

Florida. State v. Jacksonville, P. & M. R. Co., 16 Fla. 708.

Maryland. Brown v. State, 62 Md. 439.

Minnesota. Minnesota & P. R. Co. v. Sibley, 2 Minn. 13.

South Carolina. Hand v. Savannah

& C. R. Co., 17 S. C. 219, 12 S. C. 314.

Tennessee. State v. Nashville, C. & St. L. R. Co., 7 Lea 15; *White v. Nashville & N. W. R. Co.*, 7 Heisk. 518.

⁶⁵ Chapter on Receivers, *infra*.

⁶⁶ A mere claim against a railroad company not reduced to judgment, which the purchaser of the road assumes as part of the consideration, does not thereby become a lien upon the property so as to be entitled to a priority over a mortgage executed by the purchasing company. *Fogg v. Blair*, 133 U. S. 534, 33 L. Ed. 721.

A railroad operating a branch line is not entitled to an equitable lien for betterments added to the property, as against a mortgage by the owner of the branch line, even if the operating agreement is *ultra vires*. *Terre Haute & I. R. Co. v. Harrison*, 88 Fed. 913.

If money is loaned to a corpora-

It has been held that a provision in an agreement giving a construction company all the earnings of the railroad "during construction" and "until accepted" is vague and indefinite and cannot be construed as giving a lien.⁶⁷

An agreement between certain bondholders and a third person that he should have a lien superior to the mortgage is, of course, not binding on bondholders who did not consent thereto.⁶⁸

The fact that bondholders buy their bonds with knowledge of a contract pledged by the mortgage for their security does not create a priority over subsequent lienholders of the obligor under the contract, where the contract created no lien, since they are chargeable with knowledge of the legal effect of the contract.⁶⁹

§ 1423. — Where old bonds exchanged for new. Of course, one holding bonds secured by a prior mortgage can surrender them in exchange for bonds secured by a subsequent mortgage so that he will lose any right to the prior security. In such cases it has been held that "the question must be resolved in each case upon the facts of the particular transaction. Where a novation is thus sought to be established, it must be shown that the substitution of the new obligation was with design and intent to extinguish the old obligation; and as such an act would, upon its face, appear to be against the interest of the holder of the bond, such intent will not be presumed, but must be clearly established." ⁷⁰

Furthermore, it is also held that "the equitable jurisdiction of a court of equity is not, however, limited to granting relief to a bond-

tion which owns all the capital stock of a railroad company, the lender has no equitable lien on the property of the railroad company entitled to priority over a mortgage executed by such company. *Exchange Bank of Macon v. Macon Const. Co.*, 97 Ga. 1, 33 L. R. A. 800, 25 S. E. 326.

A guarantor of a debt for property sold the mortgagor, who pays the debt, has no greater claim to a lien superior to a prior mortgage than the seller would have if not paid. *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co.*, 92 Fed. 246.

An order given by a company on its treasurer directing him to pay the holder a sum from the proceeds of the first sale of its bonds, creates no

lien on the property of the company afterwards transferred to a second company before the issuance of any bonds, so as to be entitled to priority over a subsequent mortgage executed by the second company. *Roberts v. Central Trust Co. of New York*, 128 Fed. 882, *aff'g* 110 Fed. 70.

⁶⁷ *Wright v. Kentucky & G. E. R. Co.*, 117 U. S. 72, 29 L. Ed. 821.

⁶⁸ *First Nat. Bank v. Wyman*, 16 Colo. App. 468, 66 Pac. 456.

⁶⁹ *Baker v. Central Trust Co. of New York*, 235 Fed. 17.

⁷⁰ *Mowry v. Farmers' Loan & Trust Co.*, 76 Fed. 38. See also *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759.

holder under a second mortgage against the claim of an intervening lien when there is some agreement or other evidence of an intention to continue the prior lien for the benefit of the holders of the second mortgage. The court may grant relief by way of subrogation when the prior lien has been surrendered and canceled in ignorance of the existence of the intervening lien, or where by reason of any other fact it would be manifestly inequitable to admit the claim of the intervening lien to a priority. In such case the holder of the second lien is deemed in equity to have succeeded to the right of the prior lien by an equitable assignment."⁷¹ Thus, where a second mortgage is executed to secure bonds to be issued in exchange for the first mortgage bonds, and an attachment is levied before the second mortgage is recorded, the rights of the bondholders who exchange their bonds is ordinarily superior to the lien of the attachment.⁷²

§ 1424. — Necessity for recording mortgage. The mortgage is not a lien, as against third persons, until recorded,⁷³ unless the subsequent lienor acquired his lien with knowledge of the unrecorded mortgage.⁷⁴ In this respect there is no difference between corporation mortgages and other mortgages.

Directors who take a mortgage in good faith from the corporation are not chargeable with notice of the after-acquired property provision in a prior mortgage executed several years before and long before they became stockholders or directors; and knowledge of one director is not imputed to codirectors.⁷⁵

§ 1425. — Claims for land purchased, condemned or injured. Liens for the purchase price of land conveyed directly to a railway company are superior to a mortgage.⁷⁶

⁷¹ *Griffin v. International Trust Co.*, 161 Fed. 48, distinguishing *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 29 L. Ed. 963, as a case where the acceptance of bonds issued under the second mortgage in substitution for first mortgage bonds was under an agreement for the cancellation of the lien of the first mortgage. . . . See also *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

⁷² *Griffin v. International Trust Co.*, 161 Fed. 48.

⁷³ *Claffin v. South Carolina R. Co.*,

4 *Hughes* (U. S.) 12, 8 Fed. 118; *Ludlow v. Clinton Line R. Co.*, 1 *Flip.* (U. S.) 25, Fed. Cas. No. 8,600; *Coe v. New Jersey M. Ry. Co.*, 31 N. J. Eq. 105, modified 34 N. J. Eq. 266.

⁷⁴ An attaching creditor, with knowledge of the mortgage, takes subject thereto although it was not recorded. *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199.

⁷⁵ *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255.

⁷⁶ *Central Trust Co. of New York v. Bridges*, 57 Fed. 753; *Hatry v.*

A claim for damages to property from taking land for a right of way is entitled to priority.⁷⁷ This is also true as to a claim for permanent injuries to property from the construction of a railroad.⁷⁸

§ 1426. Priorities as against unsecured creditors—General rules. Before insolvency, it is the rule in some states that creditors of a corporation have no equitable lien on its assets.⁷⁹ In any event, the mortgage has priority over unsecured claims,⁸⁰ including labor claims,⁸¹ except in so far as operating expenses for a short time before the trustee goes into possession or a receiver is appointed are concerned.⁸² Thus, legal services to the company, although beneficial to the bondholders, are not entitled to priority.⁸³ Likewise, a claim for materials furnished, where the claimants have no specific lien on the property, is not superior to the rights of bondholders, in distributing the proceeds of the property.⁸⁴

Painesville & Y. Ry. Co., 1 Ohio Cir. Ct. 426, 1 Ohio Cir. Dec. 238, aff'g 23 Cinc. L. Bul. 281; *Hand v. Savannah & C. R. Co.*, 12 S. C. 314. Contra, *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551, 1 Am. Rep. 203.

⁷⁷ *Central Trust Co. of New York v. Thurman*, 94 Ga. 735, 20 S. E. 141; *Pennsylvania Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138.

⁷⁸ *Fordyce v. Kansas City & N. Connecting R. Co.*, 145 Fed. 566; *Central Trust Co. of New York v. Hennen*, 90 Fed. 593.

⁷⁹ *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226.

"The doctrine that the property of a corporation is a trust fund for the benefit of its creditors does not go to the extent of giving the creditors a lien upon the property. It means only that the corporate debts must be paid before there can be a distribution of its property, or any part of it, to the stockholders and that equity will follow the property into the hands of the stockholders, or of a fraudulent grantee and apply it, or its equivalent, to the payment of the corporate debts, in a proper proceeding for that purpose."

Barrie v. United Rys. Co. of St. Louis, 125 Mo. App. 96, 102 S. W. 1078.

⁸⁰ *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. 684; *Barstow v. Pine Bluff, M. & N. O. Ry. Co.*, 57 Ark. 334, 21 S. W. 652; *Dunham v. Isett*, 15 Iowa 284.

⁸¹ *Security Trust Co. v. Goble R. Co.*, 44 Ore. 370, 75 Pac. 697, 74 Pac. 919.

⁸² See § 1428, *infra*.

⁸³ *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 52 Fed. 678.

⁸⁴ *Denniston v. Chicago, A. & St. L. R. Co.*, 4 Biss. (U. S.) 414, Fed. Cas. No. 3,800; *Farmers' Loan & Trust Co. v. Candler*, 92 Ga. 249, 18 S. E. 540.

One furnishing rails for a railroad has no lien prior to an existing mortgage. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199.

A debt for rolling stock acquired for additional motive power is not entitled to priority over the mortgage merely because such stock has passed under the mortgage and been added to the security of the mortgagee. *Gregg v. Mercantile Trust Co.*, 109 Fed. 220.

Unsecured claims for damages arising from negligence of the mortgagor railroad company before the appointment of receivers are not entitled to a preference over the mortgage.⁸⁵ And rent of track privileges accruing before the receivership has no right to a preference.⁸⁶ But while bondholders are entitled to priority over unsecured creditors, under most circumstances, yet it has been held that they cannot shut out unsecured creditors by consenting to a long lease, instead of a foreclosure sale, whereby the rent is to be paid to the bondholders without making any provision for paying the unsecured debts.⁸⁷

On the same theory, claims for money borrowed to pay interest on the bonds are not entitled to priority;⁸⁸ nor are advances to keep the mortgagor a going concern entitled to priority out of the proceeds of sale.⁸⁹ So premiums on policies of fire insurance, where not a lien by statute, are not entitled to priority, in favor of one paying them for the company, as against bondholders.⁹⁰

The fact that the proceeds of notes purchased from the railroad mortgagor were used in the construction of the road does not give the purchaser a lien superior to a prior mortgage.⁹¹

But if the trustee itself advances money to the corporation as a loan, secured by a pledge of certain of the bonds secured by the deed of trust, the trustee, as pledgee, has priority over the general creditors, where no duty of "selling" the bonds was imposed on him.⁹²

⁸⁵ *Atchison, T. & S. F. Ry. Co. v. Osborn*, 148 Fed. 606, 611; *St. Louis Trust Co. v. Riley*, 70 Fed. 32, 30 L. R. A. 456.

⁸⁶ *Louisville & N. R. Co. v. Central Trust Co. of New York*, 87 Fed. 500.

⁸⁷ *Farmers' Loan & Trust Co. v. Missouri, I. & N. Ry. Co.*, 21 Fed. 264.

⁸⁸ *Illinois Trust & Savings Bank v. Ottumwa Elec. Ry.*, 89 Fed. 235; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655.

A loan to pay interest on matured coupons is not entitled to priority over the mortgage. *Contracting & Building Co. of Kentucky v. Continental Trust Co. of New York*, 108 Fed. 1.

⁸⁹ *Morgan's Louisiana & T. R. & S. S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 34 L. Ed. 625. Contra, where

mortgagor was a street railway, see *Illinois Trust & Savings Bank v. Ottumwa Elec. Ry.*, 89 Fed. 235.

But it has been held that if third persons, at the request of the trustee, go on bonds in order to preserve the mortgaged property from sale, and to keep it a going concern, liability so incurred should be discharged out of the income or corpus of the property in preference to the claims of the bondholders. *Jones v. Central Trust Co. of New York*, 73 Fed. 568.

⁹⁰ *Jones v. Peeples*, 145 Ga. 335, 89 S. E. 195.

⁹¹ *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co.*, 92 Fed. 246.

⁹² *Vancouver Trust & Savings Bank v. Union Woollen Mills*, 85 Wash. 114, 147 Pac. 643.

§ 1427. — Construction claims. If priority is not given by statute, persons who furnish labor or materials for the construction of all or a part of the mortgaged property are not entitled to priority over a mortgage executed by the corporation;⁹³ and a recorded mortgage is entitled to priority over subsequent claims for materials and labor for the construction of permanent improvements necessary to the maintenance and operation of a quasi public corporation.⁹⁴ For instance, railroad contractors and laborers have no prior lien for labor performed or materials furnished in the construction of the railroad,⁹⁵ where a statute gives no priority.

In other words, there is a difference between claims for original construction and those which grow out of operating the completed road and keeping it a going concern.⁹⁶

In any event, a claim for services rendered in constructing a railway, with full knowledge of the existence of the mortgage, is not superior to the mortgage.⁹⁷

⁹³ Scrip for labor in constructing or repairing the works of an irrigation company, which scrip is payable only in the purchase of a permanent water right, is not entitled to priority over a prior mortgage lien. *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 501.

⁹⁴ *Farmers' Loan & Trust Co. v. American Waterworks Co.*, 107 Fed. 23.

⁹⁵ *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. (U. S.) 254, 17 L. Ed. 584; *Tommey v. Spartanburg & Asheville R. Co.*, 4 Hughes (U. S.) 640, 7 Fed. 429; *Barstow v. Pine Bluff, M. & N. O. Ry. Co.*, 57 Ark. 334, 21 S. W. 652. But see *Pittsburg Const. Co. v. West Side Belt R. Co.*, 232 Pa. 578, 81 Atl. 884, giving priority to the claim of a contractor constructing the railroad, where the work was commenced long before the mortgage was executed.

Unsecured floating debts for construction of a railroad are not a lien on the railroad superior to the lien of a duly recorded mortgage. *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 667, 30 L. Ed. 830; *Farm-*

ers' Loan & Trust Co. v. Stuttgart & A. R. R. Co., 92 Fed. 246.

A claim against a railroad company for building a bridge on its line is not entitled to priority over an existing mortgage. *International Trust Co. v. T. B. Townsend Brick & Contracting Co.*, 95 Fed. 850; *Cleveland, C. & S. Ry. Co. v. Knickerbocker Trust Co. of New York*, 86 Fed. 73.

Under Texas statutes, the rule applies unless the material was for new construction, constituting a betterment, and thus increasing the security of the mortgagee. *Waters-Pierce Oil Co. v. United States & M. Trust Co.*, 44 Tex. Civ. App. 397, 99 S. W. 212.

⁹⁶ *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co.*, 92 Fed. 246, and see chapter on Receivers, *infra*.

A debt for construction is not entitled to priority as an "operating expense." *Wood v. Guarantee Trust & Safe Deposit Co.*, 128 U. S. 416, 32 L. Ed. 472.

⁹⁷ *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 114 Mich. 494, 4 Det. L. N. 650, 72 N. W. 362.

A railroad mortgage of the road "built and to be built" is superior to the claim of a contractor who has afterwards completed an unbuilt part of the road under an agreement for his possession of the road and application of the earnings to the liquidation of his debt.⁹⁸

On the same theory, claims for advances made to a railroad company to complete its construction are not entitled to priority.⁹⁹

So a loan to a quasi public corporation upon a pledge or mortgage of its current income to enable it to construct a substantial and beneficial addition to its plant, which was necessary to the maintenance of the volume of its business, but was not indispensable to its continuance as a going concern, is not entitled in equity to a lien upon the income or corpus of the property superior to the lien of a prior mortgage which covered all the income and all the property acquired before and after its execution.¹ Likewise, a subsequent judgment is not entitled to priority over a prior mortgage on the ground that the judgment represents the cost of the construction for the mortgagor by the judgment creditor (a railroad company) of a commercial siding, although by the Interstate Commerce Act a common carrier is required to construct upon reasonable terms a switch connection with any private siding, where such connection is reasonable.²

However, independently of statute, a court of equity may prefer the claim of a bridge company for bridges built in constructing the railroad, as against a prior mortgage on the railroad property, where the mortgagee advancing the money for the construction of the road and taking charge of the disbursements could or should have seen that the proceeds of the loan went to pay for the constituent material going into the road.³

Where a street railroad company was required by its charter to pave between its tracks, such condition was held to be carried into a mortgage executed by it, so as to give priority over the mortgage to the lien of a materialman for material furnished for paving between the tracks.⁴

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⁹⁸ *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. (U. S.) 254, 17 L. Ed. 584.

⁹⁹ *In re* *Petition of Kelly v. Receiver of Green Bay & M. R. Co.*, 10 Biss. (U. S.) 151, 5 Fed. 846; *Meyer v. Johnston*, 53 Ala. 237.

¹ *Illinois Trust & Savings Bank v. Doud*, 105 Fed. 123, 52 L. R. A. 481, *aff'g* 89 Fed. 235.

² *Guaranty Trust Co. of New York v. Newark Meadows Improvement Co.* (N. J. L.), 94 Atl. 589.

³ *Trocon v. Scott City Northern R. Co.*, 91 Kan. 887, 139 Pac. 357.

⁴ *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291, 307, 48 L. R. A. 41, 56 N. E. 665, 55 N. E. 745.

§ 1428. — **Operating expenses.** To the rule that bondholders are entitled to priority over unsecured creditors, there is one exception, in that it is well settled, at least in the federal courts, that operating expenses are chargeable against the gross income of a railroad company before that net revenue arises which constitutes the fund applicable to the payment of interest on the mortgage bonds.⁵ But where the fund in court is the proceeds of the sale of the property, and represents its corpus, it cannot ordinarily be claimed that the unsecured debts of the insolvent railroad company are entitled to priority in the distribution of the proceeds of the sale over those creditors who are secured by prior or express liens,⁶ except where current earnings are used for the benefit of mortgage creditors before current expenses are paid, in which case the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.⁷

This modern rule of equity which gives priority to debts incurred in the operation of railroads over mortgages existing at the time of incurring such debts has been said to rest upon necessity and to have been evolved from conditions peculiar to the nature of railroad franchises,⁸ and it has been doubted whether the rule applies where the mortgaged property consists of canals and works for irrigating land.⁹ In any event, it does not apply to labor performed in original construction of irrigating works, such as constructing lateral ditches from the main canals, as distinguished from "operation."¹⁰ However, it has been held that in case of corporations which are not public service corporations, where upon default the mortgaged property is surrendered to the mortgagee, who, while in possession and before the final decree, employs labor and purchases supplies which are used to

⁵ St. Louis, A. & T. H. R. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 31 L. Ed. 832; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 30 Fed. 332; Calhoun v. St. Louis & S. E. Ry. Co., 9 Biss. (U. S.) 330, 14 Fed. 9.

⁶ St. Louis, A. & T. H. R. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 31 L. Ed. 832.

Statutes requiring labor claims accruing within six months before the appointment of a receiver to be paid out of the first earnings of the railroad company, do not apply to pay-

ments out of the corpus of the property and give no prior lien in regard thereto. Security Trust Co. v. Goble R. Co., 44 Ore. 370, 379, 75 Pac. 697, 74 Pac. 919.

⁷ St. Louis, A. & T. H. R. R. Co. v. Cleveland, C., C. & I. R. Co., 125 U. S. 658, 31 L. Ed. 832.

⁸ California Safe-Deposit & Trust Co. v. Yakima Inv. Co., 82 Fed. 542.

⁹ California Safe-Deposit & Trust Co. v. Yakima Inv. Co., 82 Fed. 542.

¹⁰ California Safe-Deposit & Trust Co. v. Yakima Inv. Co., 82 Fed. 542.

improve and preserve the property and to increase its value as security, it is proper for the court to make the claims for such labor and materials liens paramount to the lien of the mortgage.¹¹

Generally, this rule as to preferential claims for labor and supplies to keep the mortgagor a going concern applies only where there is a receivership,¹² although it has been held that where the trustee, on default, takes possession of the mortgaged property, his expenses while in possession are a preferred claim prior to the claims of bondholders,¹³ and that where an insolvent railroad, after a default authorizing the trustee to take possession and run the road, is being run by a committee representing nearly all the holders of the bonds and stock, indebtedness incurred by it in operating, for supplies, etc., should be paid out of the proceeds of the foreclosure sale before distributing any of the proceeds between the bondholders.¹⁴

The right to a preference in case of an unsecured claim is not lost by prosecuting an action on such claim to final judgment.¹⁵

These questions ordinarily arise only in connection with receiverships, and hence it has been deemed advisable to defer any extended consideration of the question in this chapter and to treat the whole matter in the chapter on receivers.

§ 1429. Priorities as to after-acquired property—General rule.

A mortgage containing an after-acquired property clause creates a lien on such property, when acquired, superior to the rights of all unsecured creditors¹⁶ or subsequent mortgages.¹⁷

¹¹ Commonwealth Trust Co. v. Cockerill Zinc Co., 86 Kan. 860, 122 Pac. 875.

¹² Louisville & N. R. Co. v. Memphis Gaslight Co., 125 Fed. 97.

¹³ Mersick v. Hartford & W. H. Horse R. Co., 76 Conn. 11, 100 Am. St. Rep. 977, 55 Atl. 664.

¹⁴ Queen Anne's Ferry & Equipment Co. v. Queen Anne's R. Co., 148 Fed. 41, aff'd 162 Fed. 828.

¹⁵ Central Trust Co. v. Clark, 81 Fed. 269, 272.

¹⁶ Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. Ed. 199.

A mortgage covering real and personal property, including after-acquired property, creates a lien on per-

sonal property subsequently acquired and necessary to the mortgagor's business, superior to general creditors. Stratton v. Natural Carbonic Gas Co., 189 Fed. 928, reviewing New York decisions.

A mortgage on after-acquired property of an electric company is entitled to priority as to poles and wires belonging to it and placed on the land of another by an agreement with him made after the mortgage was recorded, as against the claims of the landowner. Monmouth County Elec. Co. v. Central R. Co. (N. J. Eq.), 54 Atl. 140.

¹⁷ Where the property mortgaged consists in part of bonds to be there-after delivered to the mortgagor, and

On the other hand, the mortgagee stands in no better position than the mortgagor, so far as after-acquired property is concerned, and the lien attaches only to that which the mortgagor actually acquires.¹⁸

The bondholder's lien on such after-acquired property is subject to any liens or equities with which it is impressed when it comes into the company's hands.¹⁹ The after-acquired clause attaches to the interest acquired by the mortgagor only, and it is always subject and inferior to junior liens, incumbrances and equities under which the property comes to the mortgagor.²⁰

The rule has been clearly stated in a federal decision by Judge Taft, as follows: "The limitations of the rule are clearly drawn in the foregoing cases. The chief is that the mortgagee of after-acquired property is not a purchaser for value, and cannot acquire an interest by way of lien greater than that which the mortgagor has himself acquired. The lien of the mortgage attaches to after-acquired property in the condition in which the mortgagor takes it from his vendor, and subject to all known liens and equities valid against the vendor, and also subject to all liens or equities valid against the vendee and mortgagor which arise in the act of purchase or acquisition, and therefore necessarily qualify its scope and extent."²¹ For instance, a vendor's lien on the property, good against the mortgagor, is prior in right to that of the mortgagee under an after-acquired clause;²²

it deposits certain of such bonds when issued with the government authorities as security and then makes another mortgage covering such bonds, the lien of the first mortgage on the bonds is superior to that of the second mortgage, although the bonds were subsequently actually delivered to the trustee in the second mortgage, at least where the bondholders under the second mortgage are not bona fide holders. *Central Trust Co. of New York v. West India Improvement Co.*, 169 N. Y. 314, 62 N. E. 387, rev'g 48 N. Y. App. Div. 147, 63 N. Y. Supp. 853.

¹⁸ *State Bank of Chicago v. Idaho-Oregon Light & Power Co.*, 219 Fed. 594.

¹⁹ *United States v. New Orleans & O. R. Co.*, 12 Wall. (U. S.) 362, 20 L. Ed. 434; *In re Frederica Water, Light*

& Power Co. (Del.), 93 Atl. 376, applying the rule to a conditional sale of chattels intended to become fixtures.

²⁰ *Central Improvement Co. v. Cambria Steel Co.*, 201 Fed. 811, where lien of mortgage on shares of stock subsequently acquired was held inferior to rights of pledgee of stock; *Dunham v. Cincinnati, P. & C. R. Co.*, Fed. Cas. No. 4,148; *Reed v. Ginsburg*, 64 Ohio St. 11, 59 N. E. 738; *Flanagan Bank v. Graham*, 42 Ore. 403, 71 Pac. 137, 790; *Murray v. Farmville & P. R. Co.*, 101 Va. 262, 43 S. E. 553.

²¹ *Harris v. Youngstown Bridge Co.*, 90 Fed. 322.

²² *Venner v. Farmers' Loan & Trust Co. of New York*, 90 Fed. 348; *Monmouth County Elec. Co. v. McKenna*, 68 N. J. Eq. 160, 60 Atl. 32.

but such a lien will not be awarded priority where to do so would be unfair to the mortgagee and bondholders.²³ So a purchase money mortgage upon after-acquired property is not displaced by the lien of a prior mortgage containing an after-acquired property clause, because in equity the purchaser is regarded as taking only the difference between the value of the property and the amount still due on the price.²⁴ Furthermore, where, at the instance of the mortgagor, a third person pays the purchase money for additions, and takes title to them himself, or directs their conveyance directly to the mortgagor, with the express agreement that he shall have a lien for the purchase money, such lien is prior to that of the mortgage, since it is only through his expenditure that the purchase is effected and the addition acquired.²⁵

Claims for land condemned are entitled to priority over an after-acquired clause in a mortgage.²⁶ So a judgment on an award of damages for land condemned by a railroad company for a right of way is a prior lien to that of a mortgage executed before the condemnation proceedings were instituted.²⁷

§ 1430. — Application of rule to conditional sales, leases, etc. In cases of conditional sales to the mortgagor, the mortgagee obtains a lien subject to the same defeasance or forfeiture as that to which the title of his mortgagor is subject.²⁸ For instance, conditional sales, or leases which are in effect conditional sales, of rolling stock, are generally held to create rights in the seller or lessor, on failure to make payments, superior to the rights of a mortgagee under an after-acquired clause.²⁹ And it is immaterial, in such a case, whether the

²³ *Venner v. Farmers' Loan & Trust Co. of New York*, 90 Fed. 348, where creditor of old corporation organized a new corporation practically owned by himself and then sold to such new corporation the property of the old corporation which he had bought at the foreclosure sale under the mortgage executed by the old company.

²⁴ *United States v. New Orleans & O. R. Co.*, 12 Wall. (U. S.) 362, 20 L. Ed. 434.

²⁵ *Harris v. Youngstown Bridge Co.*, 90 Fed. 322.

²⁶ *Central Trust Co. of New York v. Louisville, St. L. & T. Ry. Co.*, 81 Fed. 772; *Penn Mut. Life Ins. Co. v.*

Heiss, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138.

²⁷ "The plaintiffs' mortgage lien could attach only to the interest of the railroad company in the right of way, which was always subject to the charge or lien of the award which determined the amount of the damages." *Commonwealth Trust Co. v. Scott City Northern R. Co.*, 93 Kan. 340, 144 Pac. 210.

²⁸ *Washington Trust Co. of New York v. Morse Iron Works & Dry Dock Co.*, 106 N. Y. App. Div. 195, 94 N. Y. Supp. 495, modified 187 N. Y. 307, 79 N. E. 1022.

²⁹ *Meyer v. Western Car Co.*, 102 U.

contract of sale or lease is recorded as required by statute, as against an after-acquired clause in the mortgage.³⁰

In some states, however, similar transactions are held to be chattel mortgages so that they must be recorded, at least in order to create a lien as against other general creditors or purchasers.³¹

§ 1431. — Exception to rule in case of fixtures. There is a further rule that where personalty is so attached to real property as to become a fixture, the lien of the mortgage covering the realty necessarily covers the fixtures as part of the land, and all liens attaching to the fixtures merely as personalty are displaced by it.³² Thus, it

S. 1, 26 L. Ed. 59; *Fosdick v. Southwestern Car Co.*, 99 U. S. 256, 25 L. Ed. 344; *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339; *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. 123; *Meyer v. Johnston*, 53 Ala. 237.

Under the Ohio statutes, the right of one who makes a conditional sale of equipment to a railroad company is, on default in payment, to retake the property, or if the mortgagees elect to retain the property, then to a first lien on the property of the railroad company for the amount unpaid. *Metropolitan Trust Co. City of New York v. Columbus, S. & H. R. Co.*, 93 Fed. 702.

However, if the seller of locomotives is paid eighty per cent. of the price and takes indorsed notes of the company for the balance, the claim is not entitled to priority over existing mortgages. *Continental Trust Co. City of New York v. Toledo, St. L. & K. C. R. Co.*, 93 Fed. 532.

³⁰ *Myer v. Western Car Co.*, 102 U. S. 1, 26 L. Ed. 59, construing Iowa statute; *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, construing Illinois statute; *United States v. New Orleans & O. R. Co.*, 12 Wall. (U. S.) 362, 20 L. Ed. 434; *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 76 Fed. 658; *Newgass v. Atlantic & D. Ry. Co.*, 56 Fed. 676, construing Virginia statutes; *Central Trust Co. New York*

v. Marietta & N. G. Ry. Co., 48 Fed. 868.

³¹ *Heryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160, decided under Missouri statute; *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. 123, under Colorado statute; *Barney & Smith Mfg. Co. v. Hart*, 8 Ky. L. Rep. 223, 1 S. W. 414. To the same effect, see *Potter v. Boston Locomotive Works*, 12 Gray (Mass.) 154.

³² "This is really based on the doctrine of accession. The personalty has been converted into realty. The only remedy of the owners or lienors of the personalty is personal against the converter, and their remedy against the res is destroyed by its ceasing to be." *Harris v. Youngstown Bridge Co.*, 90 Fed. 322.

This rule is applied to bridges which become affixed to and part of the railroad. *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 30 L. Ed. 1210.

Machinery constituting the steam plant and motive power for a railroad, without which the railroad could not be operated, becomes, when furnished, an integral part of the railway system, and passes as after-acquired property so as to make the mortgage a lien superior to the claims of the seller of the property who reserved title until full payment made, although such payment has not been

is generally held that, "as to materials that are affixed to and made a part of a railroad which is subject to a mortgage, both present and future property will be subject to the lien of such mortgage in favor of bona fide mortgage bondholders, in superiority to any contract between the vendor of the property and the railroad company." ³³

Rights of way in streets, as granted by a city franchise, pass as after-acquired property immediately upon the passage of the ordinance, and improvements upon the rights of way only increase the security by becoming part of the realty, and hence, if a railroad has a right of way, a railroad built thereon is subject to a prior mortgage of the road containing the after-acquired clause, and the lien is superior to that of the contractor. ³⁴

A previous agreement, to which the mortgagee is not a party, that the chattel shall not become or be deemed part of any real estate, has no legal effect with regard to the priority of the mortgage. ³⁵ However, if the railroad mortgagor purchases iron under an agreement that the vendor shall retain a lien, and the trustee of the mortgage assents thereto, the mortgage is inferior to the lien, notwithstanding the iron is laid on the tracks. ³⁶

§ 1432. — Exception to rule where lien not bona fide or subsequent.

If the lien claimed to be superior to the lien of the bondholders was not acquired until after the title passed to the mortgagor or is not a bona fide lien, but instead is a device to defraud the bondholders, the lien of the mortgage is entitled to priority. ³⁷ Thus it has been said

made. *Phoenix Iron-Works Co. v. New York Security & Trust Co.*, 83 Fed. 757, aff'g 77 Fed. 529. For an application of this rule to engines made a part of the plant, see *Guaranty Trust Co. of New York v. Galveston City R. Co.*, 107 Fed. 311.

A street railway mortgage covering after-acquired machinery furnished for the railway power house, such machinery being a fixture, is superior to the right of the vendor under a contract reserving title. *Detroit Trust Co. v. Detroit, F. & S. Ry.*, 159 Mich. 442, 454, 124 N. W. 45.

Under the so-called Massachusetts rule, approved by the federal courts, where a corporate mortgage contains an after-acquired property clause, it

covers a standpipe afterwards constructed by the mortgagor, a water company, notwithstanding the contract for its construction reserved title in the contractors with the right to remove it if the price was not paid. *Tippett & Wood v. Barham*, 180 Fed. 76, 37 L. R. A. (N. S.) 119.

³³ *Haynes v. Kenosha St. Ry. Co.* (Wis.), 119 N. W. 568.

³⁴ *Harris v. Youngstown Bridge Co.*, 90 Fed. 322.

³⁵ *New York Security & Trust Co. v. Capital Ry. Co.*, 77 Fed. 529.

³⁶ *Pierce v. Emery*, 32 N. H. 484.

³⁷ *McGourkey v. Toledo & O. Cent. R. Co.*, 146 U. S. 536, 567, 36 L. Ed. 1079; *Knowles Loom Works v. Ryle*,

that if that "which is given the appearance of a vendor's or purchase-money lien is really only a device to secure money borrowed for other purposes of the mortgagor than the buying of the addition in question, then the attempt to supplant the first lien of the mortgage under the after-acquired property clause is a fraud upon the mortgagee, and the pseudo purchase-money lien must be postponed to that of the mortgage."³⁸

§ 1433. — Effect of acquisition of equitable or legal title. If the mortgagor acquires an equitable title after the execution of the mortgage, claims accruing after such title has been created, although before a legal title is acquired, are not entitled to priority.³⁹

A mortgage covering after-acquired property of a mining company creates a lien on a legal title to property afterwards acquired in place of the equitable title, which lien is superior to the lien of a subsequent incumbrancer.⁴⁰

§ 1434. — Mortgage of property not in existence. It has been held that there is "a clear distinction between the obligations of a mortgagor under a mortgage in which the property described as mortgaged, though definitely described, is yet to be bought and constructed, and the obligations of one under a mortgage in which the property described as mortgaged is in existence as a completed thing, and the after-acquired property clause is inserted only to increase the original security. In the former class of cases the mortgagor is impliedly bound to buy and complete the thing mortgaged as described, and bring it under the lien of the mortgage, without burden or incumbrance. * * * In the latter class of cases the mortgagor is bound neither to make additions, nor, if he does make them, to free them from prior liens arising in and out of the act of acquisition."⁴¹

97 Fed. 730; *Central Trust Co. v. Ohio Cent. R. Co.*, 36 Fed. 520, 537.

This rule was applied to a landlord's lien not created until after the mortgage lien attached. *Manhattan Trust Co. v. Sioux City & N. Ry. Co.*, 68 Fed. 72.

³⁸ Per Judge Taft in *Harris v. Youngstown Bridge Co.*, 90 Fed. 322.

³⁹ *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. Ed. 905, distinguishing *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn. 454, and

Williamson v. New Jersey Southern R. R., 28 N. J. Eq. 277, rev'd 29 N. J. Eq. 311; *In re Columbus, S. & H. R. Co.'s Appeal*, 109 Fed. 177, 206.

⁴⁰ *United States Mortgage & Trust Co. v. Eastern Iron Co.*, 120 N. Y. App. Div. 679, 105 N. Y. Supp. 291, aff'd without opinion in 195 N. Y. 589, 89 N. E. 1114, holding that the rule governing railroad mortgages is applicable.

⁴¹ Per Judge Taft in *Harris v. Youngstown Bridge Co.*, 90 Fed. 322.

§ 1435. Priorities as affected by statutes—General rules. The questions whether a lien is in any case created, either under a general or a special statute, whether a general lien law applies to railroads, and whether a particular act comes within the statute, railroad or general, so as to create a lien, are all governed by local statutes, and it would be both a waste of time and space to attempt to state and construe the particular statutes in the different states. Suffice it to state that certain liens or claims are often given priority over earlier mortgages, by express statutory provisions;⁴² but statutes giving priority to certain liens which would otherwise not be entitled to priority, being in derogation of the common law and intended to displace a vested lien, must be strictly construed,⁴³ and ordinarily statutes giving liens priority over earlier mortgages do not affect mortgages existing when the statute was passed.⁴⁴

This priority is often given to claims of laborers or claims for materials furnished,⁴⁵ especially in case of railroad contractors and

⁴² *New Castle Northern Ry. Co. v. Simpson*, 26 Fed. 133; *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. 232.

Where a statute permitting foreign corporations to transact business within the state expressly includes in its regulations one that mortgage liens upon property within the state shall be postponed to judgments on certain demands, such statute gives a priority to such judgments as to property within the state, over mortgages executed after the enactment of the statute. *King v. Thompson*, 110 Fed. 319, construing Ohio statute.

The priority between a street railway mortgage and special street assessments depends on the wording of the governing statute. *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469, 485, 93 N. W. 766.

State statutes may give to citizens of the state a lien on personal property of railroad companies thereafter organized superior to all mortgages, to the extent of one hundred dollars. *Brown v. Ohio Valley Ry. Co.*, 79 Fed. 176.

⁴³ *Fidelity Insurance, Trust & Safe-*

Deposit Co. v. Norfolk & W. R. Co., 90 Fed. 175.

⁴⁴ *Central Trust Co. of New York v. Louisville, St. L. & T. Ry. Co.*, 70 Fed. 282; *Phinizy v. Augusta & K. R. Co.*, 63 Fed. 922; *Feike v. C. & E. R. Co.*, 12 Ohio Cir. Ct. 362, 5 Ohio Cir. Dec. 640.

⁴⁵ *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 27 L. Ed. 1081; *Fox v. Seal*, 22 Wall. (U. S.) 424, 22 L. Ed. 774, construing Pennsylvania statute; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co.*, 81 Fed. 439, holding, however, under Virginia statute, that salary claims by officers of the corporation were not labor claims; *M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co.*, 132 Mich. 285, 93 N. W. 611; *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

In some states, statutes give a priority to railroad creditors "for services rendered and materials furnished to keep the railroad * * * in repair, and to run the same." *Bell v. St. Johnsberry & L. C. R. Co.*, 76 Vt. 42, 56 Atl. 105, holding, however, that

laborers.⁴⁶ A lien given to employees by statute for wages does not take precedence, however, over a purchase money mortgage nor is it a prior lien on property which was already mortgaged when purchased by the employer.⁴⁷

Statutes sometimes give a priority to all debts existing before the execution of the mortgage.⁴⁸

Statutes in Mississippi make debts contracted in carrying on the business of a railroad superior to mortgages.⁴⁹

General lien laws are ordinarily not applicable to railroad property.⁵⁰ Statutes giving a priority to contractor's and other like claims against a railroad company, as against a subsequent mortgage, do not invalidate such a mortgage as between the parties.⁵¹

A statute giving priority to claims against railroads for "loss of property while in the possession of said corporation" does not apply

no priority is thereby given to a claim for stationery and printing.

If a labor claim is entitled to a preference, such right passes to an assignee of the claim. In re Columbus, S. & H. R. Co.'s Appeal, 109 Fed. 177.

An apparatus for kiln drying lumber is not a part of the "supplies necessary to the operation" of a sawmill, so as to be within a statute giving such claims priority. Boston Blower Co. v. Carman Lumber Co., 94 Va. 94, 26 S. E. 390.

In Iowa, however, Code, §§ 4019, 4020, which render the property of a corporation held in custodia legis, through the medium of some process of court, or by a receiver, trustee or assignee, subject to labor liens, are not applicable to a foreclosure by notice and sale. Wells v. Kelley, 121 Iowa 577, 96 N. W. 1104.

⁴⁶ Brooks v. Burlington & S. W. Ry. Co., 101 U. S. 443, 25 L. Ed. 1057; Fox v. Seal, 22 Wall. (U. S.) 424, 22 L. Ed. 774, construing Pennsylvania statute; St. Louis & P. R. Co. v. Kerr, 153 Ill. 182, 38 N. E. 638, aff'g 48 Ill. App. 496; Kilpatrick v. Kansas City & B. R.

Co., 38 Neb. 620, 41 Am. St. Rep. 741, 57 N. W. 664.

The claim of a telegraph company against a railroad company for services was held a labor claim within the Virginia statute. Newgass v. Atlantic & D. Ry. Co., 72 Fed. 712.

⁴⁷ M. A. Furbush & Sons Mach. Co. v. Liberty Woolen Mills, 81 Fed. 425, construing Virginia statute.

⁴⁸ Traders' Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298, 305, 3 S. E. 363.

⁴⁹ Farmers' Loan & Trust Co. v. Vicksburg & M. R. Co., 33 Fed. 778; Magruder v. Hattiesburg Trust & Banking Co., 108 Miss. 857, 67 So. 485, holding that the particular mortgage, although using the word "franchises," was not within the statute, no franchise being described; New Orleans, M. & C. R. Co. v. Carter, 107 Miss. 1, 64 So. 842.

⁵⁰ Buncombe County Com'rs v. Tommey, 115 U. S. 122, 29 L. Ed. 305, construing North Carolina statute.

⁵¹ Fidelity Title & Trust Co. v. Schenley Park & H. Ry. Co., 189 Pa. St. 363, 69 Am. St. Rep. 815, 42 Atl. 140.

to a claim arising out of an executory contract in respect to the operation of another road outside of the state.⁵²

§ 1436. — Mechanics' liens. Priorities between the mortgage lien and mechanics' liens depend on the wording of the governing statute.⁵³ Reference should be made to the statutes and to standard textbooks dealing with the law relating to mechanics' liens, there being no questions involved peculiar to the law of corporations.

§ 1437. — Judgments for torts or labor. Statutes in some states make judgments against railroad companies, or all corporations, for injuries to person, property, etc., a prior lien.⁵⁴ Thus, in North Caro-

⁵² *Grand Trunk Ry. Co. v. Central Vermont R. Co.*, 91 Fed. 696, construing Vermont statute.

⁵³ *United States. Meyer v. Hornby*, 101 U. S. 728, 25 L. Ed. 1078, under Iowa statute, following *Brooks v. Railway Co.*, 101 U. S. 443, 25 L. Ed. 1057; *Meyer v. Delaware R. R. Const. Co.*, 100 U. S. 457, 25 L. Ed. 593, under Iowa laws; *Richmond & I. Const. Co. v. Richmond, N. I. & B. R. Co.*, 68 Fed. 105, 34 L. R. A. 625; *Taylor v. Burlington, C. R. & M. Ry. Co.*, 4 Dill. 570, Fed. Cas. No. 13,783, Iowa law.

Colorado. *State Bank of Chicago v. Plummer*, 54 Colo. 144, 120 Pac. 819.

Indiana. *Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co.*, 127 Ind. 250, 11 L. R. A. 740, 26 N. E. 784; *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680.

Iowa. *Beach v. Wakefield*, 107 Iowa 567, 581, 78 N. W. 197, 76 N. W. 688; *Bear v. Burlington, C. R. & M. R. Co.*, 48 Iowa 619.

Kentucky. *Montgomery v. Allen*, 107 Ky. 298, 308, 53 S. W. 813, holding terms "railroad or other public improvement" included street railway.

Ohio. *Reed v. Ginsburg*, 64 Ohio St. 11, 59 N. E. 738.

In Pennsylvania, under the 1901 statute, if the bonds are issued to raise money for the general purposes

of the corporation, and are sold in the ordinary course of business without knowledge by, or notice to the purchasers, of any particular use to which the money was to be applied, the bonds are superior to mechanics' liens created after the recording of the mortgage. *Rauch v. Island Park Ass'n*, 226 Pa. 178, 75 Atl. 202.

⁵⁴ *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 70 Fed. 764, Tennessee statute; *Southern Ry. Co. v. Bouknight*, 70 Fed. 442, 30 L. R. A. 823, construing South Carolina statutes; *Chattanooga, R. & C. R. Co. v. Evans*, 66 Fed. 809, 818, construing Tennessee statute; *Central Trust Co. of New York v. Charlotte, C. & A. R. Co.*, 65 Fed. 257; *Central Trust Co. of New York v. Bridges*, 57 Fed. 753, construing Tennessee statute; *Frazier v. East Tennessee, V. & G. Ry. Co.*, 4 Pickle (Tenn.) 138, 12 S. W. 537.

Costs necessarily resulting in action are also entitled to priority, under the Iowa statute. *Central Trust Co. v. Central Iowa Ry. Co.*, 38 Fed. 889.

A statute giving priority to judgments for damages to persons and property in the operation of the railroad, does not give the holder of such a judgment priority where he has failed, after notice, to participate in general creditors' proceedings and

lina, a statute provides that corporations cannot mortgage their property so as to exempt it from execution for the satisfaction of any judgment obtained in the state against the corporation for labor performed or for torts whereby any person was killed or any person or property injured.⁵⁵ This statute applies only to property within the state⁵⁶ and does not apply to a judgment against the lessee of a railroad so as to give it priority over a prior mortgage given by the lessor.⁵⁷ Under all these statutes, there must be a judgment,⁵⁸ although it is held that it is immaterial that the mortgaged property was sold under the mortgage before the judgment was recovered.⁵⁹

Where a statute gives priority to a judgment against a railroad company for personal injuries, there is no priority where such a judg-

the whole estate has been wound up. *Hill v. Southern Ry. Co.* (Tenn. Ch. App.), 42 S. W. 888.

⁵⁵ *Trust Co. of America v. Norfolk & S. Ry. Co.*, 183 Fed. 803, aff'd 190 Fed. 737; *Dunavant v. Caldwell & N. R. Co.*, 122 N. C. 999, 29 S. E. 837.

Action against a water company for loss from fires because of inadequate water supply is an action for a tort within this statute. *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 50 L. Ed. 367, aff'g 115 Fed. 184.

It is immaterial that the action on which the judgment was founded was not brought within sixty days of the registration of the mortgage. *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, 61 Fed. 369.

Such priority is also effective against a prior mortgage and bonds executed by another corporation whose property was purchased at a second mortgage foreclosure by the corporation against which the judgment was rendered, where the new corporation assumed the payment of the old mortgage and the old corporation was ipso facto dissolved by the foreclosure sale. *Guardian Trust & Deposit Co. v. Greensboro Water Supply Co.*, 115 Fed. 184, aff'd 200 U. S. 57, 50 L. Ed. 367.

Under an earlier statute which also covered judgments for materials furnished it was held that a steam engine and boiler are not "materials furnished," where not necessary to the conduct and continuation of the business. *James v. Greenville Lumber Co.*, 122 N. C. 157, 29 S. E. 358. Nor is an electric dynamo or other like machinery, perfect in itself and capable of being used in one place as well as another, "material." *General Elec. Co. v. Morganton Elec. Light & Power Co.*, 122 N. C. 599, 30 S. E. 314.

⁵⁶ *Fidelity Insurance, Trust & Safe Deposit Co. v. Norfolk & W. R. Co.*, 114 Fed. 389.

⁵⁷ *Hampton v. Norfolk & W. Ry. Co.*, 127 Fed. 662, aff'g 114 Fed. 389; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Norfolk & W. R. Co.*, 90 Fed. 175.

⁵⁸ *Burlington, C. R. & M. R. Co. v. Verry*, 48 Iowa 458.

Such a statute does not apply to a judgment recovered against the mortgagor for a tort committed after the sale. *Julian v. Central Trust Co. of New York*, 115 Fed. 956, aff'd 193 U. S. 93, 48 L. Ed. 629.

⁵⁹ *Wilmington & W. R. Co. v. Burnett*, 123 N. C. 210, 31 S. E. 602.

ment is reversed before the foreclosure sale and a new judgment is not obtained until after the sale and conveyance.⁶⁰

It is generally held that a statute making judgments against "any railway corporation" for injury to person or property a lien prior to a mortgage, does not apply to street railroads.⁶¹

§ 1438. Taxes as prior lien. Generally, by statute, taxes are a prior lien as against the mortgage.⁶²

It has been held that one who advances money to pay taxes is entitled to priority over the mortgage,⁶³ although it has also been held that one who advanced money to the railroad mortgagor, at its request, to pay taxes nearly a year before the trustee took possession, was not entitled to a preference over the bondholders.⁶⁴

§ 1439. Preferred stock as prior lien. Preferred stock may be made a prior lien,⁶⁵ and may be issued so as to be a lien second only to an existing mortgage.⁶⁶ So it may be made an equitable lien, as against subsequent incumbrancers with knowledge of the agreement.⁶⁷

§ 1440. Who may question priority. A person having an alleged prior lien need not intervene in the foreclosure suit, and his rights are not barred unless he is made a party to the foreclosure suit and a reasonable time given him to present his claim and be heard.⁶⁸

⁶⁰ *Winter v. Iowa Cent. Ry. Co.*, 111 Iowa 342, 82 N. W. 760.

⁶¹ *Central Trust Co. of New York v. Warren*, 121 Fed. 323, construing Montana statute; *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed. 588, construing Montana statute; *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. 82, construing Iowa statute; *Fidelity Loan & Trust Co. v. Douglas*, 104 Iowa 532, 73 N. W. 1039; *Daly Bank & Trust Co. v. Great Falls St. R. Co.*, 32 Mont. 298, 80 Pac. 252.

⁶² *First Nat. Bank of Houston v. Ewing*, 103 Fed. 168.

⁶³ *Farmers' Loan & Trust Co. v. Stuttgart, & A. R. R. Co.*, 92 Fed. 246; *Humphreys v. Allen*, 100 Ill. 511.

⁶⁴ *Mersick v. Hartford & W. H. Horse R. Co.*, 76 Conn. 11, 100 Am. St. Rep. 977, 55 Atl. 664.

⁶⁵ "It was the duty of the railroad company to pay the taxes, and Patter-

son, at the request of the company, paid its debt. The railroad company could not, by their agreement with Patterson, give him a lien or claim upon the body of the mortgaged property which would take precedence over that of the bondholders. The transaction was a loan by Patterson to the company, and he did not thereby acquire such a lien upon the mortgaged property as the state may have had." *Mersick v. Hartford & W. H. Horse R. Co.*, 76 Conn. 11, 100 Am. St. Rep. 977, 55 Atl. 664.

⁶⁶ *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 95 Fed. 497.

⁶⁷ *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 86 Fed. 929.

⁶⁸ *Skiddy v. Atlantic, M. & O. R. Co.*, 3 Hughes (U. S.) 320, Fed. Cas. No. 12,922.

⁶⁹ *Trust Co. of America v. Norfolk*

The right of a general creditor who intervened in the foreclosure suit to contest the question of priority of other asserted liens is not lost because his petition in intervention contained no averment as to the pledging of bonds, which pledge is alleged to be invalid, where the bill contained no averment as to such pledge.⁶⁹

& S. Ry. Co., 183 Fed. 803, aff'd 190
Fed. 737.

⁶⁹ Farmers' Loan & Trust Co. v.
San Diego St. Car Co., 45 Fed. 518.

CHAPTER 35

EXECUTION OF CORPORATE INSTRUMENTS

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- § 1443. — Affidavits.
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I. GENERAL CONSIDERATIONS

§ 1441. **Scope of chapter.** In prior chapters there have been fully treated all questions relating to the power of corporations to make contracts,¹ and the necessity for, sufficiency of, and effect of, seals.² In subsequent chapters will be considered the power of particular officers to make contracts,³ the powers and duties of directors in connection therewith,⁴ and the effect of ultra vires and illegal contracts.⁵

§ 1442. **Form and contents—In general.** So far as the body of the contract is concerned, no special rules apply, except that if the contract is intended to bind only the corporation, it should clearly appear as one of the parties, and the promises and covenants should be in its name. Unless there is a statutory provision to the contrary, corporations may make their contracts in the same manner as individuals.⁶

A corporate contract may take the form of a resolution of the board of directors.⁷ But it is well settled that it is not necessary that a resolu-

¹ See Chap. 22.

² See Chap. 19.

³ See chapter on Officers and Agents, infra.

⁴ See chapter on Directors, infra.

⁵ See Chap. 37 and Chap. 38.

⁶ *University of Alabama v. Moody*, 62 Ala. 389; *Blunt v. Walker*, 11 Wis. 334, 349, 78 Am. Dec. 709.

⁷ *Schless v. Poe*, 128 Md. 352, 97

tion should be passed by the board of directors in order to bind the corporation in such matters as the employment of its servants.⁸

§ 1443. — Affidavits. Affidavits required to accompany corporate instruments can, of course, be made only by some person acting for the corporation. The question has arisen in such cases whether in signing such an affidavit the signer is in reality the corporation, or is to be considered as merely an agent within the rules requiring an agent, where he makes such an affidavit, to show his authority, etc.; and it is held that an affidavit made by the president, secretary, or other proper officer, acting in behalf of the corporation, is the affidavit of the corporation itself, as distinguished from the act of an agent or attorney.⁹ And where a mortgage purports to be that of a corporation and executed by the directors in the corporate name, the directors, in signing the oath, need not profess to act for the corporation, and the certificate need not show that they acted for the corporation.¹⁰ Thus, where a statute required an affidavit of consideration to be annexed to chattel mortgages, it is sufficient, where the mortgagee is a corporation, to recite that the affiant is the vice president of the corporation, without further stating that he is the agent or attorney of the corporation, that he was duly appointed and acting under corporate authority.¹¹

Atl. 649, holding that legal effect of resolution cannot be changed by a memorandum on the records after the adjournment of the meeting, without the consent of the other parties.

⁸ *Allen v. Central Counties Land Co.*, 21 Cal. App. 163, 131 Pac. 78.

⁹ *District of Columbia. International Seal Co. v. Beyer*, 33 App. Cas. 172, 175.

New Jersey. *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822, 68 Atl. 1078; *New Brunswick Steamboat & Canal Transp. Co. v. Baldwin*, 14 N. J. L. 440; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L. R. A. 588, 21 Atl. 298.

New York. *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138.

North Carolina. *Commercial Nat. Bank of Charlotte v. Hutchison & Hutchison*, 87 N. C. 36.

Canada. *Bank of Toronto v. McDougall*, 15 U. C. C. P. 475, 482.

¹⁰ *Richards v. Merrimack & C. R. R.*, 44 N. H. 127, 138.

¹¹ *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822, 68 Atl. 1078; *Bank of Toronto v. McDougall*, 15 U. C. C. P. 475, 482.

Where a statute requires an affidavit on mortgages that the consideration is true and bona fide as therein set forth, and provides that if the affidavit is made by an agent of the mortgagee, he shall make a further affidavit to show his agency, no further affidavit is necessary where the affidavit is made by an officer of the corporation, and where the affidavit does not show that the affiant is an officer of the mortgagee the omission may be cured by parol evidence. *Buck v. Gladfelter*, 122 Md. 34, 89 Atl. 317.

This rule is often applied to verifications of pleadings by corporate officers.¹²

If a statute requires an affidavit of good faith "of all the parties" to a chattel mortgage, it is not necessary that all the members of the corporation sign it, where the mortgage is made to or by a corporation.¹³

§ 1444. Necessity for writing. Where the statutes or charter or by-laws do not provide otherwise, a corporation may make an oral contract,¹⁴ except where the contract is one which the statute of frauds requires to be in writing, in which case it must be in writing, since the statute of frauds applies equally well to corporate contracts as to others.¹⁵ Thus, a statute requiring contracts for sales of lands by agents to be authorized in writing applies to corporations as well as to individuals who are principals.¹⁶ But when the charter of a corporation requires its contracts to be in writing, an oral contract, at least so long as it is executory, is not binding upon it;¹⁷ although provisions

¹² See chapter on Actions, *infra*.

¹³ *Alferitz v. Scott*, 130 Cal. 474, 62 Pac. 735.

¹⁴ **United States.** *Hanover Nat. Bank City of New York v. First Nat. Bank of Burlingame*, Kansas, 109 Fed. 421.

Alabama. *Selma v. Mullen*, 46 Ala. 411.

Iowa. *Baker v. Johnson County*, 33 Iowa 151; *Merrick v. Burlington & W. Plank Road Co.*, 11 Iowa 74.

Maryland. *Union Bank v. Ridgely*, 1 Harr. & G. 324.

Mississippi. *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143.

Nebraska. *Columbus Co. v. Hurford*, 1 Neb. 146.

Pennsylvania. *Swisshelm v. Swissvale Laundry Co.*, 95 Pa. St. 367; *Hamilton v. Lyeoming Mut. Ins. Co.*, 5 Pa. St. 339.

Contra, *Courtney v. Mississippi Marine & Fire Ins. Co.*, 12 La. 233.

But a policy of insurance must be in writing. *Plahto v. Merchants' & Manufacturers' Ins. Co. of St. Louis*,

38 Mo. 248, 254. *Contra*, *Mobile Marine Dock & Mut. Ins. Co. v. McMillan & Son*, 31 Ala. 711. At any event, a promise to make a policy is not required to be in writing. *Commercial Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636.

¹⁵ *Smith v. Morse*, 2 Cal. 524.

The contract for a sale of all the real property must be in writing and comply with all the requisites to the making of a valid corporate contract. *Taylor v. R. D. Scott & Co.*, 149 Mich. 525, 14 Det. L. N. 503, 113 N. W. 32.

¹⁶ *Lindhorst v. St. Louis Protestant Orphan Asylum*, 231 Mo. 379, 132 S. W. 666.

¹⁷ *Foulke v. San Diego & G. S. Pac. R. Co.*, 51 Cal. 365; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Clowe v. Imperial Pine Product Co.*, 114 N. C. 304, 19 S. E. 153; *Roberts v. P. A. Deming Woodworking Co.*, 111 N. C. 432, 16 S. E. 415; *Curtis v. Piedmont Lumber & Mining Co.*, 109 N. C. 401, 13 S. E. 944.

It has been held in Missouri that

requiring corporate contracts to be in writing are often held not to preclude the enforcement of oral contracts,¹⁸ at least where executed by the other party, it sometimes being held that such provisions apply only to executory contracts.¹⁹ Thus, where a statute provides that "all notes, bonds, or contracts entered into by the company, signed by the president, shall be binding on the company," it does not necessarily invalidate an oral contract.²⁰ Likewise, some provisions are held merely to specify a mode in which the corporation may be bound without any intent to be exclusive in their effect.²¹ Statutes requiring insurance policies to be in writing do not prohibit parol promises, before the policy is issued, as to the terms upon which the policy shall

where the charter otherwise provided, an oral policy of insurance is not enforceable. *Henning v. United States Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332.

A requirement in the charter or articles of a corporation that contracts involving liabilities for the payment of money shall be in writing does not apply to an acceptance by the corporation of an order for the payment of money due under a written contract. *French Spiral Spring Co. v. New England Car Trust*, 32 Fed. 44.

¹⁸ *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419.

¹⁹ *Foulke v. San Diego & G. S. Pac. R. Co.*, 51 Cal. 365; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Clowe v. Imperial Pine Product Co.*, 114 N. C. 304, 19 S. E. 153; *Roberts v. P. A. Deming Woodworking Co.*, 111 N. C. 432, 16 S. E. 415; *Curtis v. Piedmont Lumber & Mining Co.*, 109 N. C. 401, 13 S. E. 944.

Thus, in a California case, where a corporation orally employed an attorney to defend an action, and the attorney successfully performed the contract on his part, it was held that he could maintain an action to recover his compensation under the contract,

notwithstanding the charter of the corporation provided that no contract should be binding on the corporation unless in writing. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623. See also *Fister v. La Rue*, 15 Barb. (N. Y.) 323.

²⁰ *St. Joseph Hydraulic Co. v. Globe Tissue-Paper Co.*, 156 Ind. 665, 59 N. E. 995.

²¹ *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291; *First Bapt. Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305.

The mere fact, however, that the charter of a corporation refers to the contracts to be made by the corporation as written is not necessarily equivalent to a requirement of writing. Thus, where the charter of a fire insurance company declared its object to be the making of insurance "by instrument, under seal or otherwise," and provided that certain officers should be authorized to make contracts of insurance in the name and behalf of the company, "and in and by policy of insurance in writing to be signed by the president," etc., it was held that written policies were mentioned merely because they were usual, and that there was no intention to prohibit the company from making an oral contract of insurance. *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291.

be issued.²² Where the charter prohibits contracts unless in writing and under seal and provides that "all contracts or agreements in violation hereof shall not be binding on the corporation unless duly ratified by its board of directors," the making of a contract with the knowledge and assent of all the directors manifested at a meeting in advance of the contract is a sufficient ratification.²³ Moreover, a contract by a corporation may be implied from the acts of the officers, in a proper case,²⁴ as already stated in a preceding chapter.²⁵

§ 1445. Who may execute. Corporate contracts should be executed in the name of the corporation by an officer authorized to act.²⁶ In order to bind the corporation, they cannot be executed by the stockholders or members individually,²⁷ at least unless ratified by the corporation. The officer or officers who may make particular contracts is treated of in a subsequent chapter.²⁸

If the parties of the second part are a corporation and an individual, it is binding on the corporation which has signed it, although the individual refuses to sign it, unless the parties mutually intended that the contract should not take effect until signed by all.²⁹

§ 1446. Power to sign as equivalent to power to contract. The power of certain officers and agents to contract on behalf of the corporation is considered in a subsequent chapter.³⁰ Furthermore the power to contract and the power to execute a contract by signing it in behalf of the corporation are separate and distinct.

Ordinarily, however, it would seem, where there is no charter provision, statute, by-law, or usage to the contrary, that an officer of a corporation who has power to enter into a contract, i. e., to agree upon the terms so as to bind the company, has power to bind the corporation in the formal act of executing the contract by signing the name of the corporation thereto. But it is sometimes provided by statute, charter, or by-laws, that a certain officer, or officers, shall sign specified contracts, or all contracts, on behalf of the corporation.³¹ In the latter case, power to sign does not, of course, necessarily include power to

²² *Constant v. Allegheny Ins. Co.*, Fed. Cas. No. 3,136.

²³ *New York & N. J. Globe Gas Light Co. v. Metropolitan Inv. Co.*, 10 N. Y. App. Div. 342, 41 N. Y. Supp. 797.

²⁴ *Petrie's Ex'rs v. Wright*, 14 Miss. 647.

²⁵ See § 916, *supra*.

²⁶ See §§ 1464, 1468, *infra*.

²⁷ See Chap. 1, *supra*, and chapter on Officers, *infra*.

²⁸ See chapter on Officers, *infra*.

²⁹ *Muehlebach v. Missouri & K. I. R. Co.*, 166 Mo. App. 305, 148 S. W. 453.

³⁰ See chapter on Officers, *infra*.

³¹ See § 1468, *infra*.

negotiate and enter into the contract. For instance, in a New York case, Justice Cardozo said: "But there is another resolution which reads: 'Resolved, that the president has authority to sign and execute all documents.' This does not mean that he may make any contract he pleases. It is not an attempt to delegate to him the entire powers of the board. It means that when contracts have been duly authorized the president is to sign them. It touches, not the power to contract, but the form and manner of contracting."³² So a statute providing that any note, bond or contract entered into by the corporation shall be binding when signed by the president, does not authorize the president to enter into any obligation on behalf of such company, but relates only to the formality of execution.³³ And express power to "sign and execute" all bonds, contracts, checks "or other obligations in the name of the corporation," does not confer power to enter into all such contracts on behalf of the corporation, without authority conferred by the charter or board of directors.³⁴ Nor does authority delegated by the directors to certain officers to perform the ministerial act of executing and delivering a contract include any power of the officers to exercise discretion.³⁵

§ 1447. Personal or corporate liability. Whether a contract is binding on the corporation alone, or merely on the officers who sign it, or on both, is the subject of considerable conflict in the decisions. This matter is hereafter considered in this chapter according to whether the instrument is one under seal, a mere simple nonnegotiable contract, or a negotiable instrument.³⁶

The rules governing the sufficiency of signatures of officers of a corporation to bind the corporation, and the effect of such signatures as making the officers personally liable, are largely governed by the law of agency.³⁷

In determining these questions, it is necessary oftentimes, in order to reconcile apparent conflicts or clearly to understand the decisions, to keep in mind (1) that a decision holding the corporation liable does not necessarily mean that the officer or agent is not liable; (2) that

³² *Catholic Foreign Mission Soc. of America v. Oussani*, 215 N. Y. 1, 5, Ann. Cas. 1917 A 479, 109 N. E. 80.

³³ *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812.

³⁴ The quoted clause appears in the by-laws of the United States Steel Co., in regard to the powers of the

President (see *Fletcher's Corp. Forms*, p. 690, § 4).

³⁵ *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 168, 66 Atl. 127.

³⁶ See §§ 1463, 1469, 1472 et seq., *infra*.

³⁷ See 1 *Mechem on Agency* (2nd Ed.), §§ 1090-1183.

a decision holding the signing officer liable does not necessarily mean that the corporation is not also liable; (3) that a decision that the officer is liable does not necessarily mean that if an offer of parol evidence had been made to show corporate liability the officer might not have been exonerated; (4) that decisions relating to signatures of sealed instruments do not necessarily apply to signatures of simple contracts not under seal; and (5) that decisions relating to negotiable paper do not necessarily govern in case of other contracts or vice versa.

§ 1448. Abbreviations. The abbreviation "Pt." annexed to the name of an individual is commonly understood to be an abbreviation for "President,"³⁸ and the abbreviation of "Pres." is in such common use that courts take judicial notice of its meaning.³⁹ Likewise, it is undoubtedly sufficient to use such abbreviations as "Co.," "Mf'g.," "Sec'y," "Treas." or the like.

§ 1449. Effect of statutes, charter provisions and by-laws—In general. Whether a contract is unenforceable because not executed in the mode provided for by statute, charter or by-law depends upon several things, such as whether the provision is mandatory or merely directory,⁴⁰ whether the contract is wholly executory,⁴¹ whether the contract has been executed on one side,⁴² etc. Generally speaking, however, it may be said that mere informalities in the mode of executing the contract are not fatal to its enforcement.

The violation of a by-law seems to be somewhat different from the violation of a statute or charter provision, so far as the rights of the other contracting party are concerned.⁴³ Thus, a corporation whose by-laws require its contracts to be executed in a certain manner may, by acquiescence, become liable upon contracts made by its officers in some other manner.⁴⁴ For instance, where plaintiff relies wholly upon the fact that the defendant corporation had been accustomed to recognize and pay notes signed like those sued on, it is immaterial that the by-laws provided that the notes should be signed in some other

³⁸ Evidence that "Pt." was so understood among bankers was competent as tending to explain what was intended, in case of a bank draft. *Griffin v. Erskine*, 131 Iowa 444, 448, 9 Ann. Cas. 1193, 109 N. W. 13.

³⁹ *Heaton v. Ainley*, 108 Iowa 112, 78 N. W. 798.

⁴⁰ See § 1450, *infra*.

⁴¹ See § 1452, *infra*.

⁴² See § 1453, *infra*.

⁴³ See § 502, *supra*.

⁴⁴ *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 347, 49 Pac. 197.

manner.⁴⁵ Moreover, a corporate note is enforceable, although executed without approval of two members of the executive committee as required by the by-laws, where the payee had no knowledge of the by-law.⁴⁶

It may appear from the nature of the business of a corporation and other circumstances that a provision in its charter as to the mode of entering into contracts, even though general in its terms, was not intended to apply to such contracts as are made by the corporation in the course of its ordinary business. Thus, in a Georgia case, where the charter of a bank provided that all contracts should be signed by its president and countersigned by its cashier, it was held that the provision did not apply to such dealings and transactions as are usually and necessarily performed by the cashier alone, or some other agent.⁴⁷

§ 1450. — Under requirement merely directory. Provisions in the charter of a corporation as to the form and mode of entering into contracts are often intended by the legislature, not as limitations upon the power of the corporation, but merely as directory to the officers of the corporation; and, when this is the case, contracts made by the corporation without compliance with such provisions are binding upon it. No fixed or definite rule can be laid down for determining whether a provision is directory or not. The question depends upon the intention of the legislature, to be ascertained in each case, not only from the language of the provision, but also from its nature and object.⁴⁸ Generally, however, such provisions are merely directory.⁴⁹ Thus, where the charter or deed of settlement of an insurance company provided that the seal of the corporation should not be affixed to any policy except by the order of three directors signed by them and countersigned by the manager, it was held that the provision was merely directory,

⁴⁵ Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 582, 58 N. E. 162.

⁴⁶ Lyndon Sav. Bank v. International Co., 75 Vt. 224, 54 Atl. 191.

⁴⁷ Carey v. McDougald, 7 Ga. 84. And see Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; Merchants' Bank of Macon v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Rockwell v. Elkhorn Bank, 13 Wis. 653.

⁴⁸ Where the charter of a fire insurance company provided that a

policy issued by it on property on which there was other insurance should be void in the absence of consent of the company indorsed upon the policy under the hand of the secretary, it was held that the provision was mandatory, and that it could not be waived by the company by giving its consent in any other way. Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375.

Necessity for writing, see § 1444, supra.

⁴⁹ See this section, *infra*.

and that a policy to which the corporate seal was affixed without such an order was valid.⁵⁰ A like construction was placed upon a provision in the charter of a corporation that the bond of its cashier should be accepted by the directors.⁵¹ And it has repeatedly been held that provisions in the charters of insurance companies and other corporations that policies, securities, or other contracts issued or made by them shall be signed, or signed and countersigned, by particular officers, are merely directory, and do not prevent contracts by other officers or agents, and oral contracts.⁵² Thus, a provision that contracts signed by the president or by the president and secretary shall be binding, does not exclude other forms of contracting.⁵³ Nor is a statute authorizing a corporation to transfer property through its president or other head officer to be construed as prohibiting any other mode of transfer.⁵⁴ Nor does a statute providing that "every corporation authorized to hold real estate, may convey the same by an agent appointed by vote for that purpose," exclude every other mode of corporate conveyance, but it is permissive.⁵⁵ A fortiori, a statute providing that any corporation "may" convey land by a deed "signed by the president, or presiding member or trustee and two other members of the corporation, and attested by a witness," does not exclude the common-law method.⁵⁶ If the provision is merely directory, contracts made by a corporation without compliance with the provisions

⁵⁰ Prince of Wales Life & Educational Assur. Co. v. Harding, E. B. & E. 183.

⁵¹ Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552.

⁵² Marine Ins. Co. v. Robinson, 25 Ind. 536; Dana v. Bank of St. Paul, 4 Minn. 385; Barnes v. Ontario Bank, 19 N. Y. 152; In re Norwich Yarn Co., 22 Beav. 143.

A charter requirement that notes shall be countersigned by the secretary is merely directory. *Blanc v. Germania Nat. Bank*, 114 La. 739, 38 So. 537.

Where the charter of an insurance company gave it the power "generally to do and perform all things relative to the object of the association," and provided in a subsequent section that "all policies or contracts of insurance" should be

subscribed by the president or some other officer designated by the board of directors for that purpose, it was held that the latter provision did not prevent the company from binding itself by contracts for policies and immediate insurance executed in other modes, and by other officers or agents, but merely prescribed the manner of executing the final contract or policy. *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.

⁵³ *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 674-676, 59 N. E. 995; *De Groff v. American Linen-Thread Co.*, 21 N. Y. 124.

⁵⁴ *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076.

⁵⁵ *Morris v. Keil*, 20 Minn. 531, holding deed signed by president and secretary sufficient.

⁵⁶ *Bason v. King's Mountain Min. Co.*, 90 N. C. 417, 422.

will be binding upon it, even though they may be wholly executory.⁵⁷

If the charter of a corporation, or any statute which is applicable to it, provides that it shall enter into contracts in any particular manner, or with certain formalities, and the provision is mandatory and not merely directory, the provision must be complied with, for the legislature, in giving a corporation the power to contract, may prescribe the manner in which the power shall be exercised.⁵⁸ A corporation, said Chief Justice Marshall, "may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."⁵⁹ Thus, statutes sometimes require certain officers to sign corporate contracts.⁶⁰ When the charter of a corporation provides that contracts on behalf of the corporation shall be signed by certain officers, or by a certain number of officers, and the provision is not merely directory, contracts signed by other officers, or by less than the prescribed number, will not be binding;⁶¹ but a clause in the articles of incorporation providing that all corporate contracts must be in writing, signed by the president, and countersigned by the treasurer and that "any liability otherwise created shall be null and void," has been held to be "in essential nature a mere internal regulation, and as such it does not affect the validity of contracts executed without due observance of its prescription so far at least as concerns persons dealing with the corporation without actual or imputed knowledge of its by-laws."⁶²

⁵⁷ *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536; *Dana v. St. Paul Bank*, 4 Minn. 385; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Prince of Wales Life & Educational Assur. Co. v. Harding*, E. B. & E. 183.

⁵⁸ *United States*. *Head v. Providence Ins. Co.*, 2 Cranch 127, 167, 2 L. Ed. 229.

California. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

Connecticut. *Couch v. City Fire Ins. Co.*, 38 Conn. 181, 9 Am. Rep. 375.

Indiana. *Leonard v. American Ins. Co.*, 97 Ind. 299.

North Carolina. *Roberts v. P. A. Deming Woodworking Co.*, 111 N. C. 432, 16 S. E. 415.

Ohio. *Dayton Ins. Co. v. Kelly*, 24

Ohio St. 345, 15 Am. Rep. 612.

England. *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137.

⁵⁹ *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127, 167, 2 L. Ed. 229.

⁶⁰ *Gillett v. Campbell*, 1 Den. (N. Y.) 520.

⁶¹ *Couch v. City Fire Ins. Co.*, 38 Conn. 181, 9 Am. Rep. 375; *Manderson v. Commercial Bank*, 28 Pa. St. 379; *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137.

Where a statute requires corporate deeds to be countersigned by the secretary or clerk, a deed not so countersigned confers no title. *Galloway v. Hamilton*, 68 Wis. 651, 32 N. W. 636.

⁶² *Buck Creek Lumber Co. v. Nelson*, 188 Ala. 243, 66 So. 476.

Of course, if a resolution of the board of directors authorizes contracts only when jointly executed by the president and secretary, the president alone cannot execute a contract to sell real estate.⁶³

Where it is sought to hold a corporation on a policy of insurance signed merely with the names of individuals, with the words "president" and "assistant" added, and the charter provided that policies "countersigned by the secretary shall be binding," evidence is admissible to show a usage of the company to issue policies in such form without countersigning.⁶⁴

§ 1451. — Where informality not ascertainable by other party to contract. If the requirement as to the form or manner of contracting is such that a party contracting with the corporation may not know whether or not it has been complied with by the officers of the corporation, he may assume that they have complied with it, and if he enters into the contract in good faith, and in ignorance of the fact that they have failed to comply therewith, the corporation will be estopped to set up such noncompliance to defeat an action on the contract.⁶⁵ Especially is this true where the requirement is contained in a corporate by-law.⁶⁶

§ 1452. — Executory contract. If the charter of a corporation or any other statute which is applicable to it requires that it shall enter into contracts in any particular form or manner, and the provision is

⁶³ *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494.

⁶⁴ *Bulkley v. Derby Fishing Co.*, 2 Conn. 252, 7 Am. Dec. 271. To same effect, see *Witte v. Derby Fishing Co.*, 2 Conn. 260.

"Whatever may be the forms of their obligations, if they are according to their charter, their corporate votes, or their known usage and practice, they ought to be binding." *Bulkley v. Derby Fishing Co.*, 2 Conn. 252, 255, 7 Am. Dec. 271.

⁶⁵ *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9; *Medbury v. New York & E. R. Co.*, 26 Barb. (N. Y.) 564; *Berks & D. Turnpike Road v. Meyers*, 6 Serg. & R. (Pa.)

12, 9 Am. Dec. 402; *In re Athenaeum Life Assur. Society*, 4 Kay & J. 549. And see *Louisville, N., A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081.

In such cases, the corporation is estopped to deny that it did not do it in the statutory way as against other persons who have acted upon the assumption that the corporation had done what the law said it should do. *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347, 358.

⁶⁶ *Washington & C. Ry. Co. v. Murray*, 211 Fed. 440, where a by-law required notes to be executed by both the president and the treasurer, and the note was signed by the treasurer only.

mandatory and not merely directory, no action will lie on the contract so long as it is wholly executory on both sides.⁶⁷ It has also been held that the fact that the contract has been partly performed will not render the corporation liable in an action to recover damages for its failure to perform the residue.⁶⁸

§ 1453. — Contract executed on one side. It has been held where a corporation has fully performed its part of a contract, and the other party has thereby become indebted to it, he cannot defeat an action by the corporation by setting up that the contract was not entered into in the form or manner prescribed by its charter, as that it was not entered into by the number of directors required by its charter.⁶⁹ In like manner, a corporation which has received the consideration of a contract cannot defend against an action on the contract on the ground that the provisions of the statute, charter or by-laws prescribing the form of the contract or the mode of executing it were not complied with by the officer acting for the corporation in the execution of the contract.⁷⁰ In other words, any informality in executing a con-

⁶⁷ **United States.** *Head v. Providence Ins. Co.*, 2 Cranch 127, 2 L. Ed. 229.

Arkansas. *Lindauer v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461.

California. *Foulke v. San Diego & G. S. Pac. R. Co.*, 51 Cal. 365; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

Connecticut. *Couch v. City Fire Ins. Co.*, 38 Conn. 181, 9 Am. Rep. 375.

North Carolina. *Clowe v. Imperial Pine Product Co.*, 114 N. C. 304, 19 S. E. 153; *Roberts v. P. A. Deming Woodworking Co.*, 111 N. C. 432, 16 S. E. 415; *Curtis v. Piedmont Lumber & Mining Co.*, 109 N. C. 401, 403, 13 S. E. 944.

Ohio. *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.

Pennsylvania. *Manderson v. Commercial Bank*, 28 Pa. St. 379.

England. *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137.

⁶⁸ *Roberts v. P. A. Deming Woodworking Co.*, 111 N. C. 432, 16 S. E. 415.

⁶⁹ *Bradley v. State Bank*, 20 Ind. 528; *Smith v. State Bank*, 18 Ind. 327; *Planters' Bank v. Sharp*, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470.

⁷⁰ **United States.** *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. 381, 16 L. Ed. 488; *Kessler v. Ensley Co.*, 123 Fed. 546.

Arizona. *Larkin v. Hagan*, 14 Ariz. 63, 126 Pac. 268.

California. *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 Pac. 140; *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

Connecticut. *Witte v. Derby Fishing Co.*, 2 Conn. 260; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252, 7 Am. Dec. 271.

Delaware. *St. Joseph's Polish Cath. Beneficial Soc. City of Wilmington v. St. Hedwig's Church*, 4 Pennw. 141, 53 Atl. 353.

Georgia. *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567.

Illinois. *Lurton v. Jacksonville Loan & Building Ass'n*, 187 Ill. 141,

tract is waived, and cannot be set up as a defense, where the corporation has accepted and retained the benefits of the contract.⁷¹ Even in the federal courts, there is a distinction "between cases where the corporation has no power to act and those where it has such power, but fails to perform the acts in question in the mode or manner provided by law. In the former the acts are void; in the latter, voidable."⁷²

This rule does not apply, however, where the charter or statute expressly declares that contracts not made in the form or manner prescribed thereby shall be void, or where the language and the purpose of the provision otherwise show that such was the intention of the legislature.⁷³

The fact that a contract was not executed with all the formalities required by by-laws of the corporation is no defense to the contract where the corporation has received the benefit thereof,⁷⁴ and this rule applies equally well to actions on promissory notes.⁷⁵ A fortiori, mere irregularity in executing a note is no defense as against a bona fide

58 N. E. 218, aff'g 87 Ill. App. 395; Lake St. El. R. Co. v. Carmichael, 184 Ill. 348, 352, 56 N. E. 372, aff'g 82 Ill. App. 344; New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166.

Louisiana. Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 739.

New York. Fister v. La Rue, 15 Barb. 323.

North Carolina. Clowe v. Imperial Pine Product Co., 114 N. C. 304, 19 S. E. 153; Curtis v. Piedmont Lumber & Mining Co., 109 N. C. 403, 13 S. E. 944.

Oklahoma. Bass & Harbour Furniture & Carpet Co. v. Harbour, 42 Okla. 335, 140 Pac. 956.

Pennsylvania. Hartzell v. Ebbvale Min. Co., 239 Pa. 602, 86 Atl. 1093.

⁷¹ Mershon & Co. v. Morris, 148 N. C. 48, 61 S. E. 647.

A corporation will not be permitted to avoid the consequences of a contract on the mere ground that it was ultra vires as being unauthorized by the board of directors where it has received the benefits thereof. Marion Trust Co. v. Crescent Loan & Invest-

ment Co., 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

A corporation will not be permitted to use as a defense the irregular manner in which it executed a mortgage to secure an issue of its bonds where it has received and retained the benefit thereof. Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co., 127 Fed. 625.

⁷² Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347, 358; Campbell v. Argenta Gold & Silver Min. Co., 51 Fed. 1, 5.

⁷³ Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. Ed. 229; Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Manderson v. Commercial Bank, 28 Pa. St. 379.

⁷⁴ Rose v. Baltimore, 51 Md. 256, 34 Am. Rep. 307.

⁷⁵ Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Eureka Pub. Co. v. First Nat. Bank of Stigler, — Okla. —, 159 Pac. 508, where the by-laws required the president and secretary to sign, but

holder for value of the note.⁷⁶ Moreover, failure to observe a by-law as to the mode of executing a contract is no defense where there has been a previous course of dealing of the same irregular character between the same parties for a term of years, but in such case the by-law may be deemed waived.⁷⁷ Furthermore, where the entire management and control of the corporation is allowed to pass into the hands of one of its officers who executes contracts in the name of the corporation, the corporation may be estopped by acquiescence from denying liability because the by-law has not been observed.⁷⁸

On the other hand, failure to observe the by-laws as to signatures has been held a defense where the corporation has received none of the benefits therefrom.⁷⁹ So, in an action against a mortgagor corporation by the mortgagee to recover possession of the chattels mortgaged, the corporation may set up the defense that the mortgage was executed without the required consent of two-thirds of the stockholders, at least where the mortgagor received no money when the mortgage was executed.⁸⁰ Moreover, the fact that a note is invalid because defectively executed or because of want of authority of the officer executing it does not affect the validity of regularly executed notes given in renewal thereof.⁸¹ An informal transfer by all the stockholders of a corporation, coupled with a delivery of the property, prevents the corporation from recovering the property on the ground that a vote of the directors was not had and the officers did not sign the papers in their official capacity.⁸²

the note was signed by the treasurer only, and the transaction was in line with former dealings between the parties.

⁷⁶ *Wolf v. Zachary & N. E. R. Co.*, 128 La. 1092, 55 So. 685.

⁷⁷ *Hartzell v. Ebbvale Min. Co.*, 239 Pa. 602, 605, 86 Atl. 1093.

A note or a contract which has been executed by a mercantile corporation in the manner in which it usually executes its notes or contracts, and in regular course of business, is binding on the corporation without regard to any informality in its execution resulting from noncompliance with the requirements of the corporate charter. *Blanc v. Germania Nat. Bank*, 114 La. 739, 38 So. 537.

Counter signature of the president, as required by a corporate by-law, although forged, does not invalidate a note, where for several years the notes of the corporation were countersigned in blank by the president in advance of the treasurer's signature. *Eliot Nat. Bank v. Woonsocket Elec. Machine & Power Co.*, 31 R. I. 57, 76 Atl. 782.

⁷⁸ *Hartzell v. Ebbvale Min. Co.*, 239 Pa. 602, 605, 86 Atl. 1093.

⁷⁹ *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. 157, 28 Atl. 1072.

⁸⁰ *London Realty Co. v. Coleman Stable Co.*, 140 N. Y. App. Div. 495, 125 N. Y. Supp. 410.

⁸¹ *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754.

⁸² *H. N. Frederick & Sons v. Com-*

§ 1454. — Application of rules to want of consent of stockholders.

The necessity for the consent of stockholders, as required by statute, charter or by-law, in case of particular contracts or conveyances, has been stated in preceding chapters,⁸³ while the general rules relating to the mode of giving consent, notice of the meeting of the stockholders, etc., are treated of in a subsequent volume.⁸⁴ Generally, in such cases, want of consent of the stockholders can be urged only by the stockholders themselves;⁸⁵ and the corporation cannot rely on the want of, or defects in, the consent of all or part of the stockholders, as required by statute, charter or by-law, where it has received the benefit of the contract.⁸⁶ Thus failure to give notice to every stockholder of a meeting to authorize a mortgage is no defense to a foreclosure suit where the corporation has received and retained the benefits of the mortgage.⁸⁷

mercial German Nat. Bank, 153 Ill. App. 485.

⁸³ See §§ 976 (bonds), 1206-1210 (alienation of property and franchises), 1242 (leases), 1301 (mortgages), *supra*.

⁸⁴ See chapter on Stock and Stockholders, *infra*.

⁸⁵ See sections cited in note 83, *supra*.

⁸⁶ *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 570, 43 L. Ed. 1081, applying rule to guaranty of bonds in hands of holder without notice; *Westerlund v. Black Bear Min. Co.*, 203 Fed. 599, 612; *Missouri Pac. Ry. Co. v. Sidell*, 67 Fed. 464; *Campbell v. Argenta Gold & Silver Min. Co.*, 51 Fed. 1; *Wood v. Corry Waterworks Co.*, 44 Fed. 146, 12 L. R. A. 168; *Dillon v. Myers*, 58 Colo. 492, Ann. Cas. 1916 C 1032, 146 Pac. 268; *Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695; *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428.

A corporation which has received the benefit of a mortgage cannot attack it on the ground that the required consent of the stockholders to execute the mortgage was not obtained. *Eastman v. Parkinson*, 133 Wis. 375, 13

L. R. A. (N. S.) 921, 113 N. W. 649.

That a corporate deed was not authorized by the stockholders is an objection which can be urged only by stockholders or persons connected with the corporation title. *Galbraith v. Shasta Iron Co.*, 143 Cal. 94, 99, 76 Pac. 901.

It is no defense that the votes authorizing a mortgage were passed at a stockholders' meeting held outside the state of the corporation's domicile, where the corporation has received the benefits of the mortgage. *Commonwealth Trust Co. v. Salem Light, Heat & Power Co.*, 77 N. H. 146, 149, 89 Atl. 452.

Where action is brought against a telephone company for the recovery of the purchase price of the franchise and the telephone property of the plaintiff corporation, the defendant may not assert as defense, after it has used and derived the benefit of its purchase for a number of years, that the sale to it by plaintiff was unauthorized because not consented to by the stockholders as required by statute. *Badger Tel. Co. v. Wolf River Tel. Co.*, 120 Wis. 169, 97 N. W. 907.

⁸⁷ *Drewry v. Columbia Amusement Co.*, 87 S. C. 445, 69 S. E. 879, 1094.

In some states, however, it is held that a contract not consented to by the stockholders as required by statute is void. Thus, it is held in Alabama that statutes requiring consent of stockholders at a meeting to a corporate mortgage make a mortgage void which is not so executed, and authorize a suit by the corporation to cancel the mortgage, provided the amount due thereon is tendered.⁸⁸

On the other hand, statutes providing that corporations shall not mortgage their property without the consent of stockholders and that any incumbrance without such consent shall be "void," have been construed as meaning voidable so as to be capable of ratification by the acts or silence of the persons for whose benefit the statute was enacted, i. e., the stockholders,⁸⁹ on the theory that an act declared to be void by statute which is *malum in se* or against public policy is utterly void and incapable of ratification, but an act or contract which is neither wrong in itself nor against public policy but which has been declared void for the protection or benefit of a certain party, or class of parties, is voidable only and is capable of ratification by the act or silence of the beneficiary or beneficiaries.⁹⁰

§ 1455. — Where action based on implied contract. Requirements in the charter of a corporation that it must contract in a certain form only, or that contracts shall be made or signed by certain officers or by a certain number of officers, etc., do not apply to implied or quasi contracts. If a corporation, therefore, enters into a contract without compliance with such provisions in its charter, and under the contract receives money or property, or the benefit of services, the other party, even if he cannot maintain an action on the contract itself, may maintain an action quasi *ex contractu*, or on an implied contract, to recover money due him, or the value of the property delivered or services rendered.⁹¹

§ 1456. Effect of misnomer or assumed name. A mistake in setting out the name of a corporation in an instrument is not fatal where the

⁸⁸ Southern Building & Loan Ass'n v. Casa Grande Stable Co., 128 Ala. 624, 29 So. 654.

⁸⁹ Westerlund v. Black Bear Min. Co., 203 Fed. 599, 611.

⁹⁰ Westerlund v. Black Bear Min. Co., 203 Fed. 599, 611.

⁹¹ United States. Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. Ed. 100.

California. Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

Georgia. Carey v. McDougald, 7 Ga. 84.

North Carolina. Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 16 S. E. 415.

Tennessee. Northern Bank of Kentucky v. Johnson, 5 Cold. 88.

identity of the corporation is apparent.⁹² This rule is well settled.⁹³ Moreover, a corporation may contract by a name other than its corporate name, where its identity is apparent, i. e., may contract under an assumed name.⁹⁴

It is no objection that the corporate signature uses the letters "Mfg." instead of the word "Manufacturing."⁹⁵

§ 1457. Necessity for approval by certain officers or stockholders.

Sometimes, by the terms of a contract, it is not to be binding until approved by a certain officer or officers, in which case of course such approval is necessary to make the agreement operative.⁹⁶ But a corporation which has contracted to sell its output may be estopped to set up the invalidity of the contract because not approved at a directors' meeting when a quorum was present, where the buyer has expended money in reliance thereon and the seller has ratified the contract.⁹⁷

Where the charter of a corporation provided that, before certain contracts should be made by the corporation, the consent of the stockholders, or a certain proportion of them, should be obtained, or that notice should be given them, it was held that the provision was intended merely for their protection, and might be waived by them, and that it did not affect the powers of the corporation.⁹⁸

⁹² "Any variation from the precise name of a corporation, when the true name may be collected from the instrument itself, and when it appears from the proofs that the obligations sued upon were intended to be the obligation of the corporation sued, is unimportant." In re Goldville Mfg. Co. of Goldville, South Carolina, 118 Fed. 892, 896.

⁹³ See § 742, supra.

⁹⁴ See Chap. 18, supra.

⁹⁵ "The letters are an abbreviation of the word, and are no more subject to criticism than the use of the abbreviation 'Co.' for the word 'Company.'" Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800, aff'g 106 Ill. App. 190.

⁹⁶ Car Advertising Co. v. Rohr McHenry Distilling Co., 49 Pa. Super. Ct. 442.

⁹⁷ Greensboro Gas Co. v. Home Oil

& Gas Co., 222 Pa. 4, 128 Am. St. Rep. 790, 70 Atl. 940.

⁹⁸ Nelson v. Hubbard, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; Beecher v. Marquette & P. Rolling Mill Co., 45 Mich. 103, 7 N. W. 695.

Where a statute requires consent on the part of stockholders to the execution of a corporate mortgage to be filed, failure to file such consent may be taken advantage of by the stockholders only, since the statute was enacted for their protection. In re New York Economical Printing Co., 110 Fed. 514.

A statute authorizing a corporation to borrow money on consent of the association, expressed by a vote of a majority of its members, does not require that its records shall expressly show that a majority voted to authorize a loan, in order to bind the corporation. Where its records show

§ 1458. Ratification. Defectively executed contracts of a corporation may be ratified by it so as to be binding,⁹⁹ as where it receives and retains the benefit of the transaction, with full knowledge of all the facts.¹ Thus a deed executed without authority may be rendered the binding deed of the corporation by ratification.²

The fact that it appears on the face of a deed that the corporation caused it to be executed, which deed has since been recognized as valid, is sufficient, after a lapse of more than thirty years, to establish presumptively the authority of the corporate grantor to execute the deed.³

§ 1459. Entering contract on records. It is not necessary to enter on the records of the corporation a contract made by it, in order to validate it,⁴ at least where not required by the charter or statute.⁵

§ 1460. Delivery. Ordinarily a corporate deed is not effectual until delivered, and this is true of a bill or note executed by a corporation. Furthermore, there can be no valid delivery of a deed to a corporation not in being when the attempted delivery is made.⁶ But a deed delivered after the grantee company is incorporated is valid although dated a few days before such incorporation.⁷

II. INSTRUMENTS UNDER SEAL

§ 1461. General rules. Instruments formerly required to be under seal, such as deeds, leases, mortgages, etc., where a corporation is a party thereto, should designate the corporation by its proper name as

that the money was received by its treasurer, and applied to corporate uses by the board of trustees, whose acts were approved by the corporation, compliance with the statute is shown. *Illinois Conference of Evangelical Ass'n of North America v. Plagge*, 177 Ill. 431, 69 Am. St. Rep. 252, 53 N. E. 76, aff'g 76 Ill. App. 468.

⁹⁹ *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229, 238.

A corporation, like an individual, may be bound by a written contract under which it has acted for a considerable time, and to which it has agreed, although it did not formally sign it. *Western U. Tel. Co. v. Chicago & P. R. Co.*, 86 Ill. 246, 29 Am. Rep. 28.

¹ *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229, 239.

² *Howe v. Keeler*, 27 Conn. 538; *Turner v. Kingston Lumber & Manufacturing Co. (Tenn.)*, 59 S. W. 410.

³ *Altschul v. Casey*, 45 Ore. 182, 76 Pac. 1083.

⁴ *Athearn v. Independent Dist. of Millersburg*, 33 Iowa 105.

⁵ *Stewartsville Turnpike Road Co. v. Evans*, 11 Ky. L. Rep. 308 (abstract).

⁶ *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386.

Delivery to a promoter is not of itself a delivery to the corporation afterwards formed. *Santaquin Min. Co. v. High Roller Min. Co.*, 25 Utah 282, 71 Pac. 77.

⁷ *San Diego Gas Co. v. Frame*, 137 Cal. 441, 70 Pac. 295.

a party to the instrument, and it is customary and good form, after stating the corporate name, to add "a corporation organized and existing under and by virtue of the laws of the state of," naming the state where the company was incorporated. Then, where only one of the parties is a corporation, a clause is often added, before "party of the first (or 'second') part," such as "hereinafter called the 'company.'" The covenants should all be in the name of the corporation, and the usual concluding clause, where the corporation is the grantor, is some such form as "In witness whereof, the said ——— company has hereunto caused this instrument to be executed in its name, on its behalf and under its corporate seal, by its president and secretary, this ——— day of ———, 19—." The name of the corporation should then be subscribed underneath, and the better form is for it to precede the names of the officers signing for the corporation, which should follow the name of the corporation, by some such word as "Per" or "By," and of course the title of the office should follow the name. The seal should also be impressed on the paper.⁸ Following the signatures and seal ordinarily comes the acknowledgment.⁹ However, all these things are not absolutely necessary to constitute a valid corporate instrument,¹⁰ although if the instrument in its body purports to be that of individuals it is inoperative as a corporate obligation or transfer.¹¹

It has been said that greater precision of form is required in case of

⁸ The technical mode of signing is for the proper officer to sign the corporate name, and then add his signature and official title. *Olney Loan & Building Ass'n v. Rush*, 97 Ill. App. 349.

⁹ Acknowledgments, see §§ 1487-1491, *infra*.

¹⁰ A deed reciting in its granting clause that a corporation "by" a named person, "their agent" grants, etc., and where all the covenants were in the name of the corporation, although signed merely with the agent's name, followed by "agent for" the corporation, is sufficient as a corporate conveyance. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274, 285, distinguishing *Isham v. Bennington Iron Co.*, 19 Vt. 230.

¹¹ *Zoller v. Ide*, 1 Neb. 439.

A deed not executed by or in the name of the corporation cannot take effect as a corporate deed although intended to bind the corporation as shown by the face of the deed. *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 477.

A conveyance from the president and directors of a named corporation as grantors, executed by the president in his own name and under his own seal, is of no effect. *Hatch's Lessee v. Barr*, 1 Ohio 390, 395.

A mortgage which is the personal act and conveyance of the president of a corporation is not binding on the corporation. *Clark v. Hodge*, 116 N. C. 761, 12 S. E. 562.

Where an assignment of a lease states that "I, George F. Baker, treasurer of" a named company, do assign,

sealed instruments than in case of simple and mercantile contracts.¹²

In case of chattel mortgages, it has been held that signature of the affidavit required by statute is sufficient without signing the mortgage.¹³

A deed is necessary to convey title, and a resolution of the corporation is not sufficient.¹⁴

A corporate deed need not recite the authority of the agent appointed to execute it.¹⁵ So it need not recite the authority of its president and secretary to execute it, since that will be presumed from the corporate seal.¹⁶

The effect of statutes requiring deeds, leases, mortgages or the like, to be in a certain form or signed in a particular way or by certain officers has already been noted.¹⁷

§ 1462. Seal as equivalent to signature. At common law it was not necessary to the execution of a deed that it should be signed, but in most states signing is now required.¹⁸ The mere fact that a corporate deed is sealed does not constitute corporate signature. Sealing alone, therefore, is insufficient.¹⁹ And statutes requiring corporate deeds to be signed have been construed to require the name of the corporation to be subscribed, the seal alone being insufficient.²⁰

and is signed with his name, followed by his title as treasurer of the named corporation, and is sealed with the corporate seal, it was nevertheless held that the assignment did not bind the company. *Norris v. Dains*, 52 Ohio St. 215, 49 Am. St. Rep. 716, 39 N. E. 660.

A deed wherein the president and directors of a named corporation appear as grantors, but as acting "for and in behalf of said company," is not the deed of the corporation. *Eagle Woolen Mills Co. v. Monteith*, 2 Ore. 277. This decision, however, seems to carry the rule too far.

One not a party to a contract under seal cannot be held liable thereon. *Congress Const. Co. v. Worcester Brewing Co.*, 182 Mass. 355, 65 N. E. 792.

¹² *Johnson v. Smith*, 21 Conn. 627, 634.

¹³ "That the signatures are at the end of the affidavit and not at the end

of the instrument proper we do not think should be held to defeat the rights of the mortgagee." *First Nat. Bank of Clifton v. Clifton Armory Co.*, 14 Ariz. 360, Ann. Cas. 1915 A 1061, 128 Pac. 810.

¹⁴ *Kushler v. Weber*, 182 Mich. 224, 148 N. W. 418.

¹⁵ *Deerfield Lumber Co. v. Lyman*, 89 Vt. 201, 94 Atl. 837; *Hilliard v. Burlington Shoe Co.*, 76 Vt. 57, 56 Atl. 283.

¹⁶ *Magee v. Paul*, — Tex. Civ. App. —, 159 S. W. 325.

¹⁷ See § 1449 et seq., supra.

¹⁸ 1 Devlin, *Real Estate* (3rd Ed.), § 231.

The mode in which, at common law, corporations execute deeds, is by affixing thereto their corporate seal. *Sheehan v. Davis*, 17 Ohio St. 571, 581.

¹⁹ *Hutchins v. Barre Water Co.*, 74 Vt. 36, 52 Atl. 70.

²⁰ *Isham v. Bennington Iron Co.*, 19 Vt. 230, 252.

§ 1463. **Necessity for signature of corporate name.** It often happens that the name of the corporation is not signed to the instrument but it is signed merely by officers with their title added, in which case it is generally held that if the body of the instrument shows that it was intended to bind the corporation, the signature is sufficient ²¹ for

²¹ **Alabama.** Savannah & M. R. Co. v. Lancaster, 62 Ala. 555. In any event, a deed purporting on its face to be the deed of a named corporation, but signed only by its president as such, is sufficient to protect the rights of the grantee in equity. Nolen v. Henry, 190 Ala. 540, 67 So. 500.

Connecticut. Magill v. Hinsdale, 6 Conn. 464, 469, 16 Am. Dec. 70.

Georgia. Johnston v. Crawley, 25 Ga. 316, 326, 71 Am. Dec. 173.

Illinois. Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937, aff'g 39 Ill. App. 453; Sawyer v. Cox, 63 Ill. 130.

Massachusetts. Haven v. Adams, 4 Allen 80. At one time it was held in Massachusetts that a deed in the name of a corporation "by" a named person, "their treasurer," and signed only with the name of the treasurer and his full title, was not the deed of the corporation because not executed in its name. Brinley v. Mann, 2 Cush. 337, 48 Am. Dec. 669.

Michigan. Ismon v. Loder, 135 Mich. 345, 97 N. W. 769, following Regents of University v. Detroit Young Men's Society, 12 Mich. 138.

Missouri. Kansas v. Hannibal & St. J. R. Co., 77 Mo. 180; Chouteau v. Allen, 70 Mo. 290.

New Hampshire. Tenney v. East Warren Lumber Co., 43 N. H. 343; Flint v. Clinton Co., 12 N. H. 430.

New York. Jackson v. Walsh, 3 Johns. 226.

Ohio. Sheehan v. Davis, 17 Ohio St. 571, 581.

Tennessee. Turner v. Kingston Lumber Co., 106 Tenn. 1, 58 S. W.

854, explaining Garrett v. Belmont Land Co., 94 Tenn. 459, 466, 29 S. W. 726, where a deed signed "James McLaughlin, President Second National Bank," was held insufficient as a corporate deed, although the bank was named in the body of the deed as the grantor and the concluding clause set forth that "in testimony whereof, the Second National Bank of Nashville hath hereunto set its hand, by its president," etc.

A deed need not be signed with the corporate name if it is under its seal, signed by its officers as such, and purports on its face to be the deed of the corporation. In re New Memphis Gaslight Co. Cases, 105 Tenn. 268, 278, 80 Am. St. Rep. 880, 60 S. W. 206.

Where the concluding clause of a corporate deed read "In witness whereof the said Gaston Mining Company have caused this indenture to be signed by their president and attested by their secretary and their common seal to be affixed hereto, the day and year first above written," and it was signed "G. C. Walker, President" and "Attest: George Bull, Secretary," and it was sealed, it was properly executed. Bason v. King's Mountain Min. Co., 90 N. C. 417.

If a mortgage purports to be the mortgage of a corporation, and is signed with the names of two persons with "[L. S.], President" and "[L. S.], Secretary," added, it is presumptively the mortgage of the corporation, although there is no impression of the corporate seal. Jones v. Ezell & Co., 134 Ga. 553, 68 S. E. 303. To

that purpose, especially where the name of the corporation follows the title of the office.²²

On the other hand, it has been held not sufficient to merely sign the names of individuals,²³ although in such a case it is held that the instrument may, in a proper case, be enforced in equity.²⁴

The unquestioned rule that a conveyance executed by an agent or attorney, in order to operate in a court of law as a transfer of the interest of the principal, must be made in the name of the principal, both in its body and signature, is as applicable when a corporation is the principal as when a natural person is the principal.²⁵ Where there is no personal promise or covenant, officers signing an instrument merely as individuals, but who represent themselves in the body of the instrument to be the officers and agents of a named corporation which is designated as "party of the second part," and who assume to contract for such corporation only, are not personally liable on the covenants therein.²⁶

The corporate name, if subscribed, may be typewritten.²⁷

same effect, see *Edwards v. Snow Hill Supply Co.*, 150 N. C. 173, 63 S. E. 742.

²² *Rowe v. Table Mountain Water Co.*, 10 Cal. 441; *Murphy v. Welch*, 128 Mass. 489; *Sherman v. Fitch*, 98 Mass. 59, 63; *Hutchins v. Byrnes*, 9 Gray (Mass.) 367; *Turner v. Kingston Lumber & Manufacturing Co.* (Tenn. Ch.), 59 S. W. 410.

²³ *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229, 238; *Love v. Sierra Nevada Lake Water & Mining Co.*, 32 Cal. 639, 651, 91 Am. Dec. 602.

A mortgage, although in its body it runs in the name of the corporation, is not binding on the corporation, in a court of law, where executed by an officer in his own name, and not in the name of the corporation, except where the corporation has ratified it. *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229, 237.

An indorsement on a mortgage given to a corporation and signed merely "Nathaniel Dole" does not bind the corporation. *Colton v. Depew*, 60 N. J. Eq. 454, 465, 83 Am. St. Rep. 650,

46 Atl. 728, aff'g 59 N. J. Eq. 126, 44 Atl. 662.

²⁴ *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229, 237; *Love v. Sierra Nevada Lake Water & Mining Co.*, 32 Cal. 639, 652, 91 Am. Dec. 602.

A mortgage executed by an officer in his own name, while not a legal mortgage, may be binding as an equitable mortgage. *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 477.

²⁵ *Taylor v. Agricultural & Mechanical Ass'n*, 68 Ala. 229, 237.

²⁶ "It is immaterial that the contract is sealed, or that it was signed only in their individual names, if it appears on the face of the instrument that they contracted with reference to corporate business, and that they had authority to make such contract on behalf of the corporation. In that event the signers do not become liable individually." *Whitford v. Laidler*, 94 N. Y. 145, 150, 46 Am. Rep. 131, applying rule to lease.

²⁷ *Reynolds v. Atlanta Nat. Building & Loan Ass'n*, 104 Ga. 703, 30 S. E. 942.

§ 1464. Particular officer who must sign. Generally, the instrument should be signed by the president of the corporation,²⁸ and it is the better practice for the secretary to also sign.²⁹ The seal raises a presumption that the officers signing had authority so to do.³⁰ The cashier of a bank may, it seems, sign a deed in its behalf and by its authority.³¹ The question who must sign is sometimes regulated by statute.³²

A conveyance or assignment, signed by the president in the corporate name, need not show his authority to sign the corporate name.³³

A deed to one who signed it as an officer of the grantor corporation is not void.³⁴ If the signature of the president is necessary, a deed signed by him as president to himself as grantee conveys a good title where authorized by the board of directors.³⁵

§ 1465. Execution by stockholders. Stockholders have nothing to do with the signing of corporate instruments, and they are complete without signature of the stockholders.³⁶ Furthermore, it is not sufficient for all the stockholders to sign, without other signatures.³⁷ But where by mistake a mortgage is made by the stockholders in their own names instead of the corporation, but in fulfillment of a contract

²⁸ A deed of a corporation executed by the president under the seal of the corporation is executed in a valid mode. *Merchants Bank v. Goddin*, 76 Va. 503, 506.

²⁹ Signature of the corporate name by the secretary alone has been held sufficient, where the instrument is under seal. *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076.

Where the body of an instrument expressly contemplates that it shall be executed by the secretary of the corporation, and a place for his signature appears on the paper, it seems that the corporation is not bound where the seal is not attached and the secretary does not sign. *Ballston Terminal R. Co. v. Hudson Val. R. Co.*, 76 N. Y. App. Div. 184, 78 N. Y. Supp. 399.

³⁰ See Chap. 42.

A paper signed by the president and secretary of the corporation and attested by the corporate seal is, at least *prima facie*, a duly executed paper.

Watkins v. Glas, 5 Cal. App. 68, 89 Pac. 840.

³¹ *Sheehan v. Davis*, 17 Ohio St. 571, 582.

³² *Flint River Lumber Co. v. Smith*, 134 Ga. 627, 68 S. E. 436; *Lockville Power Corporation v. Carolina Power & Light Co.*, 168 N. C. 219, 84 S. E. 398. See also § 1449, *supra*.

In Vermont, the deed must be signed by an agent appointed by vote for that purpose, but it must be in the name of the corporation. *Hutchins v. Barre Water Co.*, 74 Vt. 36, 52 Atl. 70.

³³ *Hart v. Stone*, 30 Conn. 94, 96.

³⁴ *Flint River Lumber Co. v. Smith*, 134 Ga. 627, 68 S. E. 436.

³⁵ *Coleman v. Luetkeke*, — Tex. Civ. App. —, 164 S. W. 1117; *Jones v. Hanna*, 24 Tex. Civ. App. 550, 60 S. W. 279.

³⁶ *Osborne v. Tunis*, 25 N. J. L. 633, 661.

³⁷ *Wheelock v. Moulton*, 15 Vt. 519, and see § 26, Chap. 1, *supra*.

made by the corporation, the mortgage, while not a legal one, is a good equitable mortgage against the corporation.³⁸ So where all the stock is owned by one person, his mortgage executed as an individual creates a valid equitable lien on the mortgaged property.³⁹

§ 1466. Subscribing witnesses. A subscribing witness to a corporate deed is sometimes required by statute.⁴⁰ But subscribing witnesses are not necessary, in case of a deed or mortgage, unless expressly required by statute.⁴¹

III. SIMPLE CONTRACTS OTHER THAN NEGOTIABLE PAPER

§ 1467. General rules. In case of simple contracts, ordinarily not under seal, the proper mode of making the contract is to recite the name of the corporation in the beginning of the contract, and then add "a corporation created under and by virtue of the laws of the state of," naming the state, "hereinafter called the 'company,' party of the first (or 'second') part," and then sign it with the name of the corporation, followed by the names of the officers who should sign it, preceded by the word "Per" or "By" or some equivalent and followed by the title of the officers.⁴² However, contracts are often held binding on the corporation although not in the form stated and even where very informal.

Of course, letters written on the letterheads of a corporation by an officer thereof are not necessarily binding on the corporation,⁴³ although generally letters written by corporate officers are construed as corporate rather than personal matters, where relating to the corporate business.⁴⁴ However, a letter may be written in a dual capacity so as to bind the officer personally to a guaranty, as well as to bind the corporation in regard to other matters.⁴⁵

The fact that in the body of a contract signed by a corporation by its treasurer he speaks in the first person does not prevent it being a

³⁸ *Bundy v. Ophir Iron Co.*, 38 Ohio St. 300, 311.

³⁹ *Swift v. Smith*, 65 Md. 428, 433, 57 Am. Rep. 336, 5 Atl. 534.

⁴⁰ *Frank v. Hicks*, 4 Wyo. 502, 513, 35 Pac. 475, 1025. See, generally, as to deeds, 1 Devlin, *Real Estate* (3rd Ed.), § 256.

⁴¹ *International Kaolin Co. v. Vause*, 55 Fla. 641, 46 So. 3, and see §§ 1487-1491, *infra*.

⁴² See *Amerson v. Corona Coal & Iron Co. (Ala.)*, 69 So. 601.

⁴³ *Seely Office Appliance Co. v. Encyclopaedia Britannica Co.*, 119 N. Y. Supp. 213.

⁴⁴ *Gallagher v. Quick*, 79 N. Y. Misc. 633, 141 N. Y. Supp. 215; *Siracusa v. Miller Const. Co.*, 43 Pa. Super. Ct. 466.

⁴⁵ *McCrea v. Bentley*, 154 N. Y. Supp. 174.

corporate contract, where by its terms the corporation was to receive and pay for the goods.⁴⁶

It may be stated as a general rule that a corporation is not bound by written contract signed by its stockholders only.⁴⁷

§ 1468. Proper officer to sign. Generally the president of the company is the proper officer to sign a simple contract, but signature by other officers, where authorized to bind the corporation, is sufficient,⁴⁸ at least where there is no statute, charter provision or by-law prescribing who shall sign contracts.⁴⁹ Ordinary contracts need not be signed by the secretary,⁵⁰ although it is better practice for the secretary to sign.⁵¹ Where the only stockholders are the three directors, and there are no other officers, signature of the corporate name by one director, the others being present, is sufficient.⁵² If the corporation denies the authority of certain officers to sign a contract, the plaintiff must furnish some evidence of the authority of the officers to sign, where the contract is not under seal.⁵³

If one person occupies two or more offices of a corporation, and he has power to make contracts in his capacity as one officer but not in his capacity as another officer, the fact that in signing a contract he annexes the title of the office as incumbent of which he could not contract in the matter involved, is ordinarily of no importance.⁵⁴

§ 1469. Necessity for signature of name of corporation—In general. Simple contracts are not necessarily to be signed with the corporate name.⁵⁵ If the contract is in the name of the corporation but

⁴⁶ Taylor v. Danielsonville Cotton Co., 82 Conn. 220, 72 Atl. 1080.

⁴⁷ American Preservers' Co. v. Norris, 43 Fed. 711, and see § 26, Chap. 1, supra.

⁴⁸ Signature by person as vice president is sufficient, although the name of the corporation appears only in the body of the bid. Daly v. O'Brien, 60 N. Y. Misc. 423, 112 N. Y. Supp. 304.

⁴⁹ See § 1446, supra.

⁵⁰ St. Clair v. Rutledge, 115 Wis. 583, 594, 95 Am. St. Rep. 964, 92 N. W. 234.

⁵¹ See West Penn Chemical & Manufacturing Co. v. Prentice, 236 Fed. 891.

⁵² Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

⁵³ Oldfield v. Angeles Brewing & Malting Co., 77 Wash. 158, 162, 137 Pac. 469.

⁵⁴ California & Arizona Land Co. v. Cuddebach, 27 Cal. App. 450, 150 Pac. 379.

⁵⁵ Thompson v. Ellenz, 58 Minn. 301, 307, 59 N. W. 1023, where an agreement by railway company to sell land concluded "In witness whereof the Southern Minnesota Railroad Company hath caused these presents to be signed in duplicate by the commissioner of its land office," and was signed "M. Conant, Commissioner."

The name of the corporation need not be signed to the contract where it appears in the body of the contract

is signed merely by the name of an officer with his title added, the corporation is bound thereby and the officer is not individually bound,⁵⁶ provided of course the officer was authorized to act for the corporation. Thus a contract signed "J. F. Aldrich, Mgr. Columbia Pneumatic Wagon-Wheel Co.," although not in terms purporting to be the contract of the corporation, binds it where the manager had power to make the contract for it and it was intended as a corporate contract.⁵⁷ In Oregon, where a contract was signed "F. R. Schikora, President Woodburn Orchard Co., Inc.," the court said that "the intention of the parties is the prevailing consideration, and, if the nature and circumstances of a transaction show that the intention was to bind the principal and not the agent, effect will be given to such intention. * * * In determining the intention of the parties to the instrument in this case, we should look to the circumstances of the sale and the two writings as parts of one transaction."⁵⁸ So a contract of sale which on its face sets forth that the sale was made for the account of a named corporation is prima facie binding on the company although signed "C. E. Foust, Salesman."⁵⁹

Signature of a contract with the name of an individual, adding the words "for" a named corporation, binds the corporation.⁶⁰ However, the mere fact that an individual who is an officer of a corporation adds his title to his signature to a contract made by him does not necessarily make the contract binding on the corporation. Thus, letters signed with the name of an individual with the word "Cashier" added have been held not to bind the bank.⁶¹

as one of the parties, but it may be shown that the party signing it executed the contract as the agent of the corporation. *Lewis v. Pulitzer Pub. Co.*, 77 Mo. App. 434, 445.

⁵⁶ *Neufeld v. Beidler*, 37 Ill. App. 34.

Where a contract shows on its face that it was made for a corporation, it is liable thereon although it is signed merely by its president with the word "President" added, where he had authority to act and the corporation received the benefit of the contract. *Herndon v. Wardlaw*, 100 S. C. 1, 8, 84 S. E. 112.

⁵⁷ *Conant v. American Rubber Tire Co.*, 48 N. Y. App. Div. 327, 62 N. Y. Supp. 972.

⁵⁸ *Rowley v. Hager*, 63 Ore. 246, 127 Pac. 36.

⁵⁹ *Hanks Foundry Co. v. Woodstock Iron Works*, 127 Ga. 108, 56 S. E. 106.

⁶⁰ *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 648, 46 L. Ed. 366, aff'g 101 Fed. 591.

⁶¹ *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123, where a letter asking the addressee to go on the replevin bond in a suit involving only third persons concluded "they are good customers of ours, and if you will sign said bond we will stand between you and all harm."

Ordinarily, a corporate officer who signs as such, adding his title, is not personally bound.⁶² However, a guaranty of payment for property sold to a corporation is binding on the signer personally where it reads that "I" will attend to the payment, and is signed with the name of an individual, with the words "Treas. of" the buying corporation added.⁶³ So where a contract was entitled "Understanding had with * * * , as between himself and * * * , president, and representing" a named corporation, and provided that the first named should "give his whole time and best efforts to the care and promotion of the interests of" the named corporation, for a certain salary per year, but was signed merely by the president as an individual, it was held in Massachusetts that the president was personally bound where the principal stipulations of the contract relating to purchase of stock, etc., were all matters in which the corporation was not interested.⁶⁴ And a contract reciting that "I, W. H. Plummer, treasurer of" a named company, "do hereby agree," and signed with his name and "Treas." added, binds him personally.⁶⁵

Where a certiorari bond is in the name of a corporation, but is signed merely "Eugene Anderson, President," the bond is valid where the petition for certiorari and affidavit shows that Anderson is president of said corporation.⁶⁶

§ 1470. — **Where title of office not added.** Prima facie a contract on its face appearing to be that of a corporation but signed only with the name of an individual is not binding on the corporation.⁶⁷ However, failure of the officer signing to add the title of his office is not ordinarily fatal to the validity of a corporate contract.⁶⁸ Thus, a bill of

⁶² But in Iowa where a person signed "John Jones, President White Mfg. Co.," it was held that he was personally liable where there was nothing to show that the company had any corporate existence or that it was capable of thus contracting. *Woodbury v. Blair*, 18 Iowa 572.

⁶³ *Maine Red Granite Co. v. York*, 89 Me. 54, 35 Atl. 1014.

⁶⁴ *Guernsey v. Cook*, 117 Mass. 548.

⁶⁵ Where a contract reads "I, W. H. Plummer, treasurer of" a named company, "do hereby agree with Mr. N. Gavazza that, in consideration of his subscription for" shares of stock in said company "I will, upon demand,

accept a return of his stock and refund to him the money he has paid therefor," and is signed "W. H. Plummer, Treas.," it binds him personally, since the contract is in the name of and on behalf of himself. *Gavazza v. Plummer*, 53 Wash. 14, 42 L. R. A. (N. S.) 1, 101 Pac. 370.

⁶⁶ *Georgia-Alabama Business College v. Constitution Pub. Co.*, 8 Ga. App. 348, 69 S. E. 34.

⁶⁷ *Sherman v. New York Cent. R. Co.*, 22 Barb. (N. Y.) 239.

⁶⁸ *St. Clair v. Rutledge*, 115 Wis. 583, 594, 95 Am. St. Rep. 964, 92 N. W. 234.

sale reciting that the corporation has caused these presents to be signed by its president and its corporate seal to be affixed and attested by its secretary, is sufficiently executed, where it is signed with the name of the president without designating him as president, and bears the attestation of the secretary as such.⁶⁹ So a corporation is bound by a contract signed by officers as individuals where it recites in its body that they are acting in the capacity of the president and vice president of the corporation, and that their act in entering into the contract is "on the exclusive account" of the corporation.⁷⁰ And the fact that letters are signed by one in his individual name does not necessarily show that he was not acting in his capacity as president and manager of a corporation, if the intent to make a corporate contract appears from the acts of the parties and the entire correspondence, taken together with the subject-matter of the deal.⁷¹ Moreover, a letter signed by the president of a corporation, individually and not as president, accepting a proposal addressed to him in his official capacity, to do certain work, does not make him personally liable where the pronouns "we," "our" and "us" are used, and the party making the proposal knew when he received the reply that the president was acting for the corporation.⁷²

§ 1471. Contracts made in name of other person. Where a contract is one which a corporation is authorized to make, and has in fact authorized to be made for its benefit, but in the name of some other person or persons, it may be held liable thereon.⁷³ Thus, an agreement purporting to be only the individual undertaking of certain stockholders, and signed only by them, may bind the corporation where it was in fact executed for and in behalf of the corporation which received the benefits thereof.⁷⁴ So a corporation may be held liable for a loan although evidenced by a note signed merely by corporate officers where it received the benefit of the loan, paid the interest,

⁶⁹ *L. C. Smith & Bros. Typewriter Co. v. Blakemore*, 183 Ill. App. 14.

⁷⁰ *Valente v. International Milling Co.*, 119 N. Y. App. Div. 127, 103 N. Y. Supp. 966.

⁷¹ *Towers v. Stevens Cattle Co.*, 83 Minn. 243, 86 N. W. 88.

⁷² *Richardson Press v. Vandergrift*, 165 N. Y. App. Div. 180, 150 N. Y. Supp. 238.

⁷³ "So far as natural persons are

concerned, it is usually immaterial by what name they see fit to evidence their assent to a contract, providing they do assent and intend to become bound; and the same doctrine has been held applicable to corporations." *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. 152, 153.

⁷⁴ *American Preservers' Trust v. Taylor Mfg. Co.*, 46 Fed. 152.

etc.⁷⁵ If an officer of a corporation makes a contract in his own name, the corporation may be bound if it acts thereon.⁷⁶ Likewise, the corporation may be held liable on a contract signed only by the president of a corporation as an individual, and where the promise is in his name, where the corporation received the benefits of the contract and it is affirmatively shown that the president was acting for the corporation throughout the transaction.⁷⁷ On the other hand, if an officer of a corporation makes a contract in his own name and upon the security of his own property, and there is nothing to show that corporate liability was intended by either party to the contract, the corporation is not liable although it received the benefits of the contract.⁷⁸

Where one person was the president and secretary and practically the sole owner of the stock of two corporations, and the device of separate corporations was in order to evade responsibility on the part of the corporation for which he contracted, the latter corporation was liable on a contract made by the president as an individual.⁷⁹

IV. NEGOTIABLE PAPER

§ 1472. **General rules.** There is no fixed form in which commercial paper must be signed by a corporation, but it is generally signed with the corporate name, by the president or some general officer other than the secretary.⁸⁰ The proper method of executing a note is to have it read in the body of the note that the "White Mfg. Co. promises to pay," and to sign it "White Mfg. Co., by (or 'per' or like word) John Jones, President (or other title), 'and' by William White, Secretary."⁸¹

There has been much difference of opinion as to whether particular bills or notes bind the corporation or merely the officers signing or both;⁸² but it must be remembered that the fact that the signature imposes personal liability does not prevent the corporation also being liable.⁸³ Furthermore, decisions holding that corporate officers are

⁷⁵ McGarry v. Tanner & Bakes Co.,
21 Utah 16, 59 Pac. 93.

⁷⁶ Bryant Lumber Co. v. Crist, 87
Ark. 434, 112 S. W. 965.

⁷⁷ Morton v. Manchester Inv. Co.,
181 Mo. App. 364, 168 S. W. 904.

⁷⁸ Sperry v. Pittsburg Short Method
Smelting & Refining Co., 9 Colo. App.
314, 48 Pac. 315.

⁷⁹ Fountain v. West Lumber Co.,
161 N. C. 35, 76 S. E. 533.

⁸⁰ Williams v. Harris, 198 Ill. 501,
504, 64 N. E. 988, rev'g 98 Ill. App. 27.

⁸¹ See Millard v. St. Francis Xavier
Female Academy, 8 Ill. App. 341, 347.

⁸² For an exhaustive collection of
all agency cases relating to these ques-
tions, see notes in 42 L. R. A. (N. S.)
1, and in 21 L. R. A. (N. S.) 1046.

⁸³ Froelich v. Froelich Trading Co.,
120 N. C. 39, 42, 26 S. E. 647.

personally liable on their signatures are not necessarily authorities in favor of the exclusion of parol evidence to show that they were not intended to be personally liable, since in many of such cases no attempt was made to introduce any such evidence, and no reference is made thereto.⁸⁴

Unless required by statute or otherwise, the secretary need not sign the note.⁸⁵ Nor is the signature of the president necessary.⁸⁶ Where the charter provided that all contracts should be signed and executed "with such officer or agent as said body corporate shall appoint and direct," a general superintendent not expressly authorized to sign notes for a manufacturing company has no power so to do.⁸⁷ A corporate note may be signed in the corporate name only by a director where there are no stockholders or officers other than the three directors and the other two were present at the time the note was signed and participated in the transaction.⁸⁸ If the charter authorizes directors to indorse notes of the company, a person authorized by the directors may indorse corporate paper in order to transfer title thereto.⁸⁹ An officer of a company has no power to execute and sign a corporate note payable to himself as an individual, unless specially authorized.⁹⁰

Where a note is signed with the name of a corporation, and then underneath with the name of an individual with nothing added, he is at least *prima facie* liable as an individual, although in fact the president of the corporation who signed merely to authenticate the signature of the corporation.⁹¹ So a note signed with a corporate name "by Henry O. Harstad, President. J. E. Schultz" imposes personal liability on the latter unless he shows that the failure to add his title as officer of the company was due to a mutual mistake of the parties or that his signature was obtained through fraud or misrepresentation, or that his mistake in so signing was coupled with fraud by the payee in taking advantage thereof with knowledge of the mistake.⁹²

⁸⁴ Parol evidence, see § 1492, *infra*.

⁸⁵ *Houts v. Sioux City Brass Works*, 134 Iowa 484, 110 N. W. 166.

⁸⁶ *Conowingo Land Co. of Cecil County v. McGaw*, 124 Md. 643, 93 Atl. 222.

⁸⁷ *Dobbins v. Etowah Mfg. & Min. Co.*, 75 Ga. 238.

⁸⁸ *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

⁸⁹ *Spear v. Ladd*, 11 Mass. 94.

⁹⁰ *Porter v. Winona & D. Grain Co.*, 73 Minn. 210, 80 N. W. 965.

⁹¹ *Belmont Dairy Co. v. Thrasher*, 124 Md. 320, 92 Atl. 766.

⁹² *Exchange Bank of Marcus v. Schultz*, 167 Iowa 136, 149 N. W. 99, where reformation of note was sought.

A note reading "We, in behalf of" a certain corporation, promise, was held *prima facie* binding on the individuals, where they signed without any addition to their names.⁹³ A *fortiori*, a note reading "we, the subscribers, jointly and severally, promise * * * for the Boston Glass Manufactory," and signed by them merely as individuals, imposes personal liability.⁹⁴

In case of indorsements of negotiable paper, no particular form of indorsement is necessary to bind a corporation,⁹⁵ where it is apparent that the corporation intended to be bound thereby,⁹⁶ and a slight variation in the indorsement from the correct corporate name is harmless.⁹⁷ The corporate agent who signs the indorsement need not add his own name after that of the corporation.⁹⁸ A note made payable to "the order of directors of" a named corporation, is payable to the corporation so that it may be indorsed for transfer by writing the name of the corporation, by a duly authorized officer.⁹⁹

The mere fact that the abbreviation "Sec." is in different ink, in

⁹³ *Pomeroy v. Slade*, 16 Vt. 220. See also § 1473, *infra*.

But in Maine, where a note read "We, the subscribers, for Carmel Cheese Manufacturing Company, promise," and was signed merely by the names of individuals, the signers were held not personally liable. *Simpson v. Garland*, 72 Me. 40, 39 Am. Rep. 297.

⁹⁴ "The words 'jointly and severally' are quite decisive." *Bradlee v. Boston Glass Manufactory Co.*, 16 Pick. (Mass.) 347, 351.

⁹⁵ *Van Norden Trust Co. v. Rosenberg*, 62 N. Y. Misc. 285, 114 N. Y. Supp. 1025.

⁹⁶ *Van Norden Trust Co. v. Rosenberg*, 62 N. Y. Misc. 285, 114 N. Y. Supp. 1025.

An indorsement on a note of the name of a corporation, followed by the name of an individual with his official title added, is an indorsement of the corporation. *Piser v. Serota*, 182 Ill. App. 390.

The omission of the word "by" after the name of the corporation and before the name of the officer acting for it does not render the indorsement

insufficient. *Clark v. Read*, 12 App. Cas. (D. C.) 343.

Indorsements on a corporate note of the names of individuals followed by such words as "Treas." or "V. P." or the like render the individuals personally liable on the indorsements. *Morris v. Reed*, 14 Ga. App. 729, 82 S. E. 314.

⁹⁷ The variation is harmless where the indorsement is "Louis Rosenberg, Inc." and the name of the corporation is "L. Rosenberg, Incorporated." *Van Norden Trust Co. v. Rosenberg*, 62 N. Y. Misc. 285, 114 N. Y. Supp. 1025.

⁹⁸ *Youngs v. Perry*, 42 N. Y. App. Div. 247, 59 N. Y. Supp. 19.

An indorsement of a bill or note in order to transfer it, using merely the name of the corporation without adding the name of the officer or agent by whom the indorsement was written, is sufficient, although not to be recommended. *Youngs v. Perry*, 42 N. Y. App. Div. 247, 59 N. Y. Supp. 19.

⁹⁹ *First Nat. Bank of Stratford v. Walker*, 39 Okla. 620, 50 L. R. A. (N. S.) 1115, 136 Pac. 408.

the signature to a note, does not constitute notice to the payee of a material alteration.¹

§ 1473. Effect of use of word "I" or "we." Many times, where the word "we" is used, no attention is paid thereto by the court, one way or the other. In other cases, courts have been controlled, to a greater or less degree, by the choice of words in this respect, i. e., whether the note reads "I promise to pay," or "We promise," or the promise is expressly in the name of the corporation.² It is submitted, however, that while the use of the word "we" or "I" or the use of the corporate name, may be noticed for the purpose of showing an ambiguity so as to warrant the introduction of parol evidence in a proper case, it should never be deemed a controlling factor, although in some cases that has been done. It has been said that "there is no personal pronoun which is properly adapted to use by a corporation in making a note."³ A proper method is to repeat the name of the corporation in the body of the note,⁴ but the word "we" is frequently used by a corporation.⁵ The use of the word "we" does not necessarily warrant the conclusion that the note is the joint note of the corporation and the officer signing it,⁶ while the use of the pronoun "I" does not necessarily make the note binding on the officer rather than the corporation,⁷ at least where it is signed by the corporation acting through an officer.⁸ It has well been said that "there is no difference between the words 'I promise' and 'we promise,' so far as the creation of a personal obligation upon the speaker or writer is concerned."⁹ It has even been held that there is no personal liability although the words "I, we (and each of us)" are used in the body of the note and it is signed with the corporate name and the names of persons with "President" and "Secretary" added.¹⁰

If a note reads "we or either of use promise," and is signed by an

¹ *Frazer v. State Bank of Decatur*, 101 Ark. 135, 141 S. W. 941.

² See *infra* this chapter, for particular instances.

³ *Williams v. Harris*, 198 Ill. 501, 505, 64 N. E. 988, rev'g 98 Ill. App. 27.

⁴ *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480, aff'g 46 Ill. App. 430, where, however, the note was held that of the officer.

⁵ "The word 'we' may not improperly be used to denote a corporation aggregate." *New Market Sav. Bank*

v. Gillet, 100 Ill. 254, 262, 39 Am. Rep. 39, aff'g 7 Ill. App. 499.

⁶ *Derby v. Gustafson*, 131 Ill. App. 281.

⁷ *Hovey v. Magill*, 2 Conn. 680, 682.

⁸ *Williams v. Harris*, 198 Ill. 501, 505, 64 N. E. 988, rev'g 98 Ill. App. 27.

⁹ *Mellen v. Moore*, 68 Me. 390, 392, 28 Am. Rep. 77.

¹⁰ *New England Elec. Co. v. Shook*, 27 Colo. App. 30, 145 Pac. 1002. But see § 1477, *infra*.

individual with the words "Pres." of a named company added, and also with his name with the word "personally" added, the note is binding on both the corporation and the officer.¹¹

§ 1474. Signature with name of corporation followed by "per," "by" or the like. Bills or notes are unquestionably the obligation of the corporation rather than the officer, where the signature consists of the name of the corporation followed by such words as "by,"¹² "per," "pro," or the like. So where the word "per" was followed by the names of two officers holding different offices, without repeating the word "per" before each name, it has been held that neither of the officers is personally liable, and this although the words "I or we" were used in the body of the note.¹³ But where the promise in a note was by a named corporation "and we the undersigned," and was signed with the name of the corporation "by" several individuals without any official designation, both the corporation and the individuals were held liable.¹⁴

It is self-evident that where the signature of the corporation is followed by the word "by" with the addition of the name of a person and the title of his office, and there follows the name of an individual with no title added, the word "by" does not apply to the latter;¹⁵ and the same rule has been applied to officers signing after "by B. F. Aiman, President," with such additions to their names as "vice president," "secretary" and "directors."¹⁶

§ 1475. Name of corporation not disclosed. If a bill or note does not disclose the name of the corporation in any way, but is signed with the name or names of an individual or individuals with a title

¹¹ *McCormick v. Stockton & T. C. R. Co.*, 130 Cal. 100, 62 Pac. 267.

¹² *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109, 112, 59 Am. St. Rep. 522, 68 N. W. 370. See also *Pease v. Globe Realty Co.*, 141 Iowa 482, 42 L. R. A. (N. S.) 6, 119 N. W. 975.

A contract signed with the name of a corporation, "by" a certain person as president or other officer, does not bind the latter personally, even though the contract may use the words "we" and "our." *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa 357, 75 Am. St. Rep. 259, 79 N. W. 261.

¹³ *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988, rev'g 98 Ill. App. 27.

¹⁴ *Nunnemacher v. Poss*, 116 Wis. 444, 92 N. W. 375.

¹⁵ See *Exchange Bank of Marcus v. Schultz*, 167 Iowa 136, 149 N. W. 99, holding that in such case the latter can escape personal liability only by showing that the signature without adding his title was through a mutual mistake or that the payee obtained his signature through fraud and misrepresentation.

¹⁶ *Taylor v. Reger*, 18 Ind. App. 466, 63 Am. St. Rep. 352, 48 N. E. 262.

added such as "President" or "Secretary," it is generally held that the signers are personally liable,¹⁷ or at least prima facie personally liable.¹⁸ There is a conflict of opinion, however, whether, in such a case, parol evidence is admissible to show that the individual or individuals executed the bill or note as officers of the corporation and that the intention of all concerned was that it should bind the corporation and not the individuals. The courts of some states¹⁹ reject such

¹⁷ **California.** *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320.

Georgia. *Ocilla Southern R. Co. v. Morton*, 13 Ga. App. 504, 79 S. E. 480.

Illinois. *Hackemack v. Weibrock*, 172 Ill. 98, 49 N. E. 984, aff'g 71 Ill. App. 170.

Mississippi. *Fitch v. Lawton*, 6 How. 371.

Nebraska. *Penn Mut. Life Ins. Co. v. Conoughy*, 54 Neb. 123, 74 N. W. 422.

Washington. *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

West Virginia. *Rand & Minsker v. Hale*, 3 W. Va. 495, 502, 100 Am. Dec. 761.

However, an instrument reading "By order of the board of trustees, the treasurer of" a named company will pay to a specified person a certain sum, and signed by two persons with only "Pres't" and "Sec'y" added, was held a bill drawn by the corporation upon itself. *Hasey v. White Pigeon Beet Sugar Co.*, 1 Dougl. (Mich.) 193.

In a New York case it was said: "Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking bona fide and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwith-

standing they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well settled rule. * * * It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers." *Casco Nat. Bank of Portland v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908.

¹⁸ *Laramie v. Tanner*, 69 Minn. 156, 160, 71 N. W. 1028.

¹⁹ *Richmond Locomotive & Machine Works v. Moragne*, 119 Ala. 80, 24 So. 834; *Lawrence County Bank v. Arndt*, 69 Ark. 406, 410, 65 S. W. 1052; *San Bernardino Nat. Bank v. Andreson* (Cal.), 32 Pac. 168; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320.

But in a later case in California it was held that where a note in its body does not refer to any corporation as a party thereto, and no corporate name is signed to the paper, but it is merely

evidence but the better rule is in favor of its admission²⁰, at least where introduced for the purpose of holding the corporation jointly

signed "J. W. Mosher, Pres., Ira E. Smith, Secy.," parol evidence is admissible to show that the parties intended to bind the corporation thereby. *San Joaquin Valley Bank v. Gate City Oil Co.*, 170 Cal. 250, 149 Pac. 557.

Parol evidence is not admissible to show an intention to bind the corporation rather than the officer where the name of the corporation does not appear on the face of the note as an obligor in such way as to render it doubtful from the paper itself whether the corporation or the officer was intended to be bound. *Moragne v. Richmond Locomotive & Machine Works*, 124 Ala. 537, 540, 27 So. 240.

"An obligation so signed is presumptively the individual undertaking of the person signing, and it has been held that, when sued upon it as an individual, he is estopped to deny that it is his individual undertaking, if there is nothing in the writing to indicate that he was contracting in behalf of another." *Ocilla Southern R. Co. v. Morton*, 13 Ga. App. 504, 79 S. E. 480.

But in such a case equity has interposed to reform the note to correspond to the intention of the parties as shown by parol evidence. *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052.

²⁰ *Flower v. Commercial Trust Co.*, 223 Fed. 318; *Kraniger v. People's Bldg. Society*, 60 Minn. 94, 61 N. W. 904; *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; *Washington Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480. See generally 1 *Mechem on Agency* (2nd Ed.), § 1162, notes 63, 64, and see also note in 21 L. R. A. (N. S.) 1046, 1082-1086.

"May we say, in passing that the principle of construing as mere descriptio personae such words as

'agent,' 'administrator,' 'president,' 'secretary,' * * * etc., when appended to signatures to instruments not plainly disclosing another as principal, and of refusing to hear parol as to the true capacity in which the signers acted, is a rule which long since has outlived the reason back of it? There was a day when but few men were able to identify themselves as the makers of contracts by the handwriting of the signatures—a day, also, when surnames, in the manner to which we are now accustomed, were a rarity, and John, the smith (from whom the many Smiths have since descended), was spoken of in the community and was described in contracts as 'John the Smith' or as 'John Smith,' to distinguish him from John who ran the mill (ancestor of the Miller family), and was described in his contracts as 'John the Miller,' or 'John Miller,' or from John who lived in the Glen, and was described as 'John Glen.' In those days, when one of the Johns added the words 'agent,' 'administrator,' * * * or some similar designation, after his name in a contract, there was a reason for the inference that he himself was personally contracting, and that the words appended were intended to describe him and to identify him. * * * But that day has passed. The reason has expired, but the rule persists through juridic pertinacity." *Saul v. Southern Seating & Cabinet Co.*, 6 Ga. App. 843, 846, 65 S. E. 1065.

Where a note read "we" promise to pay "at our office," and was signed by two persons with merely the words "Pres." and "Secy." added, and no corporation was mentioned in the body of the note, it was nevertheless held that the signers could show by parol that the note was a corporate note.

liable as distinguished from merely exonerating the officers.²¹ In any event, it is held that parol evidence is admissible in such case where the instrument is not negotiable.²² The United States Supreme Court has held that where a note was payable to "Geo. Moebs, Sec. & Treas.," was signed "Peninsular Cigar Co., Geo. Moebs, Sec. & Treas.," and was indorsed "Geo. Moebs, Sec. & Treas.," there was no such ambiguity as to warrant evidence to show that it was the intention of the indorser to bind himself personally as such.²³

Where the name of the corporation nowhere appears, either in the body of the note or in the signature, and there is nothing whatever to indicate that the signer is acting as an officer or agent, parol evidence is not admissible to charge a corporation as principal,²⁴ and this rule is reiterated by the Negotiable Instruments Law by its provision that "no person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided."²⁵

Decowski v. Grabarski, 181 Ill. App. 279.

In Kansas, it is held that parol evidence is admissible where a bond is signed with the name of an individual with the word "Cashier" added, even though the corporation is in no way referred to either in the body of the bond or the signature. *Gardner v. Cooper*, 9 Kan. App. 587, 60 Pac. 540, 58 Pac. 230.

Where a note was payable to "A. J. Boardman, Treasurer," and was indorsed in precisely those words, parol evidence is admissible, in an action against him as indorser, to show that he indorsed merely in his official capacity. *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1116.

Where a guaranty indorsed on a note is signed "E. J. Elliott, Pt.," parol evidence is admissible to show the capacity in which he signed, although the guaranty in no way refers to any corporation. *Small v. Elliott*, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92.

²¹ Where a note is signed by officers of a corporation, with their title added, evidence has been held admis-

sible, where not introduced to evade personal liability, to show that the loan for which the note was given was made to the corporation and was used by it, for the purpose of holding the corporation liable, where the corporate seal had been attached prior to bringing the suit. *San Joaquin Valley Bank v. Gate City Oil Co.*, 170 Cal. 250, 149 Pac. 557.

²² *Texas Land & Cattle Co. v. Carroll & Iler*, 63 Tex. 48.

²³ *Falk v. Moebs*, 127 U. S. 597, 32 L. Ed. 266.

²⁴ *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 12 L. R. A. 714, 24 Am. St. Rep. 351, 15 S. W. 417, distinguishing *Washington Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480, as involving a signature to which was added a descriptive word, i. e., "President"; *Duncan v. Kirtley*, 54 Mo. App. 655; *Weagant v. Camden*, 37 Okla. 508, 132 Pac. 487. See also *Kohrs v. Smith*, 45 Mont. 467, 124 Pac. 275.

²⁵ *Kohrs v. Smith*, 45 Mont. 467, 124 Pac. 275; *Seattle Shoe Co. v. Packard*,

§ 1476. Name of corporation only in signature after name of officer. Sometimes the name of the corporation in no way appears in the body of the negotiable instrument, but the signature is in the form "John Jones, President (or 'Secretary' or 'Treasurer' or the like) White Manufacturing Company." In such a case, the law differs from that governing in regard to other written contracts, not negotiable, in which latter case it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound.²⁶ So where a note is signed with the name of a corporation followed by the names of individuals, but there is nothing to indicate that they are connected with the corporation in any way, parol evidence is not admissible to show that the individuals signed in their representative capacity only.²⁷

If the person so signing "be, in fact, a mere agent, trustee or officer of some principal, and is in the habit of expressing, in that way, his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligations, contrary to the intent of the parties."²⁸ Generally, such a signature is held to impose personal liability, as maker or drawer,²⁹

43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845, in which cases, however, a corporation was not involved.

²⁶ See § 1493, *infra*, and see 1 Daniel, Neg. Inst. § 303.

²⁷ Way v. Lyric Theatre Co., 79 Wash. 275, 140 Pac. 320.

"This would be to create an ambiguity where none exists, and to make for the parties a contract which they did not make for themselves." Toon v. McCaw, 74 Wash. 335, L. R. A. 1915 A 590, 133 Pac. 469.

²⁸ Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665. See generally 1 Mechem on Agency, § 1162, note 62.

²⁹ California. Chamberlain v. Pacific Wool-Growing Co., 54 Cal. 103.

Illinois. Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177; Williams v. Miami Powder Co., 36 Ill. App. 107.

Indiana. McClellan v. Robe, 93 Ind. 298; Williams v. Second Nat. Bank, 83

Ind. 237; Hayes v. Brubaker, 65 Ind. 27; Hayes v. Matthews, 63 Ind. 412, 30 Am. Rep. 226; Hays v. Crutcher, 54 Ind. 260.

Iowa. Coburn v. Omega Lodge, 71 Iowa 581, 32 N. W. 513.

Kentucky. Burbank v. Posey's Adm'r, 70 Ky. 372.

Maine. McClure v. Livermore, 78 Me. 390, 6 Atl. 11; Mellen v. Moore, 68 Me. 390, 28 Am. Rep. 77.

Maryland. Sumwalt v. Ridgely, 20 Md. 107.

Massachusetts. Fiske v. Eldridge, 12 Gray 474.

Michigan. Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420.

New York. Hills v. Bannister, 8 Cow. 31; Barker v. Mechanic Fire Ins. Co., 3 Wend. 94, 20 Am. Dec. 664.

North Carolina. Froelich v. Froelich Trading Co., 120 N. C. 39, 26 S. E. 647.

or as acceptor of a bill of exchange,³⁰ at least prima facie,³¹ especially where the words "I promise" are used in the body of the note.³² But the contrary has been held in Massachusetts under the terms of the Negotiable Instruments Law.³³ Furthermore, a note signed by one person as "secretary" and another as "president," and payable "to the order of 'ourselves,'" and indorsed with the name of a corporation followed by names of the makers with their titles added, is the note of the corporation.³⁴ Where a note was signed "Arthur W. Magill, agent for" a named company, and it appeared that he had been in the constant habit of signing notes in this manner, with the knowledge of the company, which had been regularly paid, he was held not personally liable.³⁵

In most jurisdictions parol evidence is held admissible in case of such signatures to show the intention of the parties,³⁶ but in some

West Virginia. *Scott v. Baker*, 3 W. Va. 285.

Contra, *Johnson v. Smith*, 21 Conn. 627; *Despatch Line of Packets v. Belamy Mfg. Co.*, 12 N. H. 205, 229, 37 Am. Dec. 203.

However, an agreement to pay in bonds of the corporation "as soon as the bonds be issued in the regular and legal way" shows an intention to bind the corporation, although the body of note does not refer to any corporation and the signature is by the name of an individual, with the words "President" of a named corporation added. *Reed v. Fleming*, 209 Ill. 390, 395, 70 N. E. 667, rev'g 102 Ill. App. 668.

But where a note read "we promise to pay," and was signed "G. A. Colby, Pres't Pac. Peat Coal Co." and on the next line "D. K. Tripp, Sec. pro tem.," it was held that they were not personally liable, especially in case of Colby who indorsed the note merely as an individual. *Farmers' & Mechanics' Bank v. Colby*, 64 Cal. 352, 28 Pac. 118.

³⁰ *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep.

829, 8 N. E. 583. Contra, *Amison & Dovey v. Ewing*, 42 Tenn. 366.

Rule applied to acceptance of bill of exchange by "John R. Livingston, Jr., President Rosendale M'ng Co., 16 Wall st." *Moss v. Livingston*, 4 N. Y. 208.

³¹ *Drake v. Flewellen & Co.*, 33 Ala. 106; *McNeil v. Shober & C. Lithographing Co.*, 144 Ill. 238, 33 N. E. 31, aff'g 44 Ill. App. 297; *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182.

³² *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Haverhill Mut. Fire Ins. Co. v. Newhall*, 1 Allen (Mass.) 130.

³³ *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878, set forth at length in § 1485, *infra*.

³⁴ *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 589, 58 N. E. 162.

³⁵ *Hovey v. Magill*, 2 Conn. 680.

³⁶ **Alabama.** *Drake v. Flewellen & Co.*, 33 Ala. 106.

Kansas. *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997, where note sued on is still in hands of payee; *Shaffer v. Hohenschild*, 2 Kan. App. 516, 43 Pac. 979.

states such evidence is rejected.³⁷ at least where the words "I promise" are used.³⁸

Where paper is made payable to a corporation and is indorsed by a person signing as an officer of the corporation, it is presumed that the indorsement is a corporate act.³⁹

§ 1477. Signature with name of corporation followed by name of officer and title of office. A common form of signing negotiable paper is to sign the name of the corporation, and then the name or names of an officer or officers, followed by the title of the officer or officers. Thus: "White Manufacturing Co., John Jones, Treasurer." In such cases it is generally held that the corporation is liable on the

Minnesota. *Kraniger v. People's Bldg. Society*, 60 Minn. 94, 61 N. W. 904.

Missouri. *Smith v. Alexander*, 31 Mo. 193.

Montana. *Gerber v. Stuart*, 1 Mont. 172.

Nevada. *Schaefer v. Bidwell*, 9 Nev. 209.

New Jersey. *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182.

New York. *Brockway v. Allen*, 17 Wend. 40.

West Virginia. *Devendorf v. West Virginia Oil & Oil Land Co.*, 17 W. Va. 135, 172.

Thus, where a bill of exchange is drawn on one as an individual and is accepted by him with the addition to his name of the words "Treasurer of" a named company, there is such an ambiguity as to warrant the admission of parol evidence. *Lafin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 417, 30 Am. Rep. 472.

A note signed by an individual followed by "Sec'y The Enid Town Co.," may be shown to have been signed in his official capacity. *James v. Citizens Bank of North Enid*, 9 Okla. 546, 60 Pac. 290, overruling *Keokuk Falls Improvement Co. v. Kingsland & Douglas Mfg. Co.*, 5 Okla. 32, 47 Pac. 484.

Where a note reads "We promise

to pay," and is signed "John Jones, President of White Mfg. Co.," the corporation may be held liable thereon where it intended thereby to bind itself. *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

³⁷ *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11; *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 583.

In Nebraska, it is held that where persons sign as "directors of" a named company, but the name of the company does not appear on the face of the note, parol evidence is not admissible to exonerate the signers from personal liability; but that where they did not intend to bind themselves personally which was known to the payee, the signers are, on a proper plea, entitled to have the note reformed to express the real intention of the parties. *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512.

³⁸ *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Haverhill Mut. Fire Ins. Co. v. Newhall*, 1 Allen (Mass.) 130. Contra, *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997.

³⁹ *Page v. Ford*, 65 Ore. 450, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915 A 1048, 131 Pac. 1013.

paper and that the officer is not liable,⁴⁰ at least in the absence of extrinsic evidence tending to show the contrary,⁴¹ and this is so even though the words "we promise to pay" are used in the body of the instrument.⁴² In any event, it seems that parol evidence is admissible to show that the note was intended to be a corporate obligation;⁴³

40 Colorado. *New England Elec. Co. v. Shook*, 27 Colo. App. 30, 145 Pac. 1002.

Georgia. *Spiller-Beall Co. v. Hirsh*, 18 Ga. App. 450, 89 S. E. 587.

Illinois. *Derby v. Gustafson*, 131 Ill. App. 281; *Miers v. Coates*, 57 Ill. App. 216. *Contra*, *Lumley v. Kinsella Glass Co.*, 85 Ill. App. 412.

Iowa. This is the rule at the present time, or at least parol evidence is admissible in such a case to show that the signature of the individual was in behalf of the corporation. *Farmers' Nat. Bank v. Hatcher*, — Iowa —, 157 N. W. 876, applying rule to guaranty on back of note and adopting dissenting opinion in *Mathews v. Dubuque Mattress Co.*, 87 Iowa 246, 19 L. R. A. 676, 54 N. W. 225. The contrary was held in the earlier cases of *Heffner v. Brownell*, 70 Iowa 591, 31 N. W. 947, and *McCandless v. Belle Plaine Canning Co.*, 78 Iowa 161, 4 L. R. A. 396, 16 Am. St. Rep. 429, 42 N. W. 635.

Maine. *Gleason v. Sanitary Milk-Supply Co.*, 93 Me. 544, 74 Am. St. Rep. 370, 45 Atl. 825; *Castle v. Bel-fast Foundry Co.*, 72 Me. 167.

Massachusetts. *Diaper v. Massachusetts Steam Heating Co.*, 5 Allen 338.

Nebraska. *American Nat. Bank v. Omaha Coffin Mfg. Co.*, 1 Neb. (Unoff.) 322.

New Jersey. *Reeve v. First Nat. Bank of Glassboro*, 54 N. J. L. 208, 16 L. R. A. 143, 33 Am. St. Rep. 675, 23 Atl. 853.

Ohio. *Aungst v. Creque*, 72 Ohio St. 551, 74 N. E. 1073.

Tennessee. *Wilson v. Fite*, 46 S. W. 1056.

Texas. *Latham v. Houston Flour-Mills*, 68 Tex. 127, 3 S. W. 462.

Utah. *Armstrong v. Cache Valley Land & Canal Co.*, 14 Utah 450, 48 Pac. 690.

Wisconsin. *Liebscher v. Kraus*, 74 Wis. 387, 5 L. R. A. 496, 17 Am. St. Rep. 171, 43 N. W. 166.

In Alabama, however, where a note is so signed, the rule is that it imposes prima facie a personal liability upon the officer, at least where the words "we promise" are used in the body of the note. *Briel v. Exchange Nat. Bank*, 172 Ala. 475, 55 So. 808.

⁴¹ *Thompson v. Hasselman*, 131 Ill. App. 257.

⁴² *Derby v. Gustafson*, 131 Ill. App. 281; *Thompson v. Hasselman*, 131 Ill. App. 257; *Aungst v. Creque*, 72 Ohio St. 551, 74 N. E. 1073, and see cases cited in preceding notes, in many of which the word "we" was used in the note but no special attention was paid thereto.

"I do not perceive any significance in the use of the words 'We promise to pay' instead of 'The company promises to pay.' The contention was that the use of these words raised an implication that it was the joint note of the corporation and of Warriek. But, as has been remarked in more than one of the cases cited in which the notes contained a promise in like form, the word 'we' is often used by a corporation aggregate." *Reeve v. First Nat. Bank*, 54 N. J. L. 208, 16 L. R. A. 143, 33 Am. St. Rep. 675, 23 Atl. 853.

⁴³ *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86; *Western Grocer Co. v. Lackman*, 75

and this rule is not changed by the provisions of the Negotiable Instruments Law.⁴⁴ In Iowa, however, it was held in the earlier cases that parol evidence was not admissible in such cases to show corporate liability,⁴⁵ but the contrary rule now prevails in that state.⁴⁶ The better rule, in all such cases, is that the signature conclusively shows corporate liability and that parol evidence is not admissible to show that the officer signed in his individual capacity.⁴⁷

If the names of two or more officers follow the corporate name, there is some conflict in the decisions, some holding there is no personal liability,⁴⁸ or at least that parol evidence is admissible to show that the officers were not intended to be personally liable,⁴⁹ while other cases hold that the officers are personally liable, at least where the words "we promise" are used.⁵⁰ In Oklahoma, it has been held that a note signed with the name of a corporation and underneath the words "By W. M. Denham, Direct." and followed by the names of several persons with "Direct." or "Pres." added, may be shown to be an obligation of the individuals.⁵¹ In Wisconsin it is held that

Kan. 34, 88 Pac. 527; *Myers v. Chesley*, 190 Mo. App. 371, 177 S. W. 326.

⁴⁴ *Myers v. Chesley*, 190 Mo. App. 371, 379, 177 S. W. 326.

⁴⁵ *Mathews v. Dubuque Mattress Co.*, 87 Iowa 246, 19 L. R. A. 676, 54 N. W. 225; *McCandless v. Belle Plaine Canning Co.*, 78 Iowa 161, 4 L. R. A. 396, 16 Am. St. Rep. 429, 42 N. W. 635; *Heffner v. Brownell*, 75 Iowa 341, 39 N. W. 640.

⁴⁶ *Farmers' Nat. Bank v. Hatcher*, — Iowa —, 157 N. W. 876.

⁴⁷ *Liebscher v. Kraus*, 74 Wis. 387, 5 L. R. A. 496, 17 Am. St. Rep. 171, 43 N. W. 166. *Contra*, *Swarts v. Cohen*, 11 Ind. App. 20, 38 N. E. 536.

In Wisconsin, where the note names the corporation as the promisor, it is held that there is no ambiguity, and that parol evidence is not admissible to show that the officer signed as a joint maker. The provision of the Negotiable Instruments Law was referred to. *Germania Nat. Bank of Milwaukee v. Mariner*, 129 Wis. 544, 546, 109 N. W. 574.

An indorsement on a note of the

name of a corporation, followed by "Frank A. Smith, Pres." is an indorsement of the corporation and extrinsic evidence is not admissible to show who was intended to be bound. *Piser v. Serota*, 182 Ill. App. 390.

⁴⁸ *Northeastern Coal Co. v. Tyrrell*, 133 Ill. App. 472; *English & Scottish American Mortg. & Ins. Co. v. Globe Loan & Trust Co.*, 70 Neb. 435, 6 Ann. Cas. 999, 97 N. W. 612; *Aungst v. Creque*, 72 Ohio St. 551, 74 N. E. 1073; *Armstrong v. Cache Valley Land & Canal Co.*, 14 Utah 450, 48 Pac. 690.

⁴⁹ *Western Grocer Co. v. Lackman*, 75 Kan. 34, 88 Pac. 527.

⁵⁰ *Heffner v. Brownell*, 75 Iowa 341, 39 N. W. 640. But see later Iowa cases, note 40, *supra*.

⁵¹ *Denman v. Brennaman*, — Okla. —, 57 L. R. A. (N. S.) 1047, 149 Pac. 1105, where the court said, however, by way of dictum, that if the name of the corporation had been followed by only one name after the "By," it would have been the note of the corporation.

where the promise to pay, in a note, is in the name of a corporation, and it is signed with the name of the corporation to which is added "E. R. Stillman, Treas., John W. Mariner," parol evidence is admissible to show that the latter signed in his official capacity as secretary of the corporation.⁵² A decision which goes to the extreme limit in upholding parol evidence decides that where a note is signed with the name of a corporation, and underneath with the name of two individuals with the words "President" and "Secretary" added, and is indorsed on the back before delivery with the names of several individuals followed by the words "Board of Directors," parol evidence is admissible to show that the directors signed merely as officers and to bind the corporation only.⁵³

In California, a note read "we promise to pay" and was signed with the name of a corporation, followed by the words "By J. H. Barbour, Pt. Bryant Howard, Secretary." Then, underneath, appeared several individual names, including that of Bryant Howard, to all of which were added "As Stockholders." It was held that Howard was personally liable, overruling the contention that his signature and that of the other stockholders was merely to ratify the contract made in the name of the corporation for the purpose of making it a valid corporate act.⁵⁴

§ 1478. Promise that of corporation. Where the note reads that a named company promises to pay, persons who sign as individuals with their title of office added⁵⁵ or without any title added,⁵⁶ are not personally liable, and this is so although the name of the corporation is not signed to the note.⁵⁷

In Illinois, however, it was held that where the signature merely added the title "Gen. Supt.," who prima facie has no authority to execute notes for the corporation, parol evidence was admissible to

⁵² *Germania Nat. Bank of Milwaukee v. Mariner*, 129 Wis. 544, 109 N. W. 574. Contra, under Negotiable Instruments Law, where corporation not named in body of note. *Rudolph Wurlitzer Co. v. Rossmann*, — Mo. App. —, 190 S. W. 636.

⁵³ *Kline v. Bank of Tescott*, 50 Kan. 91, 18 L. R. A. 533, 34 Am. St. Rep. 107, 31 Pac. 688.

⁵⁴ *Savings Bank of San Diego County v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273.

⁵⁵ *Shaver v. Ocean Min. Co.*, 21 Cal. 45.

In Iowa the contrary has been held. *Day v. Ramsdell*, 90 Iowa 731, 57 N. W. 630, 52 N. W. 208.

⁵⁶ *Shaver v. Ocean Min. Co.*, 21 Cal. 45; *Armstrong v. Kirkpatrick*, 79 Ind. 527.

⁵⁷ *Shaver v. Ocean Min. Co.*, 21 Cal. 45; *Armstrong v. Kirkpatrick*, 79 Ind. 527.

show individual liability.⁵⁸ And in Oklahoma, where a note is signed by individuals with the words "Pres." and "Sec." added, parol evidence was held admissible to show them personally liable although the promise in the body of the note was in the name of a corporation.⁵⁹

Where the promise in the body of a note is that of the corporation, but the conditions therein are so worded as apparently to bind the signing officers as individuals, and the note is signed first by the officers with their title added, and then with the corporate name, evidence is admissible to show in what capacity they signed.⁶⁰

§ 1479. Promise in name of officers as officers. A note sometimes reads "We, trustees (or 'directors' or the like)" of a named company "promise to pay," or "The Trustees (or the like) of" a named corporation promise to pay, and is signed by the names of the individuals with their titles as trustees or the like added. In construing such notes, as to corporate or personal liability, there is much conflict in the decisions.⁶¹ In some jurisdictions such notes are held not to bind the signers personally,⁶² but that the corporation is bound,⁶³ especially where the true name of the corporation is "The Trustees of" etc.⁶⁴

⁵⁸ Frankland v. Johnson, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480, aff'g 46 Ill. App. 430.

⁵⁹ Wiers v. Treese, 27 Okla. 774, 117 Pac. 182.

⁶⁰ Planters' Chemical & Oil Co. v. Stearnes, 189 Ala. 503, 66 So. 699.

⁶¹ See, as to agents generally, 1 Mechem on Agency (2nd Ed.), §§ 1130-1135.

⁶² Blanchard v. Kaull, 44 Cal. 440; Aimen v. Hardin, 60 Ind. 119; Pearse v. Welborn, 42 Ind. 331; Pitman v. Kintner, 5 Blackf. (Ind.) 250, 33 Am. Dec. 469; Mann v. Chandler, 9 Mass. 335; Mott v. Hicks, 1 Cow. (N. Y.) 513, 531, 13 Am. Dec. 550. But see Prescott v. Hixon, 22 Ind. App. 139, 72 Am. St. Rep. 291, 50 N. E. 391.

⁶³ Blanchard v. Kaull, 44 Cal. 440; Emerson v. Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Mann v. Chandler, 9 Mass. 335; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am.

Dec. 550; Lindus v. Melrose, 2 H. & N. 293.

⁶⁴ New Market Sav. Bank v. Gillet, 100 Ill. 254, 39 Am. Rep. 39, aff'g 7 Ill. App. 499, and distinguishing Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175, on the ground that in that case the name used in the body of the note was not that of the corporation.

A fortiori is this true where the note recites that the trustees of a certain church, "as such trustees," promise to pay, and is signed by individuals with the words "as trustee," etc., added. Little v. Bailey, 87 Ill. 239.

Where a note read "we promise, for ourselves and our successors," and was signed with several names followed by the words "Vestrymen of St. James' Parish," and a statute provides that "the vestrymen of every parish" shall be a corporation, they are not personally liable. Cres-

Other jurisdictions hold the signers personally liable,⁶⁵ at least where the signatures do not add the title of the officers.⁶⁶ Thus, it is held in Massachusetts that the mere insertion of "for" or "for or in behalf of" the principal, in the body of a note, does not make it the contract of the corporation if signed merely by the name of the officer or officers without adding his or their title;⁶⁷ but the contrary is held in Maine.⁶⁸ In Illinois, a note was held the individual promise of the trustees where it read "we, the trustees of * * * promise" and was signed by the trustees as individuals;⁶⁹ and a like decision was rendered in Kentucky where a note read "we, the directors of the * * * company promise" and was signed by the directors in their individual names.⁷⁰

Sometimes it is held that such a note is so ambiguous as to warrant the introduction of parol evidence.⁷¹

well v. Holden, 3 MacArthur (D. C.) 579.

⁶⁵ Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175; Bingham v. Stewart, 13 Minn. 106; Vliet v. Simanton, 63 N. J. L. 458, 43 Atl. 738; Dayton v. Warne, 43 N. J. L. 659; Dutton v. Marsh, L. R. 6 Q. B. 361, although seal of corporation was attached.

⁶⁶ McKensey v. Edwards, 88 Ky. 272, 3 L. R. A. 397, 21 Am. St. Rep. 339, 10 S. W. 815; Paek v. White, 78 Ky. 243; Fogg v. Virgin, 19 Me. 352, 36 Am. Dec. 757; Packard v. Nye, 2 Metc. (Mass.) 47. Contra, Haskell v. Cornish, 13 Cal. 45.

Where a note read "We the Trustees of Oakchumpna Academy promise to pay" and was signed by individuals with no title added, they were held personally liable. Cleaveland v. Stewart, 3 Ga. 283.

In Illinois, parol evidence is not admissible to exonerate the individuals. Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71.

⁶⁷ Barlow v. Congregational Society, 8 Allen (Mass.) 460; Bradlee v. Boston Glass Manufactory, 16 Pick. (Mass.) 347.

In Massachusetts, it has been held that where a note read "We, the

prudential committee for and in behalf of the Baptist Church in Lee," and was signed by individuals without adding any title to their names, they are personally liable. Morell v. Codding, 4 Allen (Mass.) 403.

⁶⁸ Simpson v. Garland, 72 Me. 40, 39 Am. Rep. 297.

⁶⁹ Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71.

⁷⁰ Yowell v. Dodd, 66 Ky. 581, 96 Am. Dec. 256.

⁷¹ Haile v. Peirce, 32 Md. 327, 3 Am. Rep. 139; Simanton v. Vliet, 61 N. J. L. 595, 40 Atl. 595; Miller v. Way, 5 S. D. 468, 59 N. W. 467; Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152.

Where a note reads "We the trustees of * * * , known as W. Fleming and Company, promise to pay" and is signed merely by the names of individuals with the word "trustees" added, parol evidence is admissible to show the note a corporate obligation. Simanton v. Vliet, 61 N. J. L. 595, 40 Atl. 595.

In Texas, it is held that although the signers are prima facie individually liable, parol evidence is admissible to show that the note was made with the intent of binding the cor-

Where a note reads "We or either of us, directors of" a named corporation, promise to pay, and is signed by individuals without adding their title, they are personally liable.⁷²

In any event, where a note reads that "we as trustees but not individually" promise, and is signed by the individuals with the word "Trustees" added, they are not personally liable even though no principal is referred to in the note.⁷³ Even in Massachusetts it was held that a promise by "I, as treasurer of * * * or my successors in office" and signed by him with the word "Treasurer" added, binds the corporation.⁷⁴ Where a note read "we, the undersigned (trustees of the Evangelical German Church, at Jackson, Mo., for ourselves, as such trustees, and our successors in office), promise and bind ourselves (for said congregation and such successors in office)," and was signed merely by the trustees with the word "trustees" added, they were held not personally liable.⁷⁵

Where a note read "the president, by the order of the board of the * * * company, promise to pay," and was signed "E. J. Dodd, Pres.," and with other names merely as individuals, they are all personally liable.⁷⁶

In any event, there is personal liability where the company referred to had never been incorporated.⁷⁷

§ 1480. Signature "for" named corporation with name and title added. A note reading "we" promise to pay, and signed "For the (name of corporation), John Jones, President, William White, Secretary," is prima facie binding only on the corporation.⁷⁸

The contrary, however, has been held where the words "I promise" were used in the body of the note;⁷⁹ but in Connecticut it was held

poration only to the knowledge of the payee, where it is still in his hands. Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152.

⁷² Whitney v. Sudduth, 61 Ky. 296; Titus v. Kyle, 10 Ohio St. 444.

⁷³ Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49.

⁷⁴ Barlow v. Congregational Society, 90 Mass. 460.

⁷⁵ Klostermann v. Loos, 58 Mo. 290.

⁷⁶ Caphart v. Dodd, 66 Ky. 584, 96 Am. Dec. 258.

⁷⁷ McKenney v. Bowie, 94 Me. 397, 47 Atl. 918.

⁷⁸ Roney's Adm'r v. Winter, 37 Ala.

277. To same effect, see McCall v. Clayton, 44 N. C. 422.

A note reading "we" promise to pay, and signed "For the [name of a corporation]" with the names of two persons below following by the title of their respective offices, is a corporate obligation. Gold Glen Mining, Milling & Tunneling Co. v. Dennis, 21 Colo. App. 284, 121 Pac. 677.

Same rule applies where signature is "For the Dubuque Times Co., Fred. S. Winslow, Treasurer." Wheelock v. Winslow, 15 Iowa 464.

⁷⁹ Macbean v. Morrison, 8 Ky. 545.

that "when an agent, duly authorized, subscribes an engagement, in such manner as to manifest an intent not to bind himself, but to bind the principal, and when, by his subscription, he has actually bound the principal, then it is clear that the contract cannot be binding on him personally. It will be agreed that no precise form of words is required to be used in the signature, that every word must have an effect, if possible, and that the intention must be collected from the whole instrument taken together"; and it was held that a note using the words, "I promise to pay," etc., and signed by an agent of a corporation with his own name, followed by the words, "Agent for _____ Company," was the note of the company, and not binding on the agent personally.⁸⁰

§ 1481. Use of word "as." Signature by one "as" president, trustee, secretary, or the like, of a named corporation imposes no personal liability.⁸¹

§ 1482. Name of corporation printed or written at top or on side. Although the contrary is held in New York,⁸² the fact that a bill of exchange, check or note was intended to bind the corporation is often inferred from the name of the corporation being printed at the top or side of the paper,⁸³ at least in case of a draft where there is a direction therein to charge the amount to the account of such corporation.⁸⁴ Thus, in case of a draft where it was headed "New England Agency of the Pennsylvania Fire Insurance Company," and had the words "Foster & Cole, General Agents for the New England States" printed

⁸⁰ Hovey v. Magill, 2 Conn. 680.

⁸¹ Little v. Bailey, 87 Ill. 239.

⁸² First Nat. Bank of Brooklyn v. Wallis, 150 N. Y. 455, 44 N. E. 1038, aff'g 80 Hun (N. Y.) 435, 30 N. Y. Supp. 83, where words "Wallis Iron Works" appeared on margin of note but it was held an obligation of the individuals who added to their signatures the words "President" and "Treasurer."

"The appearance upon the margin of the paper of the printed name 'Ridgewood Ice Company' was not a fact carrying any presumption that the note was, or was intended to be, one by that company." Casco Nat. Bank of Portland v. Clark, 139 N. Y. 307, 312, 36 Am. St. Rep. 705, 34 N.

E. 908, aff'g 64 Hun (N. Y.) 634, 18 N. Y. Supp. 887.

⁸³ Lacy v. Dubuque Lumber Co., 43 Iowa 510; Slawson v. Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Fuller v. Hooper, 3 Gray (Mass.) 334, where bill of exchange was stamped in the margin "Pompton Iron Works" and was signed "W. Burt, Agt."

In Washington, however, it is held immaterial that the name of a corporation appeared at the top of a note, where the name was merely lithographed upon a blank form of receipt which was used as a paper on which to write the note. Daniel v. Glidden, 38 Wash. 556, 564, 80 Pac. 811.

⁸⁴ Hitchcock v. Buchanan, 105 U. S. 416, 26 L. Ed. 1078.

in the margin, and it appeared on its face to be drawn upon said insurance company in payment of a claim against it, the agents are not personally liable as drawers.⁸⁵ So a check having the words "Aetna Mills" printed in the margin and signed "I. D. Farnsworth, Treasurer," was held the check of the corporation and not of the individual.⁸⁶ And where a bill of exchange was headed with the name of a corporation, was signed "Butler Ives, Superintendent," and was addressed to "J. E. Garrett, Secretary," and accepted by "J. E. Garrett, Secretary L. B. R. Co.," the corporation was liable thereon.⁸⁷

In any event, where the name of the corporation is printed at the head of the note, and it is signed by an individual with the word "President" following his name, parol evidence is admissible to show the note was intended to bind the corporation.⁸⁸

§ 1483. Effect of corporate seal on paper. If the corporate seal is impressed on a note, it is a strong circumstance tending to show that the note is that of the corporation only, and not of the individuals whose names are followed by their official titles;⁸⁹ and generally it is held to exempt the officers from liability, although in the absence of such seal they would be personally liable on the paper.⁹⁰

⁸⁵ Chipman v. Foster, 119 Mass. 189.

⁸⁶ Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360.

⁸⁷ Gillig, Mott & Co. v. Lake Bigler Road Co., 2 Nev. 214.

⁸⁸ Second Nat. Bank of Akron, Ohio v. Midland Steel Co., 155 Ind. 581, 52 L. R. A. 307, 58 N. E. 833.

⁸⁹ New England Elec. Co. v. Shook, 27 Colo. App. 30, 145 Pac. 1002; Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624.

⁹⁰ Illinois. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667, rev'g 102 Ill. App. 668; Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624.

Indiana. Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330; Pitman v. Kintner, 5 Blackf. 250, 33 Am. Dec. 469.

Massachusetts. Miller v. Roach, 150 Mass. 140, 6 L. R. A. 71, 22 N. E. 634.

Missouri. Musser v. Johnson, 42 Mo. 74, 97 Am. Dec. 316.

New York. Hood v. Hallenbeck, 7 Hun 362.

Oregon. Guthrie v. Imbrie, 12 Ore. 182, 53 Am. Rep. 331, 6 Pac. 664.

Contra, Daniel v. Glidden, 38 Wash. 556, 564, 80 Pac. 811.

Where the note was signed "Wm. B. Swormstedt, Sec'y," and sealed with the corporate seal, the court said: "The seal of the company is in the hands of the secretary; it is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affix the seal of the corporation, which, containing upon its face the proper designation of the corporation, was a signing of their name." Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330.

"It is inconceivable a person familiar with the business transacted by a corporation, taking a note executed by its officers under its corporate seal, should believe he was obtaining the

§ 1484. Effect of directions to charge to corporation. A direction to the drawees, in a draft, to "charge the same to the account of Pembroke Iron Works," where signed merely with the name of an individual, does not make the company liable as drawer nor relieve the individual from personal liability.⁹¹

But a bill of exchange signed by an individual, followed by his title and the name of the corporation, is held to be the bill of the corporation and not of the officer where it directs that the amount shall be charged or placed to the account of the corporation.⁹²

§ 1485. Effect of Negotiable Instruments Law. The Negotiable Instruments Law, now enacted in all but five of the states in this country, provides as follows: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument, if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."⁹³

Professor Mechem, in his work on Agency, comments on this provision as follows: "Unfortunately, this provision, which ought to give help, is so obscure, indefinite and inadequate, that it furnishes little aid. What the practical difference between the first clause and the second is, what words or what sort of words shall be deemed 'words

individual note of the officers whose names are attached to it." Scanlan v. Keith, 102 Ill. 634, 642, 40 Am. Rep. 624.

The authenticity of the seal need not be established. Reed v. Fleming, 209 Ill. 390, 394, 70 N. E. 667, rev'g 102 Ill. App. 668.

In Iowa, however, it is said that in the absence of an averment in the petition that the company was a corporation having a seal, "we do not think that the impression of said words upon the notes would control the rights of the parties." Tama Water Power Co. v. Ramsdell, 90 Iowa 747, 57 N. W. 631, 52 N. W. 209.

⁹¹ Bank of British North America v. Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390.

⁹² Hitchcock v. Buchanan, 105 U. S.

416, 26 L. Ed. 1078; Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280. To same effect, see Chipman v. Foster, 119 Mass. 189; Slawson v. Loring, 5 Allen (Mass.) 340, 81 Am. Dec. 750; Fuller v. Hooper, 3 Gray (Mass.) 334. But see Bank of British North America v. Hooper, 5 Gray (Mass.) 567, 66 Am. Dec. 390.

A bill of exchange headed "Office of the Tioga Navigation Company," and signed "James R. Wilson, Pres. T. N. Co.," and directing the contents to be charged "to motive power and account" is the bill of the corporation. Olcott v. Tioga R. Co., 27 N. Y. 546, 559, 84 Am. Dec. 298.

⁹³ See Negotiable Instruments Law which has been enacted in all the states except California, Georgia, Maine, Mississippi and Texas.

indicating' that the signer acts for a principal, etc., are not made clear, and it will require judicial interpretation to make this section definite. So far as it goes, however, the provision seems to be in the direction of the more recent cases. At present it is apparently necessary to still resort to the decisions which were made before the act was passed."⁹⁴ The courts have in several cases referred to this provision⁹⁵ but have carefully avoided attempting to construe it further than in some instances to state that it does not change the existing rules.⁹⁶ It has been held, under this statute, that where a bishop of a church indorsed a church note with the word "trustee" added to his name, and he was authorized in his representative capacity to bind the property of the diocese, he may show that he intended to sign in his representative capacity only, to the knowledge of the payee and indorsee.⁹⁷ In Missouri, it has been held thereunder that where notes were signed "International Electric Piano Co., M. D. Gross, Pres. Tekla Rossmann," the latter was personally liable, and parol evidence was not admissible to show the contrary; and that the same rule applies where the corporation was not named in the body of the note nor elsewhere and the signature was merely "M. D. Gross, Tekla Rossmann, Secy."⁹⁸

Where a note reading "we promise to pay" was signed "J. H. Sparling, Treas. Stratton Engine Co., David F. Burns, Pres. Stratton Engine Co.," the Supreme Judicial Court of Massachusetts, in a recent decision, after referring to this provision of the Negotiable Instruments Law, said: "Under the law previous to the enactment of the Negotiable Instruments Act, the defendant corporation would not have been held on this note. It would have been not the note of the corporation, but simply the individual note of the two individuals who signed. * * * A change in the law in this respect has been wrought by that act. * * * These words [referring to

⁹⁴ 1 Mechem on Agency (2nd Ed.), § 1127.

⁹⁵ **Maryland.** Belmont Dairy Co. v. Thrasher, 124 Md. 320, 325, 92 Atl. 766.

New York. Megowan v. Peterson, 173 N. Y. 1, 4, 65 N. E. 738; Kerby v. Ruegamer, 107 App. Div. 491, 497, 95 N. Y. Supp. 408.

Pennsylvania. Chatham Nat. Bank v. Gardner, 31 Pa. Super. Ct. 135, 138.

Washington. Daniel v. Glidden, 38 Wash. 556, 564, 80 Pac. 811.

Wisconsin. Germania Nat. Bank of Milwaukee v. Mariner, 129 Wis. 544, 109 N. W. 574.

⁹⁶ **Birmingham Iron Foundry v. Regnery**, 33 Pa. Super. Ct. 54, holding last clause of provision does not change common-law rule.

⁹⁷ **American Trust Co. v. Canevin**, 184 Fed. 657. To same effect see **Birmingham Iron Foundry v. Regnery**, 33 Pa. Super. Ct. 54.

⁹⁸ **Rudolph Wurlitzer Co. v. Rossmann**, — Mo. App. —, 190 S. W. 636.

the statute] plainly imply that if the person signing a promissory note adds to his signature words describing himself an agent or as occupying some representative position which at the same time discloses the name of the principal, he shall be exempted from personal liability, while if he omits the name of the principal, although adding words of agency, he will be held liable personally and the words of agency will be treated simply as *descriptio personae*. In this respect the common-law rule of this commonwealth whereby agents bind themselves by a form of signing a note such as the one at bar, even though acting with authority [citing case], is abrogated. The agent now relieves himself from liability by a form of signature whereby he is described as agent of a disclosed principal. * * * Although the law on this point in other jurisdictions before the passage of the Negotiable Instruments Act may have differed from that of this commonwealth, the result here reached appears to be in harmony with the rule now generally prevailing under that act."⁹⁹

Under this provision of the Negotiable Instruments Law, where a note was signed by the name of a corporation, and on the back was indorsed "Peter Weber, President," it was held in New Jersey that the common law theretofore existing in that state was not changed in so far as it permitted parol evidence to show that there was no intention to create a personal liability.¹

§ 1486. Paper as payable to corporation. A note payable to "the President and Directors" of a named corporation is payable to the corporation,² as is a note payable "to the Treasurer" of a named company.³ But it is held that a note payable to the order of a named person, "President" of a certain corporation, may be legally transferred by him.⁴

Parol evidence is admissible to show that a note given to "the President and Directors" of a corporation was intended to be made in favor of the corporation itself.⁵

⁹⁹ *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878.

¹ *Phelps v. Weber*, 84 N. J. L. 630, 87 Atl. 469.

² *Hazard v. Planters' & Merchants' Bank*, 4 Ala. 299. To same effect see *Societe des Mines D'Argent et Fonderies de Bingham v. Mackintosh*, 5 Utah 568, 18 Pac. 363.

Rule applied to bond. *Culpeper*

Agr. & Mfg. Society v. Digges, 6 Rand. (Va.) 165, 18 Am. Dec. 708.

³ *Alston v. Heartman*, 2 Ala. 699. *Contra*, *Chadsey v. McCreery*, 27 Ill. 253; *Shaw v. Stone*, 1 Cush. (Mass.) 228, 254.

⁴ *Van Buskirk v. Day*, 32 Ill. 260.

⁵ *Newport Mechanics Mfg. Co. v. Starbird*, 10 N. H. 123, 34 Am. Dec. 145.

V. ACKNOWLEDGMENTS

§ 1487. General considerations. In the absence of a statute to the contrary, an acknowledgment is necessary merely to entitle instruments to be recorded or registered so as to make them constructive notice, and to authorize their introduction in evidence without other proof of execution; and if the acknowledgment is insufficient on its face, the instrument is not entitled to be recorded, or, if recorded, is not constructive notice, and the instrument is not entitled to be introduced in evidence without proof of its execution. Acknowledgment is not necessary to make the instrument valid as between the parties, unless the statute so provides; and it follows that a defective acknowledgment does not invalidate the instrument in the absence of a statute to the contrary.⁶ These rules apply to acknowledgments of all instruments and are in no way peculiar to corporate instruments.

A corporate mortgage may be acknowledged in a state other than the one where the corporation is domiciled and where its property is located.⁷ Where a statute requires that a chattel mortgage shall be acknowledged before a justice of the peace where the mortgagor resides, it is properly acknowledged in the town where the corporation has its office and place of business, notwithstanding the mortgage recites that the mortgagor is of a different town.⁸

§ 1488. What person should acknowledge instrument. Where the instrument is executed by a corporation, the question may arise as

⁶ Where the statutes provide that corporate conveyances must be acknowledged and recorded in a form prescribed, in order to operate as notice to third persons, but that as between the parties a corporate conveyance shall be valid without such acknowledgment or record, a conveyance not acknowledged as the statute requires may be held valid as against the trustee of the corporation in bankruptcy. *Murray v. Beal*, 23 Utah 548, 553, 65 Pac. 726.

The object of such statutes is to secure good faith on the part of the officers of the corporation in its behalf and protect the public against their unauthorized acts, under the presumption that they would perform

their duty under oath more faithfully than without it. *Murray v. Beal*, 23 Utah 548, 553, 65 Pac. 726.

In some states, however, under the statutes, corporate mortgages are not valid even as between the parties where not duly acknowledged. *Barrie v. United Rys. Co. of St. Louis*, 138 Mo. App. 557, 119 S. W. 1020.

Unacknowledged mortgages, or mortgages with insufficient acknowledgments, cannot be attacked by creditors with notice thereof. *Larkin v. Hagan*, 14 Ariz. 63, 126 Pac. 268, where statute so provided.

⁷ *Hodder v. Kentucky & G. E. Ry. Co.*, 7 Fed. 793.

⁸ *Gilbert v. Sprague*, 196 Ill. 444,

to the particular person by whom it should be acknowledged. Of course, it can only be acknowledged by an officer or agent who signed the instrument. Generally, the officer or officers who signed it may acknowledge it,⁹ provided he or they had authority to execute the instrument in behalf of the corporation.¹⁰ Where there is no statute to the contrary, the officer affixing the corporate seal is a proper person to make the acknowledgment.¹¹

If signed by the president and cashier of a bank, it has been held sufficient for the cashier alone to acknowledge it.¹² In particular cases, acknowledgments by the president,¹³ vice president,¹⁴ secretary,¹⁵ cashier,¹⁶ attorney,¹⁷ or board of directors who signed the instrument¹⁸ have been held sufficient. But if a statute requires the

450, 63 N. E. 993, rev'g 88 Ill. App. 508.

⁹ *Jinwright v. Nelson*, 105 Ala. 399, 405, 17 So. 91; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L. R. A. 588, 21 Atl. 298; *Lovett v. Steam Saw Mill Ass'n*, 6 Paige (N. Y.) 54; *Gordon v. Preston*, 1 Watts (Pa.) 385, 388, 26 Am. Dec. 75.

Cashier of bank who signs deed may acknowledge it. *Sheehan v. Davis*, 17 Ohio St. 571, 581.

¹⁰ *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L. R. A. 588, 21 Atl. 298; *Bernhardt v. Brown*, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. 884.

"The acknowledgment for the corporation can only be made by some officer or representative who has authority to execute such instrument in its behalf." *Bennett v. Knowles*, 66 Minn. 4, 6, 68 N. W. 111.

Where there is no seal, and the secretary of the corporation had no authority to execute it, it is not sufficient for the secretary alone to make the acknowledgment, the instrument being also signed by the president. *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017.

¹¹ *Kelly v. Calhoun*, 95 U. S. 710, 24 L. Ed. 544; *Bowers v. Hechtman*, 45 Minn. 238, 241, 47 N. W. 792.

¹² *Merrill v. Montgomery*, 25 Mich. 73.

¹³ *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67, 71.

Where the deed was signed by the president and secretary, and both acknowledged it, the court said: "The officers of the corporation, signing the name of the company, and their respective names, and affixing the corporate seal, were the proper parties to acknowledge its execution; there were no other officers or agents having the capacity." *Jinwright v. Nelson*, 105 Ala. 399, 405, 17 So. 91.

An acknowledgment by the president alone is sometimes held insufficient, on the theory that the acknowledgment of the secretary is also necessary where he is one of the officers authorized by the resolution of the directors to execute the instrument and where he has custody of the corporate seal. *Frank v. Hicks*, 4 Wyo. 502, 513, 35 Pac. 475, 1025.

¹⁴ *Sawyer v. Cox*, 63 Ill. 130.

¹⁵ *Pruyne v. Adams Furniture & Manufacturing Co.*, 92 Hun (N. Y.) 214, 36 N. Y. Supp. 361.

¹⁶ *Sheehan v. Davis*, 17 Ohio St. 571, 581.

¹⁷ *Lovett v. Steam Saw Mill Ass'n*, 6 Paige (N. Y.) 54, 69.

¹⁸ *Gordon v. Preston*, 1 Watts (Pa.) 385, 388, 26 Am. Dec. 75.

certificate of acknowledgment to state that the person acknowledging is known or proved to be "the president or secretary of such corporation," the acknowledgment cannot be made by the vice president and assistant secretary.¹⁹

§ 1489. Who may take—Stockholder. It is generally held that the interest of a stockholder in a corporation disqualifies him to take an acknowledgment where the corporation is a party to the instrument, without discussing whether the act is a judicial or a ministerial one.²⁰ However, in some jurisdictions, if the notary does not exercise judicial functions, he is not disqualified because a stockholder of the mortgagee.²¹ In Arkansas, it is held that an acknowledgment taken by a

¹⁹ *Erickson v. Conniff*, 19 S. D. 41, 101 N. W. 1104.

²⁰ *Alabama. Hayes v. Southern Home Building & Loan Ass'n*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 So. 527.

Georgia. Southern Iron & Equipment Co. v. Voyles, 138 Ga. 258, 41 L. R. A. (N. S.) 375, and note, Ann. Cas. 1913 D 369, 75 S. E. 248.

Illinois. Ogden Building & Loan Ass'n v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049, aff'g 99 Ill. App. 67, reviewing authorities at length.

Indiana. Kothe v. Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594.

Iowa. Smith v. Clark, 100 Iowa 605, 69 N. W. 1011.

Nebraska. Talmadge v. Minton-Woodward Co., 83 Neb. 29, 118 N. W. 1099; *Wilson v. Griess*, 64 Neb. 792, 90 N. W. 866; *Chadron Loan & Building Ass'n v. O'Linn*, 1 Neb. (Unoff.) 1.

Pennsylvania. See Monongahela Bank v. Porter, 2 Watts 141.

Texas. Bexar Building & Loan Ass'n v. Heady, 21 Tex. Civ. App. 154, 57 S. W. 583, 50 S. W. 1079.

Wyoming. Boswell v. First Nat. Bank, 16 Wyo. 161, 93 Pac. 661, 92 Pac. 624; *First Nat. Bank of Sheridan v. Citizens' State Bank*, 11 Wyo.

32, 100 Am. St. Rep. 925, 70 Pac. 726.

Rule applied where acknowledgment taken before stockholder of mortgagee, a building and loan association. *Jenkins v. Jonas Schwab Co.*, 138 Ala. 664, 35 So. 649; *Hayes v. Southern Home Building & Loan Ass'n*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 So. 527; *Fugman v. Jiri Washington Building & Loan Ass'n*, 209 Ill. 176, 70 N. E. 644; *Steger v. Traveling Men's Building & Loan Ass'n*, 208 Ill. 236, 100 Am. St. Rep. 225, 70 N. E. 236; *Ogden Building & Loan Ass'n v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049, aff'g 99 Ill. App. 67; *Miles v. Kelley*, 16 Tex. Civ. App. 147, 40 S. W. 599.

For full discussion of these questions, see 1 Devlin, *Real Estate* (3rd Ed.), § 477b et seq.

²¹ *California. First Nat. Bank of Riverside v. Merrill*, 167 Cal. 392, 139 Pac. 1066.

Colorado. Babbitt v. Bent County Bank, 50 Colo. 258, 108 Pac. 1003.

Ohio. Read v. Toledo Loan Co., 68 Ohio St. 280, 62 L. R. A. 790, 96 Am. St. Rep. 663, 67 N. E. 729.

Oklahoma. Ardmore Nat. Bank v. Briggs Machinery & Supply Co., 20 Okla. 427, 23 L. R. A. (N. S.) 1074,

stockholder is not void where there is no fraud alleged or proved in regard to the execution of the instrument and no coercion or undue advantage is taken of the other parties executing the instrument, either by the officer who took the acknowledgment or by the corporation itself;²² and this is the rule in Tennessee.²³ In any event, it seems that a corporator in a purely eleemosynary institution, although he receives a small sum for attending each meeting of the board and acting as its secretary, is not disqualified.²⁴ When the grantor is a corporation and the deed is confirmed with the signatures of all the stockholders, one of the stockholders may take the acknowledgments of the others, where the consent of the other stockholders was sufficient to validate the conveyance without his joining therein at all, and he took no beneficial interest under the conveyance.²⁵

However, conceding that a notary who is a stockholder has no power to take an acknowledgment, it is held in some states that where the relationship of the notary does not appear on the face of the instrument the acknowledgment is not void and the registry of the instrument constitutes notice,²⁶ although there is authority to the contrary.²⁷ In any event, it seems that a deed is not subject to collateral attack on this ground.²⁸

A stockholder of a corporation cannot, as notary, "attest" a cor-

129 Am. St. Rep. 747, 16 Ann. Cas. 133, 94 Pac. 533.

Washington. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 577, 73 Pac. 680.

²² Davis v. Hale, 114 Ark. 426, Ann. Cas. 1916 D 701, 170 S. W. 99.

²³ Cooper v. Hamilton Perpetual Building & Loan Ass'n, 97 Tenn. 285, 33 L. R. A. 338, 56 Am. St. Rep. 795, 37 S. W. 12.

The instrument is not void because thereof. Kennedy v. Security Bldg. & Sav. Ass'n (Tenn. Ch. App.), 57 S. W. 388.

²⁴ Nicholson v. Gloucester Charity School, 93 Va. 101, 24 S. E. 899.

²⁵ Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904.

²⁶ **Illinois.** Ogden Building & Loan Ass'n v. Mensch, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1049, aff'g 99 Ill. App. 67.

Minnesota. Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449.

Oklahoma. Ardmore Nat. Bank v. Briggs Machinery & Supply Co., 20 Okla. 427, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133, 94 Pac. 533.

Texas. Southwestern Mfg. Co. v. Hughes, 24 Tex. Civ. App. 637, 60 S. W. 684.

Wyoming. Boswell v. First Nat. Bank of Laramie, 16 Wyo. 161, 93 Pac. 661, 92 Pac. 624.

²⁷ Betts-Evans Trading Co. v. Bass, 2 Ga. App. 718, 59 S. E. 8; Kothe v. Krag-Reynolds Co., 20 Ind. App. 293, 50 N. E. 594; Smith v. Clark, 100 Iowa 605, 69 N. W. 1011.

²⁸ National Building & Loan Ass'n v. Cunningham, 130 Ala. 539, 30 So. 335; Monroe v. Arthur, 126 Ala. 362, 85 Am. St. Rep. 36, 28 So. 476.

porate instrument, because of his interest;²⁹ but a stockholder is not incompetent as an unofficial attesting witness.³⁰

A statute curing acknowledgments to corporation mortgages, where the acknowledgments were taken before a notary who was at the time a stockholder of the corporation, has no retroactive operation as against liens vested at the time the statute goes into effect.³¹

§ 1490. — Officer or agent. The reason that an officer who is also a stockholder in a corporation is disqualified from taking an acknowledgment of a conveyance to such corporation is based upon the principle that he has a pecuniary interest in the conveyance. If he has no such pecuniary interest, the principle, naturally, does not apply.³² Hence, unless it is otherwise provided by statute,³³ an officer or agent of a corporation, at least if he is not a stockholder, may take the acknowledgment of an instrument to which the corporation is a party;³⁴ and there is no presumption that an officer of a corporation is a stockholder.³⁵ Thus, an acknowledgment may be taken by the

²⁹ *Southern Iron & Equipment Co. v. Voyles*, 138 Ga. 258, 41 L. R. A. (N. S.) 375, Ann. Cas. 1913 D 369, 75 S. E. 248.

In Connecticut it has been held that a stockholder cannot attest the signature of the grantor. *Winsted Sav. Bank & Bldg. Ass'n v. Spencer*, 26 Conn. 195.

³⁰ *Maddox v. Wood*, 151 Ala. 157, 43 So. 968; *Peagler v. Davis*, 143 Ga. 11, 16, Ann. Cas. 1917 A 232, 84 S. E. 59.

³¹ *Fugman v. Jiri Washington Building & Loan Ass'n*, 209 Ill. 176, 70 N. E. 644.

³² See 1 *Devlin, Real Estate* (3rd Ed.), § 477h.

³³ *Kothe v. Krag-Reynolds Co.*, 20 Ind. App. 293, 299, 50 N. E. 594, where statute forbids.

³⁴ *California. Bank of Woodland v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070.

Florida. Florida Sav. Bank & Real Estate Exchange v. Rivers, 36 Fla. 575, 18 So. 850.

Illinois. Ogden Building & Loan

Ass'n v. Mensch, 196 Ill. 554, 569, 89 Am. St. Rep. 330, 63 N. E. 1049, aff'g 99 Ill. App. 67; *Sawyer v. Cox*, 63 Ill. 130.

Iowa. Bardsley v. German-American Bank, 113 Iowa 216, 84 N. W. 1041.

Nebraska. Banking House of A. Castetter v. Stewart, 70 Neb. 815, 98 N. W. 34; *Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434, 67 N. W. 485.

Washington. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 577, 73 Pac. 680.

But see *Barrow v. E. Tris Napier Co.*, 16 Ga. App. 309, 85 S. E. 267.

The fact that the notary who took the acknowledgment was assistant cashier of the mortgagee bank does not constitute a disqualification sufficient to avoid the acknowledgment. *First Nat. Bank of Riverside v. Merrill*, 167 Cal. 392, 139 Pac. 1066.

³⁵ *Florida Sav. Bank & Real Estate Exchange v. Rivers*, 36 Fla. 575, 18 So. 850; *Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434, 67 N. W. 485.

cashier of the mortgagee bank,³⁶ or by one who is the secretary and treasurer.³⁷

The mere fact that the notary is the selling agent of the vendor in a conditional sale does not make him so interested in the sale as to disqualify him from taking the acknowledgment of the vendee.³⁸ And a notary is not disqualified because he was an agent of the lender and represented it in negotiations for a particular loan to take the acknowledgment of a security deed given to the loaning corporation.³⁹

§ 1491. Mode of taking and contents. Acknowledgments of corporate instruments are taken the same as in case of individuals, except where a statute otherwise provides, subject to certain rules hereinafter noticed in this section. The officer taking the acknowledgment is not required to take evidence that the corporate seal was affixed by authority, or to examine into the title of the person who assumes to be the officer of the corporation.⁴⁰ However, if the person taking the acknowledgment does not know that the person making the acknowledgment holds the office indicated by the signature, he cannot rely on any presumption arising from the recitals or seal of the instrument itself.⁴¹

So far as the contents of the certificate of acknowledgment are concerned, the general rules relating to all certificates, regardless of whether a corporation is the grantor, will not be reiterated⁴² but instead only those rules more or less peculiar to corporate instruments will be noticed in this connection. In some states, special statutes govern corporate acknowledgments, at least in so far as the contents of the certificate of acknowledgment are concerned.⁴³ If there is no statute specially applicable to corporations, the general statute relat-

³⁶ *Bank of Woodland v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070.

The fact that part of the proceeds of the mortgage went to pay off the cashier's debt did not give him such an interest therein as to invalidate his certificate. *Bardsley v. German-American Bank*, 113 Iowa 216, 84 N. W. 1041.

³⁷ *Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434, 67 N. W. 485.

³⁸ *National Cash Register Co. v. Lesko*, 77 Conn. 276, 58 Atl. 967.

³⁹ *Austin v. Southern Home Building & Loan Ass'n*, 122 Ga. 439, 448, 50 S. E. 382.

⁴⁰ *Canandaigua Academy v. McKechnie*, 19 Hun (N. Y.) 62, 67.

⁴¹ *Holt v. Metropolitan Trust Co.*, 11 S. D. 456, 460, 78 N. W. 947.

⁴² See 1 Devlin, *Real Estate*, §§ 464-547f, where questions relating to acknowledgments in general are fully and ably considered at length.

⁴³ In North Carolina the statute prescribes forms of corporate acknowledgment but expressly provides that such forms shall not exclude other forms which would be deemed sufficient in law. *Witherell v. Murphy*, 154 N. C. 82, 89, 69 S. E. 748. The certificate is called a probate. *Southern Spruce*

ing to acknowledgments governs,⁴⁴ and an acknowledgment of a corporate instrument is sufficient where it contains every substantial statement of the general form prescribed for individuals.⁴⁵ If no form of certificate is prescribed by statute, it need not be in any particular form.⁴⁶

If a statute prescribes a separate form of acknowledgment for corporations, the acknowledgment, in order to be valid, must comply at least substantially with the special form prescribed; ⁴⁷ but a literal compliance with the precise language of the statute is not necessary, if there is a substantial compliance therewith.⁴⁸ Such statutes are generally not mandatory.⁴⁹ Thus, statutory forms for corporations which the statutes say "may be used" are not mandatory but permissive,⁵⁰ and in such a case an acknowledgment to a corporate instrument, if good before the statute was enacted, is good thereafter.⁵¹ Where the statute is not mandatory, if any other form is adopted, the certificate must state all that is necessary to show a valid acknowledgment.⁵² Using the word "subscribed" instead of "acknowledged" is not fatal.⁵³

Co. v. Hunnicutt, 166 N. C. 202, 81 S. E. 1079, holding probate sufficient in particular case. "This provision can only refer to forms of probate deemed sufficient by the common law." *National Bank of Goldsboro v. Hill*, 226 Fed. 102, 108, construing North Carolina statute.

⁴⁴ *Jinwright v. Nelson*, 105 Ala. 399, 405, 17 So. 91.

Form held sufficient, see *Strother v. Barrow*, 246 Mo. 241, 151 S. W. 960.

In New York there is no special statute. *Rogers v. Pell*, 47 N. Y. App. Div. 240, 244, 62 N. Y. Supp. 92.

⁴⁵ *Jinwright v. Nelson*, 105 Ala. 399, 403, 17 So. 91; *Steverson v. W. C. Agee & Co.*, 9 Ala. App. 389, 395, 63 So. 794.

⁴⁶ *Pruyne v. Adams Furniture & Manufacturing Co.*, 92 Hun (N. Y.) 214, 36 N. Y. Supp. 361.

⁴⁷ *Toledo Computing Scale Co. v. Computing Scale Co.*, 208 Fed. 410, 415, setting out requirements under Massachusetts statute; *Steverson v. W. C. Agee & Co.*, 9 Ala. App. 389, 395, 63

So. 794; *Larkin v. Hagan*, 14 Ariz. 63, 126 Pac. 268; *Murray v. Beal*, 23 Utah 548, 553, 65 Pac. 726.

⁴⁸ *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94; *Cuykendall v. Douglas*, 19 Hun (N. Y.) 577, 585; *Canandaigua Academy v. McKechnie*, 19 Hun (N. Y.) 62; *State v. Coughran*, 19 S. D. 271, 103 N. W. 31.

In Arizona, the omission of the word "free" before "act and deed" and "voluntarily" is not fatal where the mortgage recites the authority for its execution. *Larkin v. Hagan*, 14 Ariz. 63, 126 Pac. 268; *Copper Belle Min. Co. v. Costello*, 11 Ariz. 334, 95 Pac. 94.

⁴⁹ *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111.

⁵⁰ *Strother v. Barrow*, 246 Mo. 241, 151 S. W. 960.

⁵¹ *Huse v. Ames*, 104 Mo. 91, 102, 103, 15 S. W. 965.

⁵² *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111.

⁵³ *Cuykendall v. Douglas*, 19 Hun (N. Y.) 577, 584.

Generally it is held that the certificate is sufficient although it recites that the officer or agent making the acknowledgment acknowledged the instrument to be "his" free act and deed, instead of the instrument of the corporation.⁵⁴ Thus, where a deed was signed with a corporate name "by L. H. Jewett, President," an acknowledgment that he, president of the corporation, appeared and acknowledged "said instrument to be his voluntary act and deed," is sufficient to entitle the deed to be recorded, although the statute required the acknowledgment to state the deed was the act of the corporation.⁵⁵ But it has been held insufficient to merely acknowledge "the above to be their signature," instead of acknowledging the instrument to be either "the act and deed of the corporation" or "his" act and deed.⁵⁶ So in North Dakota, where the statute required that the acknowledgment must be "that such corporation executed the same," it was held that an acknowledgment by an agent of the corporation that he executed the instrument was insufficient.⁵⁷ But in North Carolina it is held that it is not sufficient for the officers signing the deed as officers to acknowledge it merely as individuals.⁵⁸

54 Maine. *Fitch v. Lewiston Steam-mill Co.*, 80 Me. 34, 36, 12 Atl. 732.

Missouri. *Epwright v. Nickerson*, 78 Mo. 482, 484-487; *Kansas v. Hannibal & St. J. R. Co.*, 77 Mo. 180.

New Hampshire. *Tenney v. East Warren Lumber Co.*, 43 N. H. 343.

Texas. *Muller v. Boone*, 63 Tex. 91, followed in *Ballard v. Carmichael*, 83 Tex. 355, 368, 18 S. W. 734; *Zimpleman v. Stamps*, 21 Tex. Civ. App. 129, 51 S. W. 341.

Vermont. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274, 286.

It is sufficient to merely state that the above named signers "acknowledged the foregoing instrument to be their voluntary act and deed," where the signatures were expressly made in the official capacity as president and treasurer. *Tenney v. East Warren Lumber Co.*, 43 N. H. 343, 354.

⁵⁵ "We, however, are of the opinion that, although the acknowledgment is irregular, it is sufficient in substance to entitle the deed to record. The deed is regular in all other respects

and signed for the corporation by the president who acknowledged the deed. The bank could only act through its officers, and the statute explicitly authorizes its president to sign its deeds. In connection with the recitations in the deed and the signature thereto, the reasonable explanation is that Jewett acknowledged the execution of said instrument for and on behalf of the corporation." *Powers v. Spiedel*, 84 Neb. 630, 121 N. W. 968.

Under very similar facts, but where there was no statute, it was held in Missouri that such a deed was admissible in evidence as the deed of the corporation. *Kansas v. Hannibal & St. J. R. Co.*, 77 Mo. 180, 183.

⁵⁶ *Witherell v. Murphy*, 154 N. C. 82, 69 S. E. 748.

⁵⁷ *Gessner v. Minneapolis, St. P. & S. S. M. R. Co.*, 15 N. D. 560, 108 N. W. 786.

⁵⁸ *Bernhardt v. Brown*, 122 N. C. 587, 591, 65 Am. St. Rep. 725, 29 S. E. 884.

The identity of the person making the acknowledgment, and that he was known to be the officer of the corporation he represents himself to be, should appear to be within the knowledge of the officer taking the acknowledgment or proved before him. And it is not sufficient to certify that the persons making the acknowledgment are the identical persons whose names are subscribed to the instrument, where the statute requires knowledge or proof that such persons hold the offices indicated by their signatures.⁵⁹ But it has been held that it is sufficient to state that the person making the acknowledgment "did say that he is the president," etc., without expressly stating that the notary knew or that it was proved he was such president, where the instrument is under seal, notwithstanding the statute requires that the acknowledgment must not be taken unless the officer taking it "knows, or has satisfactory evidence, on the oath or affirmation of a credible witness," that the person making such acknowledgment is the officer of the corporation as designated in the signature.⁶⁰ So it has been held sufficient to state that the person taking the acknowledgment is "satisfied" that the person making it is the president or other officer of the corporation.⁶¹ But if there is no seal, it has been held that it is not sufficient for the officer who signs the instrument as such, to "acknowledge" that he is the officer designated and that he signed as such and was duly authorized so to do, since it is not enough to admit or acknowledge such facts before the notary but it is necessary to prove them by oath.⁶²

The certificate must show on its face, or in connection with the instrument acknowledged, that the person making the acknowledgment was authorized to execute the instrument for the corporation;⁶³

⁵⁹ *Holt v. Metropolitan Trust Co.*, 11 S. D. 456, 460, 78 N. W. 947.

Where the officer signing as such is not described in the instrument, it is not sufficient to state in the certificate that he was known by the notary "to be the person described in, and who executed, the foregoing instrument," where there is no seal, since it does not show that he was known to the notary to occupy the office by which title he signed the instrument. *Bennett v. Knowles*, 66 Minn. 4, 8, 68 N. W. 111.

⁶⁰ *State v. Coughran*, 19 S. D. 271, 281, 103 N. W. 31. In this case, the

court seems to base its decision on the fact that the officer making the acknowledgment was a competent witness and that his statement was sufficient; but it is respectfully submitted that what the statute means is that the evidence of some credible third person is necessary to identify the officer as such where he is not known to the notary as such.

⁶¹ *Rogers v. Pell*, 47 N. Y. App. Div. 240, 62 N. Y. Supp. 92.

⁶² *Bennett v. Knowles*, 66 Minn. 4, 8, 68 N. W. 111.

⁶³ *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111.

but where the corporate seal is attached it is sufficient for the certificate to show the identity of the parties executing the instrument for the corporation and that they acknowledged its execution, since the seal itself is *prima facie* evidence that it was affixed by proper authority and that the officers or agents executing the instrument were authorized so to do.⁶⁴

It has been held that the certificate need not contain any proof that the seal is that of the corporation, and affixed by its order, to authorize the recording of the instrument.⁶⁵ However, it is also held that if a seal is necessary, the acknowledgment should show that the seal affixed is the common seal of the corporation, and that it was affixed by an officer of the corporation.⁶⁶

Parol evidence cannot be introduced to aid a defective certificate.⁶⁷

VI. PAROL EVIDENCE

§ 1492. In general. Without regard to whether the instrument in question is a sealed one, a simple contract, or negotiable paper, it is settled that parol evidence is admissible to show whether the corporation or the officer or officers are bound where the contract upon its face is ambiguous and uncertain as to whether the corporation or the officer was intended to be bound.⁶⁸ On the other hand where there is no

⁶⁴ *Dieta in Bennett v. Knowles*, 66 Minn. 4, 7, 68 N. W. 111.

⁶⁵ *Hoopes v. Auburn Waterworks Co.*, 37 Hun (N. Y.) 568, 572, *aff'd* 109 N. Y. 635, 16 N. E. 681.

⁶⁶ See *Witherell v. Murphy*, 154 N. C. 82, 89, 69 S. E. 748.

⁶⁷ *National Bank of Goldsboro v. Hill*, 226 Fed. 102.

⁶⁸ *United States. Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, 5 L. Ed. 100.

Alabama. *May v. Hewitt & Norton Co.*, 33 Ala. 161, 166; *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

Colorado. *New England Elec. Co. v. Shook*, 27 Colo. App. 30, 145 Pac. 1002.

Kansas. *Kenner v. Decatur County Rochdale Co-op. Ass'n*, 87 Kan. 293, 123 Pac. 739; *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997.

Missouri. *Klostermann v. Loos*, 58 Mo. 290; *Marks v. Turner*, 54 Mo. App. 650.

New York. *United Surety Co. v. Meenan*, 211 N. Y. 39, 105 N. E. 106, *rev'g* 151 App. Div. 942, 106 N. Y. Supp. 1149.

South Dakota. *Miller v. Way*, 5 S. D. 468, 59 N. W. 467.

Parol evidence is admissible, where a bond is ambiguous, to show that it was intended to bind the corporation. Rule applied where a bond, although referring to the parties in an individual sense, also referred to "successors," where the bond bore the corporate seal; where the acknowledgment of the secretary recited that he was the secretary of the corporation "described in and which executed the foregoing instrument," etc. *United Surety Co. v. Meenan*, 211 N. Y. 39, 105 N. E. 106, *rev'g* 151 N. Y. App. Div. 942, 136 N. Y. Supp. 1149.

ambiguity, parol evidence is generally held not admissible, at least to exonerate officers from personal liability.⁶⁹

The question is whether there is enough uncertainty upon the face of the contract to make it ambiguous, and it can readily be seen that this gives much room for difference of opinion which has resulted in considerable conflict in the decisions, especially in case of signatures to bills and notes.⁷⁰ In commenting on the conflict in the decisions, Judge Mitchell of the Minnesota Supreme Court said: "Each case seems to have been decided with reference to its own facts. If what the courts sometimes call 'corporate marks' greatly predominate on the face of the paper, they hold it the contract of the corporation, and that extrinsic evidence is inadmissible to show that it was the individual contract of the officer or agent. If these marks are less strong, they hold it *prima facie* the individual contract of the officer or agent, but that extrinsic evidence is admissible to show that he executed it in his official capacity in behalf of the corporation; while in still other cases they hold that it is the personal contract of the party who signed it; that the terms 'agent,' 'secretary,' and the like, are merely descriptive of the person, and that extrinsic evidence is not admissible to show the contrary."⁷¹

To sum up the situation, it may be said that while the courts of some states, especially Massachusetts, have gone to the extreme in rejecting parol evidence, the courts of other states have been liberal in allowing such evidence, and some states formerly rejecting parol evidence in certain cases have changed their decisions in favor of a more liberal rule;⁷² that the whole tendency is in favor of greater liberality

⁶⁹ Nebraska Nat. Bank of York v. Ferguson, 49 Neb. 109, 112, 59 Am. St. Rep. 522, 68 N. W. 370.

A guaranty of the indebtedness of a named corporation signed by individuals "as board of directors," where they were the directors of such corporation, is not so ambiguous as to authorize parol evidence, since the guaranty by a corporation of its own debt would be without meaning. Marx v. Luling Co-op. Ass'n, 17 Tex. Civ. App. 408, 43 S. W. 596.

The legal effect of a plain and unambiguous personal obligation cannot be changed so that it will become an obligation of a corporation not then

in being, by proof that all the parties knew at the time that a corporation was to be formed, and that there was an oral understanding that it was to be considered the note of such corporation and not of the individuals who signed it, where there is no mutual mistake nor grounds for reforming the agreement. Bohn Mfg. Co. v. Reif, 116 Wis. 471, 479, 93 N. W. 466.

⁷⁰ Admissibility in case of bills and notes, see §§ 1472-1486, *supra*.

⁷¹ Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 295, 48 N. W. 1116.

⁷² See Farmers' Nat. Bank v. Hatcher, — Iowa —, 157 N. W. 876.

in admitting parol evidence to show what was the real intention of the parties; that the rules admitting such evidence are more lax in case of ordinary simple contracts than in case of sealed instruments or negotiable instruments;⁷³ and that although parol evidence is otherwise admissible, it may be rejected as mere opinions, undisclosed intentions, self-serving declarations, conversations not a part of the *res gestae*, etc.⁷⁴

Some courts have sought to get around former decisions rejecting parol evidence in certain cases by admitting it solely for the purpose of reforming the contract;⁷⁵ but this subterfuge by which courts have sometimes sought to indirectly escape the effect of the rule, where overburdened with respect for precedents recognized as unjust, has been criticised in recent decisions.⁷⁶

A misnomer of the corporation in a deed may be explained by parol.⁷⁷

§ 1493. Illustrative decisions. Having already considered the question whether parol evidence is admissible in case of bills or notes drawn up in certain forms,⁷⁸ decisions relating to simple contracts other than bills or notes are here collected.⁷⁹ It has been held that where a contract on its face purports to be the act of a corporation but is signed

⁷³ The rule seems to be more strict against parol modification or explanation of sealed instruments or negotiable instruments than in case of simple contracts other than negotiable instruments. *Rowley v. Hager*, 63 Ore. 246, 127 Pac. 36.

See also § 1461, *supra*, and § 1493, *infra*.

⁷⁴ *Planters' Chemical & Oil Co. v. Stearnes*, 189 Ala. 503, 66 So. 699.

⁷⁵ *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052.

⁷⁶ "No reason is suggested why a party should be driven to a court of equity except to avoid the necessity of overruling bad precedents. The rule announced in the cases cited in the majority opinion is not a rule of property, and, as I believe, contrary to the trend of modern decisions, is well calculated to effectuate injustice; and is indefensible from any point of view." Dissenting opinion of Justice

Kinne in Mathews v. Dubuque Mat-tress Co., 87 Iowa 246, 19 L. R. A. 676, 54 N. W. 225, approved in *Farmers' Nat. Bank v. Hatcher*, — Iowa —, 157 N. W. 876.

⁷⁷ *Cobb v. Bryan* (Tex. Civ. App.), 97 S. W. 513.

⁷⁸ See §§ 1472-1486, *supra*.

For general treatment of question as applied to agents in general, see able and exhaustive statement in 1 *Mechan on Agency* (2nd Ed.), §§ 1150-1163.

⁷⁹ Where two contracts of the same date for improving a building were signed "Neubauer Decorating Company, D. E. Livermore, Supt. of Contracts," and "D. E. Livermore, Mfg. Agt. & Supt. of Contracts," parol evidence is admissible to show who was intended to be bound by the latter contract. *Kelly Brewing Co. v. Neubauer Decorating Co.*, 194 Ill. 580, 586, 62 N. E. 923.

by a stranger without any addition to his name, parol evidence is admissible to show that the signature was for and on behalf of the corporation pursuant to authority;⁸⁰ that where one of the parties to a contract describes himself in the body of the contract as the general agent of a named corporation, and signs it merely by subscribing his name, with the words "general agent" added, parol evidence is admissible to show that the individual acted merely as agent of the corporation;⁸¹ that where an order for goods is written upon the printed letterheads of a corporation and is signed by a person as an individual, parol evidence is admissible to show that the order was that of the corporation;⁸² that a guarantee written on the letterhead of a bank and signed "O. B. Woolley, Manager," but containing nothing to show that the bank was bound, is *prima facie* the personal undertaking of an individual, but parol evidence is admissible to overcome the presumption;⁸³ and that the officer may introduce evidence to show that he is not personally liable where the signatures are first the name of the corporation "per" a certain person as president, and then the names of several persons with "Secty." or "Trustees" added.⁸⁴ So a signature such as "John Jones, President White Mfg. Co.," may be shown by parol to be the contract of the corporation.⁸⁵

However, where a person signs a contract on the letterhead of a corporation in his own name, the use of the words "we" and "us" in the contract does not create such an ambiguity as to warrant parol evidence.⁸⁶ Furthermore, in case of simple contracts, the principal may be charged as such by parol evidence upon a simple contract made by his agent, even though the contract gives no indication on its face of an intention to charge any other person than the signer;⁸⁷ and this rule applies to corporate contracts.⁸⁸ In the case of a simple contract,

⁸⁰ *Pacific Improvement Co. v. Jones*, 164 Cal. 260, 128 Pac. 404.

⁸¹ *Lewis v. Mutual Life Ins. Co.*, 8 Colo. App. 368, 46 Pac. 621.

⁸² *Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 457.

⁸³ *Griffin v. Union Savings & Trust Co.*, 86 Wash. 605, 150 Pac. 1128, distinguishing *People's Bank v. National Bank*, 101 U. S. 181, 25 L. Ed. 907, in that in the latter case the guaranty read "this bank hereby guarantees."

⁸⁴ *Knippenberg v. Greenwood Min-*

ing & Milling Co., 39 Mont. 11, 101 Pac. 159.

⁸⁵ *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650, followed in *Lynch v. McDonald*, 155 Cal. 704, 102 Pac. 918; *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624.

⁸⁶ *Reif v. Commercial Cabinet Co.*, 185 Ill. App. 577.

⁸⁷ 1 *Mechem on Agency* (2nd Ed.), § 1176.

⁸⁸ *Jones v. Williams*, 139 Mo. 1, 23. 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486. Contra,

signed by an individual, parol evidence is admissible to show that the individual was acting as vice president and agent of a corporation, where the evidence is introduced not to discharge the agent, but to bind, in addition, others.⁸⁹ But the rule that the presumption that a contract made in the name of the agent of a known principal is the contract of the agent and not of the principal is a disputable one, and that it may be shown by parol that the principal is bound also, but that in no event may the agent be so discharged, is generally limited to simple contracts and cannot be extended to negotiable instruments and specialties under seal.⁹⁰

§ 1494. As against third persons. The rule that parol evidence is admissible to show whether the liability is corporate or personal or both, in case of an ambiguity, applies to commercial paper even in the hands of third persons, where the ambiguity is so apparent to a reasonably prudent man on the face of the paper that he is necessarily put upon inquiry.⁹¹ Thus, where a note was signed with the name of a corporation, followed by the words "by W. E. Higman, President, I. C. Swan, Sec'y and Treas.," the Iowa Supreme Court said: "The form of the signature to the note is unusual and well calculated to suggest the fact that the defendant (Swan) may have intended to sign the note in an official capacity only. * * * Words of a like character are so frequently used, with a signature, to designate an official act, and are so rarely used in that manner for any other purpose, that when they are attached to a signature, they are well calculated to suggest that the signature was intended to be official, and not merely to describe the signer."⁹² And of course if he had actual notice of the facts, parol evidence thereof is admissible against him.⁹³

Russell v. Broadus Cotton Mills (Ala.), 39 So. 712.

In Georgia, however, parol evidence is not admissible in order to charge a corporation, to show that a contract signed by an individual was executed by him as officer of a corporation. *Carr v. Louisville & N. R. Co.*, 141 Ga. 219, 80 S. E. 716.

⁸⁹ *First Nat. Bank of Kennewick v. Conway*, 87 Wash. 506, 151 Pac. 1129.

⁹⁰ *Kendrick State Bank v. First Nat.*

Bank of Portland, 206 Fed. 940, rule in Oregon; *Barbre v. Goodale*, 28 Ore. 465, 43 Pac. 378, 38 Pac. 67.

⁹¹ *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665; *Germania Nat. Bank of Milwaukee v. Mariner*, 129 Wis. 544, 549, 109 N. W. 574.

⁹² *Capital Savings Bank & Trust Co. v. Swan*, 100 Iowa 718, 723, 69 N. W. 1065.

⁹³ *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665.

CHAPTER 36

EMINENT DOMAIN

- § 1495. Definition.
- § 1496. Taxation distinguished.
- § 1497. Police power distinguished.
- § 1498. Existence of right or power.
- § 1499. Delegation of right or power—In general.
- § 1500 — Foreign corporations.
- § 1501. Exercise of right or power by de facto corporation.
- § 1502. Public use—Necessity.
- § 1503. — What constitutes.
- § 1504. Property which may be taken.
- § 1505. What constitutes “taking.”
- § 1506. Compensation.

§ 1495. Definition. The Supreme Court of the United States has said that “the right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain.”¹ A later case decided by the same court is authority for the proposition that the power to take private property for public uses is generally termed the right of eminent domain.²

Justice Cooley, while a member of the Supreme Court of Michigan, said on the subject: “The eminent domain may be said to be the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand.”³

¹ Pollard's Lessee v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565. See also the dissenting opinion of Justice Story in Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773.

In Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 460, it is said that “the phrase ‘eminent domain’ * * * originated in the writings of an eminent publicist, Grotius, in 1625, who says: ‘The property of subjects is under the eminent domain of the state, so that the state,

or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way.’ Grotius, De Jure Belli et Pacis, Lib. 3, c. 20.”

² United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015.

³ Trombley v. Humphrey, 23 Mich.

A practical definition of the term as it is generally understood to-day is: the right or power to take or damage⁴ specific private property⁵ for public use⁶ upon making just compensation⁷ for such property.⁸

§ 1496. Taxation distinguished. Eminent domain and taxation are separate and distinct rights or powers.⁸ Wherein the distinction

471, 474, 9 Am. Rep. 94. See also *Jockheck v. Board Com'rs Shawnee Co.*, 53 Kan. 780, 37 Pac. 621.

⁴ See § 1505, *infra*.

⁵ See §§ 1496, 1504, *infra*.

⁶ See §§ 1502, 1503, *infra*.

⁷ See § 1506, *infra*.

⁸ For definitions either formulated or recognized by the courts of the several states, see:

Arkansas. *Ex parte Martin*, 13 Ark. 198, 58 Am. Dec. 321.

California. *Marin County Water Co. v. Marin County*, 145 Cal. 586, 79 Pac. 282.

Connecticut. *New York, N. H. & H. R. Co. v. Long*, 69 Conn. 424, 37 Atl. 1070.

Florida. *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225.

Illinois. *South Park Com'rs v. Montgomery, Ward & Co.*, 248 Ill. 299, 21 Ann. Cas. 127, 93 N. E. 910.

Indiana. *Kinney v. Citizens' Water & Light Co.*, 173 Ind. 252, 26 L. R. A. (N. S.) 195, 90 N. E. 129.

Iowa. *Gano v. Minneapolis & St. L. R. Co.*, 114 Iowa 713, 55 L. R. A. 263, 89 Am. St. Rep. 393, 87 N. W. 714.

Kansas. *Jockheck v. Board Com'rs Shawnee Co.*, 53 Kan. 780, 37 Pac. 621.

Maine. *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

Maryland. *Baltimore & F. Turnpike Road v. Baltimore, C. & E. M. Passenger R. Co.*, 81 Md. 247, 31 Atl. 854.

Massachusetts. *Com. v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450.

Michigan. *Fort St. Union Depot*

Co. v. Backus, 103 Mich. 556, 61 N. W. 787.

Minnesota. *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155, 163.

Nebraska. *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb. 465, 36 N. W. 806.

New Hampshire. *Varney v. Manchester*, 58 N. H. 430, 42 Am. Rep. 592.

New Jersey. *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 63, *aff'd* 18 N. J. Eq. 518, 90 Am. Dec. 634.

New York. *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689.

North Carolina. *Jeffress v. Town of Greenville*, 154 N. C. 490, 70 S. E. 919.

Ohio. *Cincinnati v. Louisville & N. R. Co.*, 88 Ohio St. 283, 102 N. E. 951.

Oklahoma. *Blincoe v. Choctaw, O. & W. R. Co.*, 16 Okla. 236, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689, 83 Pac. 903.

Pennsylvania. *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487.

South Carolina. *Stark v. McGowen*, 1 Nott & M. 387, 392, 9 Am. Dec. 712.

Texas. *Crawford v. Frio County*, — Tex. Civ. App. —, 153 S. W. 388.

Washington. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac. 681.

West Virginia. *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86.

Wyoming. *Grover Irrigation & Land Co. v. Lovella Ditch Reservoir & Irrigation Co.*, 21 Wyo. 204, Ann. Cas. 1915 D 1207, 131 Pac. 43.

⁹ **United States.** *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

between the two lies has, perhaps, been pointed out nowhere more clearly and definitely than in an early New York case. In this case the court said: "Private property may be constitutionally taken for public use in two modes: that is to say, by taxation and by right of eminent domain. These are rights which the people collectively retain over the property of individuals, to resume such portions of it as may be necessary for public use. The right of taxation and the right of eminent domain rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public use; and the taxpayer receives, or is supposed to receive, his just compensation in the protection which the government affords to his life, liberty, and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax. When private property is taken by right of eminent domain, special compensation is made * * *. Taxation exacts money, or services, from individuals, as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without refer-

California. Clute v. Turner, 157 Cal. 73, 106 Pac. 240.

Connecticut. Booth v. Woodbury, 32 Conn. 118, 130.

Indiana. Goodrich v. Winchester & D. Turnpike Co., 26 Ind. 119, 120.

Pennsylvania. In re Washington Ave., 69 Pa. St. 352, 8 Am. Rep. 255.

"Inasmuch as the compensation is made by the constitution a necessary concomitant of all taking for public use, if we say that taxation and taking are the same, we are reduced to the absurdity of deciding that no tax can be levied for the most important purpose of the state, without an immediate redistribution of it among the

people who pay it." Sharpless v. Philadelphia, 21 Pa. St. 147, 167, 59 Am. Dec. 759.

"While the right to take private property for public use is conditioned upon making compensation, the taxing power is not thus limited. Indeed, the very idea of taxation implies the power to collect levies of money from the people without making any direct pecuniary compensation. The only revenue possessed by the state is derived from taxation; and it would be absurd to say that she should compensate the citizen for taxes collected." Steward v. Supervisors of Polk County, 30 Iowa 9, 1 Am. Rep. 238.

ence to the amount or value exacted from any other individual or class of individuals.”¹⁰

In keeping with this view of the matter, it is held that the common constitutional inhibition against the taking of private property for public use without just compensation does not refer to the taxing power of the state¹¹ nor operate as a restriction thereupon, but refers only to the exercise of the power of eminent domain.¹²

¹⁰ *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266. See also *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443; *Booth v. Woodbury*, 32 Conn. 118, 130; *Goodrich v. Winchester & D. Turnpike Co.*, 26 Ind. 119, 120; *Hanson v. Vernon*, 27 Iowa 28, 1 Am. Rep. 215; *Moale v. Baltimore*, 5 Md. 314, 320, 61 Am. Dec. 276; *Woodbridge v. Detroit*, 8 Mich. 274, 280; *State v. Mayor, etc., of Newark*, 8 Vroom (N. J. L.) 415, 18 Am. Rep. 729; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *Ridenour v. Saffin*, 1 Handy (Ohio) 464, 471; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *McBean & Co. v. Chandler*, 9 Heisk. (Tenn.) 349, 360, 24 Am. Rep. 308; *Norris v. Waco*, 57 Tex. 635, 643.

“Although the right of levying taxes upon private property generally in the state, results from, and is part of, the right of eminent domain, that term, in its more modern acceptance, applies especially to the taking of some particular private property for some particular public use.” *Gilmer v. Lime Point*, 18 Cal. 229, 250.

Eminent domain “takes specific property (not money) upon paying compensation therefor. * * * [Taxation] takes money, the only compensation being that it will be appropriated according to law.” *Austin v. Nalle*, 102 Tex. 536, 120 S. W. 996. See also *Haas v. Misner & Lamkin*, 1 Idaho 170, 181.

¹¹ *United States. Cole v. La Grange*, 113 U. S. 1, 28 L. Ed. 896.

Connecticut. Nichols v. Bridgeport, 23 Conn. 189, 205, 60 Am. Dec. 636.

Illinois. White v. People, 94 Ill. 604, 611.

Indiana. Logansport v. Seybold, 59 Ind. 225, 228.

Michigan. Williams v. Detroit, 2 Mich. 560, 566.

Mississippi. Edwards House Co. v. Jackson, 91 Miss. 429, 45 So. 14.

New York. People v. Lawrence, 41 N. Y. 123, 140.

Texas. Norris v. Waco, 57 Tex. 635, 643.

Utah. Kimball v. Grantsville City, 19 Utah 368, 374, 45 L. R. A. 628, 57 Pac. 1.

“Neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution. Taxation only exacts a contribution from individuals of the state or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation.” *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

¹² *Hanly v. Sims*, 175 Ind. 345, 93 N. E. 228; *Stewart v. Supervisors of Polk County*, 30 Iowa 9, 1 Am. Rep. 238. See also *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 423, 55 Am. Dec. 266.

“The clause prohibiting taking private property for public use without

Manifestly, however, it is altogether possible for this constitutional inhibition to be violated under color of the taxing power and under the pretense of levying a tax.¹³ So, although special assessments for local improvements are undoubtedly to be referred, as a general thing, to the taxing power,¹⁴ an excessive exaction of such character is, as to the excess, a taking of the landowner's property within the meaning of the Constitution,¹⁵ at least when such excess is a substantial one.¹⁶

§ 1497. Police power distinguished. In an early Massachusetts case,¹⁷ there was drawn a distinction between the police power and

just compensation has no reference to taxation. If it has, then all taxation is forbidden, for 'just compensation' means pecuniary recompense to the person whose property is taken equivalent in value to the property. * * * The restriction is upon the right of eminent domain, not upon the right of taxation." *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. (U. S.) 667, 21 L. Ed. 375.

¹³ *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 614, 43 L. Ed. 823; *Slack v. Maysville & L. R. Co.*, 13 B. Mon. (Ky.) 132; *Gordon v. Cornes*, 47 N. Y. 608; *In re Dorrance St.*, 4 R. I. 230, 246.

¹⁴ *California*. *Burnett v. Sacramento*, 12 Cal. 76, 84, 73 Am. Dec. 518.

Illinois. *Chicago & A. R. Co. v. Joliet*, 153 Ill. 649, 654, 39 N. E. 1077; *Adams County v. Quincy*, 130 Ill. 566, 575, 6 L. R. A. 155, 22 N. E. 624; *White v. People*, 94 Ill. 604, 611. Compare *Hessler v. Drainage Com'rs*, 53 Ill. 105, 114; *Harward v. St. Clair & M. Levee & Drainage Co.*, 51 Ill. 130, 136; *Bedard v. Hall*, 44 Ill. 91, 95; *Ottawa v. Spencer*, 40 Ill. 211, 216; *Chicago v. Larned*, 34 Ill. 203, 276.

Indiana. *New York, C. & St. L. R. Co. v. Hammond*, 170 Ind. 493, 83 N. E. 244.

Iowa. *Warren v. Henly*, 31 Iowa 31, 39.

Maryland. *Baltimore v. Green Mount Cemetery*, 7 Md. 517, 536.

Massachusetts. *Howe v. Cambridge*, 114 Mass. 388, 390.

Michigan. *Williams v. Detroit*, 2 Mich. 560, 566.

Mississippi. *Edwards House Co. v. Jackson*, 91 Miss. 429, 45 So. 14.

New York. *People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

Pennsylvania. *In re Vacation of Centre St.*, 115 Pa. St. 247, 8 Atl. 56; *In re Washington Ave.*, 69 Pa. St. 352, 8 Am. Rep. 255.

Rhode Island. *In re Dorrance St.*, 4 R. I. 230, 244.

Vermont. *Allen v. Drew*, 44 Vt. 174, 187.

¹⁵ *Hanscom v. Omaha*, 11 Neb. 37, 41, 7 N. W. 739; *Tidewater Co. v. Coster*, 18 N. J. Eq. 518, 527, 90 Am. Dec. 634; *State v. Mayor, etc., of Newark*, 8 Vroom (N. J. L.) 415, 18 Am. Rep. 729.

"Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of this particular benefit, it is, pro tanto, a taking of his private property for public use without any provision for compensation." *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

¹⁶ *Village of Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443.

¹⁷ *Com. v. Alger*, 7 Cush. (Mass.) 53, 84.

the power of eminent domain which has since been accorded the seal of approval by the Supreme Court of the United States,¹⁸ and which would seem to stand as the law on the subject.¹⁹ Said the Massachusetts court, speaking through Chief Justice Shaw: "We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth * * * is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. * * * Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. * * * [The owner] is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *sic utere*

¹⁸ Sweet v. Rechel, 159 U. S. 380, 40 L. Ed. 188.

¹⁹ State v. Griffin, 69 N. H. 1, 41 L. R. A. 177, 76 Am. St. Rep. 139, 39 Atl. 260 (wherein the court declared that "the universal doctrine on the

subject is nowhere more clearly stated than in the * * * language of Chief Justice Shaw," quoted in the text); Town Council of Summerville v. Pressley, 33 S. C. 56, 8 L. R. A. 854, 26 Am. St. Rep. 659, 11 S. E. 545.

tuo, ut alienum non laedas. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain."²⁰

²⁰ Com. v. Alger, 7 Cush. (Mass.) 53, 84.

"A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests." *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205.

"The police power is distinguished from the right of eminent domain in that the state by exercising the latter right takes private property for public use, thereby entitling the owner to compensation under the Constitution, while the police power, founded as it is on the maxim, '*Sic utere tuo ut alienum non laedas*,' is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather destroyed in order to conserve the safety, morals, health, or general welfare of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general * * * benefits resulting from the exercise of the police power." *Com. v. Plymouth Coal Co.*, 232 Pa. 141, 81 Atl. 148. See also *Chicago, B. & Q. R. Co. v. People*,

212 Ill. 103, 72 N. E. 219, aff'd 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175; *Tenement House Department City of New York v. Moeschén*, 179 N. Y. 325, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, 72 N. E. 231; *Illinois Cent. R. Co. v. Moriarity*, 135 Tenn. 446, 186 S. W. 1053.

"To destroy property because it is a dangerous nuisance is not to appropriate it to a public use, but to prevent any use of it by the owner, and put an end to its existence, because it could not be used consistently with maxim '*Sic utere tuo ut alienum non laedas*.' In abating nuisances, the public does not exercise the power of eminent domain, but the police power." *Dunbar v. City Council of Augusta*, 90 Ga. 390, 17 S. E. 907. See also *Louisa County v. Yancey's Trustee*, 109 Va. 229, 63 S. E. 452.

"There is a very clear distinction between a taking or an appropriation of property for a public use, and regulating the use of property devoted to a use in which the public has an interest. The latter is an exercise of the 'police power,' as it is called; the former, of the power of eminent domain. The state in the former case compels the dedication of the property, or some interest therein, to a public use, or, if already dedicated to one public use, then to another. In the latter the owner has voluntarily, or in pursuance of the provisions of its [corporate] charter, dedicated the property to a use in which the public has an interest, and the use of that property so dedicated is merely regulated and controlled for the public welfare." *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 So. 225.

There being this distinction between the two powers, it would seem to follow that the holding that the constitutional provision which prohibits the taking of private property for public use without just compensation cannot be invoked to defeat a valid exercise of the police power²¹ is the only one that could properly be made.

§ 1498. Existence of right or power. The right or power of eminent domain is inherent in and incident to sovereignty. Constitutional recognition of its existence is unnecessary.²² While it does not include

²¹ *Frazer v. City of Chicago*, 186 Ill. 480, 57 N. E. 1055; *Indianapolis v. Indianapolis Water Co.*, — Ind. —, 113 N. E. 369; *American Coal Co. v. Allegany County Com'rs*, 128 Md. 564, 98 Atl. 143; *Houston & T. C. R. Co. v. Dallas*, 98 Tex. 396, 70 L. R. A. 850, 84 S. W. 648.

"The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people." *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979. See also *Northern Pac. R. Co. v. Minnesota*, 208 U. S. 583, 52 L. Ed. 630; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175.

"The enforcement of regulations enacted in the proper exercise of the police power of the state cannot be resisted as a taking of private property without compensation." *Stone v. Fritts*, 169 Ind. 361, 15 L. R. A. (N. S.) 1147, 14 Ann. Cas. 295, 82 N. E. 792.

²² *United States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015.

Alabama. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

Arizona. *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 144 Pac. 277.

Arkansas. *Ex parte Martin*, 13 Ark. 198, 58 Am. Dec. 321.

California. *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

Connecticut. *Connecticut College for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633.

Georgia. *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422.

Illinois. *South Park Com'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 21 Ann. Cas. 127, 93 N. E. 910.

Indiana. *Kinney v. Citizens' Water & Light Co.*, 173 Ind. 252, 26 L. R. A. (N. S.) 195, 90 N. E. 129.

Iowa. *Sisson v. Board Sup'rs Buena Vista Co.*, 128 Iowa 442, 70 L. R. A. 440, 104 N. W. 454.

Maine. *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

Maryland. *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276.

Massachusetts. *In re Wellington*, 16 Pick. 87, 26 Am. Dec. 631.

Minnesota. *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155, 163.

Mississippi. *Wise v. Yazoo City*, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912B 377, 51 So. 453.

Missouri. *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453.

New Jersey. *Scudder v. Trenton Delaware Falls Co.*, 1 Saxt. (N. J. Eq.) 694, 23 Am. Dec. 756.

New York. *People v. New York*, 198 N. Y. 439, 92 N. E. 18.

all sovereign power,²³ it is inseparable from sovereignty unless denied thereto by the fundamental law.²⁴ It exists in every independent government,²⁵ and that, of course, means, in this country, in the federal

North Carolina. Jeffress v. Town of Greenville, 154 N. C. 490, 70 S. E. 919.

Ohio. Cincinnati v. Louisville & N. R. Co., 88 Ohio St. 283, 102 N. E. 951.

Pennsylvania. Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 Atl. 487.

South Dakota. Hyde v. Minnesota, D. & P. R. Co., 29 S. D. 220, 40 L. R. A. (N. S.) 48, 136 N. W. 92.

Tennessee. Southern Ry. Co. v. Memphis, 126 Tenn. 267, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913 E 153, 148 S. W. 662.

Texas. Crawford v. Frio County, — Tex. Civ. App. —, 153 S. W. 388.

Washington. State v. Superior Court of Skagit County, 78 Wash. 679, 51 L. R. A. (N. S.) 987, 139 Pac. 601.

West Virginia. Pittsburg Hydro-Electric Co. v. Liston, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86.

Wyoming. Grover Irrigation & Land Co. v. Lovella Ditch Reservoir & Irrigation Co., 21 Wyo. 204, Ann. Cas. 1915 D 1207, 131 Pac. 43.

"The right of eminent domain, is always vested in the supreme authority of the state. Whatever the form of the government may be, the paramount right being in such supreme authority, its power to subject private property to public use, has never been questioned." Aldridge v. Tuscomb, C. & D. R. Co., 2 Stew. & P. (Ala.) 199, 203, 23 Am. Dec. 307. See also Davis v. Tuscomb, C. & D. R. Co., 4 Stew. & P. (Ala.) 421, 440.

The right of eminent domain is not conferred by the constitution, but exists because the state exists. It is not a right reserved, but a right inherent in the state as sovereign. While it may be limited and regulated by the constitution, it exists inde-

pendently of the latter as a necessary attribute of sovereignty. People v. Adirondack Ry. Co., 160 N. Y. 225, 54 N. E. 689.

"The right of eminent domain is an inherent and essential element of sovereignty. It results from the social compact; and hence, would exist without any express provision of the organic law upon the subject." Brown v. Beatty, 34 Miss. 227, 239, 69 Am. Dec. 389.

²³ Pollard's Lessee v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565.

"Sovereignty, according to the best authorities, is the supreme power which governs the body politic or society that constitutes the state. And this power is independent of the particular form of government, whether monarchical, aristocratic, or democratic. * * * To each and every sovereignty belong certain rights which are deemed essential to its existence. These are called by the civilians *jura majestatis*, or rights of sovereignty. Among them is the *jus eminens*, or the supreme power of the state over its members and whatever belongs to them. When applied to property alone, it is called the *dominium eminens*, or the right of eminent domain; that is, the right of the sovereignty to use the property of its members for the public good or public necessity." Gilmer v. Lime Point, 18 Cal. 229, 250.

²⁴ Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443; Bauman v. Ross, 167 U. S. 548, 42 L. Ed. 270; Searl v. School Dist. No. 2, Lake County, 133 U. S. 553, 33 L. Ed. 740; Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449.

²⁵ United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015; Mississippi &

government,²⁶ and in each and every state government.²⁷ Moreover, it knows no limitations nor restrictions excepting such as are contained in the constitution.²⁸

Although this right or power has been said to be high,²⁹ an extraordinary,³⁰ and a dangerous one,³¹ and notwithstanding it is to be exercised with great caution,³² it is, nevertheless, a right or power that is absolutely necessary to government.³³ Indeed, it has been said to

Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

²⁶ Chappel v. United States, 160 U. S. 499, 40 L. Ed. 510; Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449, (holding that the United States may exercise the right of eminent domain within the several states without let or hindrance thereby as far as is necessary to its enjoyment of the powers conferred upon it by the Federal Constitution); Neitzel v. Spokane International R. Co., 65 Wash. 100, 36 L. R. A. (N. S.) 522, 117 Pac. 864.

²⁷ Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449; Trombley v. Humphrey, 23 Mich. 471, 475, 9 Am. Rep. 94; Neitzel v. Spokane International R. Co., 65 Wash. 100, 36 L. R. A. (N. S.) 522, 117 Pac. 864.

"The Constitution of the United States, although adopted by the sovereign states of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute [eminent domain] in the states; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the states, to ascribe to them the intention to relinquish the power of self-government and self-preservation." West River Bridge v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535. See also Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449.

"There is a vital essential and paramount power belonging to the state which has never been surrendered to

the general government, and which is not limited or embarrassed by any considerations inferior to a regard for the public welfare. It is the right of eminent domain." President, etc., of Baltimore & F. Turnpike Road v. Baltimore, C. & E. M. Passenger R. Co., 81 Md. 247, 31 Atl. 854.

²⁸ Columbus Waterworks Co. v. Long, 121 Ala. 245, 25 So. 702; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 15 L. R. A. 505, 29 N. E. 1062; Southern Ry. Co. v. Memphis, 126 Tenn. 267, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913 E 153, 148 S. W. 662.

In providing that private property shall not be taken for public use without just compensation, the Fifth Amendment to the Federal Constitution applies only to the Federal government. Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369. See also Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Kimball v. Grantsville City, 19 Utah 368, 45 L. R. A. 628, 57 Pac. 1.

²⁹ Illyes v. White River Light & Power Co., 175 Ind. 118, 93 N. E. 670.

³⁰ Crawford v. Frio County, — Tex. Civ. App. —, 153 S. W. 388.

³¹ Gary v. Much (Ind. App.), 94 N. E. 583; Crawford v. Frio County, — Tex. Civ. App. —, 153 S. W. 388.

³² Wise v. Yazoo City, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912 B 377, 51 So. 453.

³³ "If this power which resides in the state is a great power, it cannot be denied that it is also a necessary power. If it may seem in one aspect

have its foundation in the law of necessity.³⁴ "All private property is held subject to the necessities of government,"³⁵—to the right of the public to have it put to a necessary public use.³⁶ Into each grant of land by the state there enters the implied reservation that the state may retake the land granted when the public use demands it.³⁷ In the words of the Supreme Court of the United States, "in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach

of it to be a despotic power, it cannot be denied that it is at the same time a beneficent power and absolutely essential to the public welfare. Without it, a road could not be opened, a railroad or telegraph line constructed, a canal dug, a bridge built, a new street laid out or an old one altered, and all public improvements would come to a stand-still. It oppresses no one, for its exercise is always accompanied by adequate and full compensation. It is guarded by just restrictions, and its abuse is prevented by adequate limitations." Twelfth St. Market Co. v. Philadelphia & R. Terminal R. Co., 142 Pa. St. 580, 584, 21 Atl. 902.

³⁴Trombley v. Humphrey, 23 Mich. 471, 474, 9 Am. Rep. 94. In delivering the opinion of the court in this case, Justice Cooley said: "The authority springs from no contract or arrangement between the government and the citizen whose property may be appropriated, but it has its foundation in the imperative law of necessity, and is recognized, and may be defended and enforced, upon the ground that no government could perpetuate its existence and further the prosperity of its people, if the means for the exercise of any of its sovereign powers might be withheld at the option of individuals. The right being thus found to rest upon necessity, the

power to appropriate in any case must be justified and limited by the necessity. * * * Any employment of the power for other purposes than to enable the government to exercise and give effect to its proper authority, effectuate the purpose of its creation and carry out the policy of its laws, could not be rested upon the justification and basis which underlie the power, and consequently would be wholly unauthorized and inadmissible." See also Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449; Connecticut College for Women v. Calvert, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633; Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 21 L. R. A. (N. S.) 410, 69 Atl. 870; Grover Irrigation & Land Co. v. Lovella Ditch Reservoir & Irrigation Co., 21 Wyo. 204, Ann. Cas. 1915 D 1207, 131 Pac. 43.

³⁵United States v. Lynah, 188 U. S. 445, 47 L. Ed. 539.

³⁶Kinney v. Citizens' Water & Light Co., 173 Ind. 252, 26 L. R. A. (N. S.) 195, 90 N. E. 129.

³⁷Denver Power & Irrigation Co. v. Denver & R. G. R. Co., 30 Colo. 204, 60 L. R. A. 303, 69 Pac. 568; Todd v. Austin, 34 Conn. 78, 88; Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 Atl. 487; Imperial Irrigation Co. v. Jayne, 104 Tex. 395, Ann. Cas. 1914 B 322, 138 S. W. 575.

and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated 'eminent domain' of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise."³⁸

Moreover, the right or power of eminent domain is indestructible,³⁹ inextinguishable,⁴⁰ and inalienable.⁴¹ It may be delegated,⁴² but the act of delegation is revocable at will,⁴³ subject to property rights and the duty of making compensation therefor.⁴⁴

§ 1499. Delegation of right or power—In general. While the right or power of eminent domain is inherent in the state,⁴⁵ it is also

³⁸ *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, 12 L. Ed. 535.

The right of eminent domain "attaches, as an incident to every sovereignty, and it constitutes a condition, upon which all private property is held. Whenever the public use of property requires it, the private rights to property must yield to this paramount right of sovereign power to take it for the public use." *Varner v. Martin*, 21 W. Va. 534, 544. See also *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

³⁹ The right of eminent domain is "as enduring and indestructible as the state itself." *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689.

⁴⁰ "There is no such thing as extinguishing the right of eminent domain; and any attempt to do so by one legislature has no binding force upon its successors." *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

⁴¹ *Portneuf Irrigating Co. v. Budge*, 16 Idaho 116, 126, 18 Ann. Cas. 674, 100 Pac. 1046; *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86.

⁴² See § 1499, *infra*.

⁴³ "The power of eminent domain is not exhausted by any grant it [the sovereignty] may make, though accepted and acted on. Being granted for the public welfare, it may be revoked or modified whenever the public good requires it. The public good being the pole star, whenever that object or desideratum will be best accomplished by retaking or withdrawing the whole or a part of the franchise granted, the sovereignty will not stay its hand, but will again assert itself, if the public welfare demand it. To that grand aim of all good government all mere private enterprises or exclusive channels of commerce must yield." *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 6 So. 404.

⁴⁴ "While the state may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to property rights and the duty of paying therefor." *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689.

⁴⁵ See § 1498, *supra*.

dormant, except perhaps under a constitutional provision such as exists in certain of the western states⁴⁶ until the legislature arouses it

⁴⁶“Counsel for respondent also contends that until the people of Idaho speak through their legislature granting a private corporation the right to take private property for a temporary logging road under the law no such right of appropriation of private property can be enjoyed or exercised. Counsel * * * overlooks the fact, * * * that the people themselves have spoken in their Constitution and have clearly provided that private persons or private corporations, if engaged in the development of the material resources of the state, to the end that their complete development may be made, may exercise that right. The necessary use of lands for that purpose is declared by the people themselves to be a public use. What is the Constitution of Idaho, anyway? It is the supreme law of the state formed by the mighty hand of the people themselves, in which certain fixed principles of fundamental law are established. It contains the will of the people, and is the supreme law of the state. It is superior to and above the power of the legislature, and can be revoked, nullified, or altered only by the authority that made it. The life-giving principle in that instrument proceeded direct from the people, and the death-dealing stroke, when given, must proceed from the same power. In the Constitution the people have said to the legislature, ‘Thus far ye shall go and no farther,’ and the people have declared that the right of eminent domain may be invoked wherever it is necessary to the complete development of the material resources of the state, and any act of the legislature that would prohibit the exercise of that right for such

complete development would be unconstitutional and void. No legislative authority is needed under the provisions of section 14 of the Constitution to invoke the power of eminent domain, further than to provide the judicial procedure for the exercise of that right or power, which procedure the legislature has amply supplied. In 15 Cyc. p. 567, it is said that the right of eminent domain lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise. The authorities cited in support of that statement are from states not having constitutional provisions such as are contained in said section 14 of our Constitution, but from states where the whole subject of eminent domain was left to the legislature. The constitutions of such states, however, usually prohibited the taking of private property for a public use until a just compensation had been paid therefor. But the people of this state have determined the ‘occasions’ and ‘conditions’ on which the ‘right may be exercised,’ and only have left to the legislature the right or authority to fix the ‘mode’ and ‘agencies for its exercise’; in other words, to provide the procedure whereby the right may be exercised. The same statement is made in Cooley on Constitutional Limitations, p. 259, and the author in 15 Cyc. 569, cites Cooley and other authorities in support of the statements therein made. These statements are correct in all states where the people have not exercised their sovereignty and declared what uses are public in their constitutions, as the people have done in this state. The people in this state left to the legislature the authority only to pro-

into activity by taking steps for the exercise of the power.⁴⁷

In transforming this right or power from a potential one into an active one the legislature may proceed directly and appropriate the required property by legislative act,⁴⁸ or it may proceed indirectly by delegating its right or power to take such property to its chosen agent. Nor is it required that the agent selected be a governmental or political body. No doubt can exist at this late day that, in the absence of constitutional restrictions, the legislature is free and untrammelled in the matter of the selection of the person or persons upon whom or upon which it may confer its right or power of eminent domain. Only recently the whole matter has been summed up as follows: "Eminent domain is a sovereign power—it belongs to the state, and the state can authorize such persons as it sees fit to exercise

vide the procedure, so far as the uses provided for by said section 14 are concerned." *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 Pac. 680. Section 14, of article 1 of the Idaho Constitution provides that "the necessary use of lands for the construction of reservoirs or storage basins, for the purposes of irrigation, or for the rights of way for the construction of canals, ditches, flumes or pipes to convey water to the place of use, for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state. Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor."

⁴⁷ *Chestatee Pyrites Co. v. Caven-*

ders Creek Gold Min. Co., 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422; *Wise v. Yazoo City*, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912 B 377, 51 So. 453; *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429; *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86. See also *Madison v. Daley*, 58 Fed. 751, 753; *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 21 L. R. A. (N. S.) 410, 69 Atl. 870.

"This right to appropriate private property for public uses must lie dormant in the state, until the legislature by law points out the modes, conditions and agencies whereby the appropriation can be made." *Varner v. Martin*, 21 W. Va. 534, 544.

"Until a statute authorizes an exercise of the power, it is latent and potential merely, and not active or efficient, and the state can neither directly exercise the prerogative, nor can it delegate its exercise except through the medium of legislation." *In re Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601.

⁴⁸ *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206.

the right in the public interest.”⁴⁹ If this statement—assuming it to be a correct presentation of the law on the subject, as it is believed to be—means anything, it means that the legislature may authorize, *inter alia*, a private corporation, organized primarily for purposes of private gain, to take private property under the right or power of eminent domain in any case in which the legislature might take such property by legislative act, always provided, of course, the constitution contains no prohibitory provision.⁵⁰ “There is nothing then in the term ‘eminent domain,’ which implies any restriction as to the manner in which this power of the sovereign to take private property for public uses may be exercised. If there are any restrictions as to the manner of its exercise, they must be found then in the Constitution; for nothing of less authority than the organic and fundamental law which lays out the very frame of government could impose them. But the Constitution contains no such restriction, except as to the matter of compensation, which is not here important. There is no reason, then, why the legislature, representing the state, may

⁴⁹ *Rogers v. Cosgrave*, 98 Neb. 608, 153 N. W. 569. See also *In re Townsend*, 39 N. Y. 171, 174.

“The exercise of the power of eminent domain being an attribute of sovereignty, the sovereign may grant it to whomsoever it may think proper, and deny it to all others.” *Consumers’ Gas Trust Co. v. Harless*, 131 Ind. 446, 15 L. R. A. 505, 29 N. E. 1062.

The state may grant or withhold the power to exercise the right of eminent domain at its pleasure. *People v. City of New York*, 198 N. Y. 439, 92 N. E. 18.

⁵⁰ The constitutional provision that “municipal and other corporations * * * invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed,” etc., constitutes a clear recognition of the power of the legislature to grant to corporations the right to condemn private property for public use. *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487.

An act, bearing a proper title as far as the act’s amendatory character is concerned, which amends the general incorporation law by authorizing the organization of public service corporations of a particular class and conferring on such corporations the power of eminent domain is not open to the objection that its subject-matter is broader than its caption, when the caption of the act amended is broad enough to justify a provision for the organization of such corporations and, since it is usual and customary to endow public service corporations with the right to condemn the lands necessary for their use, a provision that they may exercise the right of eminent domain. *Tennessee Coal, Iron & Railroad Co. v. Paint Rock Flume & Transportation Co.*, 128 Tenn. 277, 160 S. W. 522.

The better rule seems to be that the delegated right is a franchise. See Chap. 31, *supra*.

not enact laws by which the eminent domain may be exercised by a private corporation.”⁵¹

Notwithstanding all of this, however, a private corporation has no inherent right to appropriate private property under any circumstances,⁵² but the right or power of eminent domain inheres only in the state, and its exercise by a private corporation is impossible unless it has been delegated to such corporation by the constitution⁵³ or by a statute.⁵⁴ Hence it is that a “corporation which claims the right to exercise the power must be able to show a legislative warrant.”⁵⁵

A delegation of the right or power to a private corporation is never presumed, however great may be the necessity that it have and exercise such right or power.⁵⁶ Nor will it be inferred from vague and

⁵¹ *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155, 163.

A city cannot delegate its power of eminent domain to a railroad company. *Spokane v. Spokane & I. E. R. Co.*, 75 Wash. 651, 135 Pac. 636.

⁵² An injunction will lie against a trespass resulting from the unauthorized exercise of the power of eminent domain. *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487.

⁵³ Constitutional or statutory authority is necessary in order that others than the state may exercise the right of eminent domain. *Gasaway v. Seattle*, 52 Wash. 444, 21 L. R. A. (N. S.) 68, 100 Pac. 991.

⁵⁴ *San Joaquín & Kings River Canal & Irrigation Co. v. Stevenson*, 164 Cal. 221, 128 Pac. 924; *In re Water Front in City of New York*, 190 N. Y. 350, 83 N. E. 299.

⁵⁵ *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429. See also *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422.

“The right to exercise the power of eminent domain must be found in some statute of the state.” *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

When the state delegates the right

of eminent domain, “it may impose upon the donee any condition that does not encroach upon or abridge any of the constitutional rights of those whose property is to be taken. It may require the donee of the right to do more than is demanded by the constitution, but it may not permit less to be done. If the donee accepts the right and exercises it, the conditions subject to which it is granted cannot be evaded or ignored. They are part and parcel of the grant.” *People v. City of New York*, 198 N. Y. 439, 92 N. E. 18. See also *In re Water Front in City of New York*, 190 N. Y. 350, 83 N. E. 299; *Portland Oregon City R. Co. v. Penny*, — Ore. —, 158 Pac. 404.

⁵⁶ *Wise v. Yazoo City*, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912 B 377, 51 So. 453.

“Wherever an attempt is made either by the officers of the state or by a corporation organized for a public purpose to take private property under the power of eminent domain, the officers or body claiming the right must be able to point to a statute conferring it. In the absence of statutory authority, private property cannot be invaded by the power, however strong may be the reasons for

doubtful general phrases.⁵⁷ To the contrary, a private corporation can exercise the right or power to take private property only when such right or power is clearly given it,⁵⁸ either in express terms⁵⁹ or by necessary implication.⁶⁰ But not only must there be constitutional

the appropriation." In re Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601.

Unless such other be its lessee (Beckman v. Lincoln & N. W. R. Co., 79 Neb. 89, 112 N. W. 348; Glaser v. Glenwood R. Co., 208 Pa. St. 328, 57 Atl. 713) one corporation cannot condemn property for the use of another but the exercise of the power must be for the benefit of the corporation to which it was granted. Lizare v. City of Chicago, 139 Ill. 46; Kinney v. Citizens' Water & Light Co., 173 Ind. 252, 90 N. E. 129; City of Spokane v. Spokane & I. E. R. Co., 75 Wash. 651, 135 Pac. 636. See also State v. Superior Court for Skagit County, 78 Wash. 679, 139 Pac. 601.

A dummy corporation which has no real and bona fide purpose of its own and no intention to attempt to actually carry out the object of its organization as set out in its articles of incorporation does not have the right of eminent domain when land sought to be appropriated will accrue to the sole use and benefit of the parent corporation. Parkside Cemetery Ass'n v. Cleveland, B. & G. L. Traction Co., 93 Ohio St. 161, 112 N. E. 596; Country Home Co. v. Cleveland, B. & G. L. Traction Co., 93 Ohio St. 198, 112 N. E. 606.

⁵⁷ *Comiskey v. Lynn*, — Mass. —, 115 N. E. 312.

"Unless both the letter and the spirit of the statute relied upon clearly confer the power, it cannot be exercised." *Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co.*, 208 Ill. 419, 423, 70 N. E. 357.

In determining what corporations, incorporated under a general corpora-

tion law, are entitled to exercise the right of eminent domain, the maxim "expressio unius est exclusio alterius" would seem to apply. *Pennsylvania Tel. Co. v. Hoover*, 209 Pa. 555, 58 Atl. 922.

A mining company, authorized to build a railroad from its mine "to any other railroad," held not invested with the power of eminent domain by reason of its being required to be governed by the acts in relation to railroads, so far as they are applicable, which acts conferred on railroad corporations the power to appropriate the lands necessary for their roads, etc. *Miami Coal Co. v. Wigton*, 19 Ohio St. 560.

⁵⁸ *State v. Jacksonville Terminal Co.*, 71 Fla. 295, 71 So. 474; *Illyes v. White River Light & Power Co.*, 175 Ind. 118, 93 N. E. 670; *Wise v. Yazoo City*, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912 B 377, 51 So. 453.

⁵⁹ "The power of eminent domain * * * can only be exercised by subordinate agencies when expressly granted within constitutional limitations, through the medium of legislative enactment." *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 36 L. R. A. (N. S.) 522, 117 Pac. 864. See also *Crawford v. Frio County*, — Tex. Civ. App. —, 153 S. W. 388.

⁶⁰ *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 164 Cal. 221, 128 Pac. 924; *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

"The power to exercise the right of eminent domain, whether delegated to private or municipal corporations, is limited to the express terms or clear implication of the statute authorizing

or statutory authority in order that a private corporation may exercise the right or power of eminent domain, but, in harmony with, although not necessarily in consequence of, the rule that the constitutional provision relating to the taking of private property must be accorded a liberal construction—a construction effectuating its purposes—in favor of the property owner,⁶¹ it is generally held that the statute relied on as delegating such right or power must be given a strict construction⁶²—that is, at least a reasonably strict construc-

its exercise, and where it is to be implied it can only be implied in a case where the implied power is indispensable to the effectuation of the purpose granted by the express terms of the statute." *Wise v. Yazoo City*, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912 B 377, 51 So. 453.

An act making terminal companies common carriers does not thereby confer on such companies the power of eminent domain. *State v. Jacksonville Terminal Co.*, 71 Fla. 295, 71 So. 474.

⁶¹ *King County v. Seattle Cedar Lumber Mfg. Co.*, — Wash. —, 162 Pac. 27.

⁶² *Alabama. Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 6 So. 404.

California. Southern Pac. R. Co. v. Wilson, 49 Cal. 396, 398.

Colorado. Ortiz v. Hansen, 35 Colo. 100, 83 Pac. 964.

Delaware. Clendaniel v. Conrad, 26 Del. 549, 83 Atl. 1036.

Florida. Florida Cent. & P. R. Co. v. Bear, 43 Fla. 319, 31 So. 287.

Illinois. Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 239 Ill. 197, 87 N. E. 933.

Indiana. Gary v. Much (Ind. App.), 94 N. E. 583.

Kansas. Atchison, T. & S. F. R. Co. v. Kansas City, M. & O. R. Co., 67 Kan. 569, 73 Pac. 899, rev'g on rehearing 67 Kan. 569, 70 Pac. 939.

Kentucky. Board Park Com'rs of

Louisville v. Du Pont, 110 Ky. 743, 62 S. W. 891.

Louisiana. Breaux v. Bienvenu, 51 La. Ann. 687, 25 So. 321.

Maine. Clark v. Coburn, 108 Me. 26, Ann. Cas. 1913 B 167, 78 Atl. 1107.

Mississippi. Wise v. Yazoo City, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912 B 377, 51 So. 453.

Missouri. School Dist. of Columbia v. Jones, 229 Mo. 510, 129 S. W. 705.

New Hampshire. Claremont Railway & Lighting Co. v. Putney, 73 N. H. 431, 62 Atl. 727.

New Jersey. Metlar v. Middlesex & S. Traction Co., 72 N. J. L. 524, 63 Atl. 497.

New York. Erie R. Co. v. Steward, 170 N. Y. 172, 63 N. E. 118.

North Carolina. Carolina & N. W. R. Co. v. Pennecarden Lumber & Manufacturing Co., 132 N. C. 644, 44 S. E. 358.

Ohio. Parkside Cemetery Ass'n v. Cleveland, B. & C. Lake Traction Co., 93 Ohio St. 161, 112 N. E. 596.

Pennsylvania. Lazarus v. Morris, 212 Pa. 128, 61 Atl. 815.

South Carolina. Paris Mountain Water Co. v. Greenville, — S. C. —, 89 S. E. 669.

Tennessee. Woolard v. Nashville, 108 Tenn. 353, 67 S. W. 801.

Texas. Crawford v. Frio County. — Tex. Civ. App. —, 153 S. W. 388.

Virginia. Chesapeake & O. R. Co. v. Walker, 100 Va. 69, 40 S. E. 633.

Washington. State v. Superior

tion⁶³—against the claimant corporation. Although, as is said that “this is not a rule to be asserted and then disregarded, but to be rigidly enforced,”⁶⁴ the construction given the statute should not be overtechnical,⁶⁵ nor so literal as to defeat the manifest purpose of the legislature.⁶⁶ Moreover, the usual presumption in favor of the

Court of Grant County, 64 Wash. 189, 116 Pac. 855.

West Virginia. Fork Ridge Bapt. Cemetery Ass’n v. Redd, 33 W. Va. 262, 10 S. E. 405.

“In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of government, is in derogation of the ordinary rights of private ownership and of the control which an owner usually has of his property. The rule of strict construction of condemnation statutes is especially applicable to delegations of the power by the legislature to private corporations. The motive of the promoters of such corporations is usually private gain, although their creation may subserve a public purpose. When such corporations claim to exercise this delegated power, the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by the clear warrant of law.” *In re Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601. See also *Carolina & N. W. R. Co. v. Pennecarden Lumber & Manufacturing Co.*, 132 N. C. 644, 44 S. E. 358.

⁶³ *Comiskey v. Lynn*, — Mass. —, 115 N. E. 312; *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385.

⁶⁴ *Platt v. Pennsylvania Co.*, 43 Ohio St. 228, 1 N. E. 420.

“Words in the statute fairly susceptible of a meaning limiting the power are to be so construed, if the context will fairly permit.” *Clark v. Coburn*, 108 Me. 26, Ann. Cas. 1913 B 167, 78 Atl. 1107.

“Public roads, streets, lands or highways” in an act authorizing telegraph companies to construct their lines along and upon any of such public roads, etc., held required to be read as if written “public roads, public streets, public lands, or public highways,” and to be incapable of being read as if written “public roads, public streets, private lands, or public highways.” *Pennsylvania Tel. Co. v. Hoover*, 209 Pa. 555, 58 Atl. 922. (Quaere as to the effect of the omission of the word “lands” from the provision in section 33, cl. 1, that the lines of telegraph “shall not be so constructed as to incommode the public use of said roads, streets or highways.”)

⁶⁵ *Erie R. Co. v. Steward*, 170 N. Y. 172, 63 N. E. 118.

⁶⁶ *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 6 So. 404; *Wise v. Yazoo City*, 96 Miss. 507, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912 B 377, 51 So. 453.

“Such a construction must necessarily be given as will, if possible, give effect to all its words, and to the chief and manifest purpose for which it was passed.” *Chesapeake & O. R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633.

A statute actually conferring the right of eminent domain will be reasonably—even liberally—construed in order to effectuate its purpose. *Peters-*

constitutionality of statutes obtains,⁶⁷ and the court will not imply a conflict between the constitution and the statute, but, the meaning of the former being clear, will, if possible, so construe the latter as to give it effect.⁶⁸

The fact remains, however, that notwithstanding the right or power to appropriate private property be delegated to a private corporation and the delegating statute be valid under the constitution, such right or power can be exercised by the corporation only to the extent of the authority which the statute confers either in express terms or by clear implication.⁶⁹

As a general rule, a lease of its franchises and property by a corporation, possessing the power to exercise the right of eminent domain, does not deprive it of such power,^{69a} nor, of itself, invest

burg School Dist. Nelson County v. Peterson, 14 N. D. 344, 103 N. W. 756.

A corporation may carry freight only and yet be a "railroad" corporation within the meaning of the eminent domain statute. Vicksburg, A. & S. R. Co. v. Louisiana & A. R. Co., 136 La. 691, 67 So. 553.

⁶⁷ Clendaniel v. Conrad, 26 Del. 549, 83 Atl. 1036.

⁶⁸ In re Rhode Island Suburban Ry. Co., 22 R. I. 455, 48 Atl. 590.

"We recognize the well-established rule that every presumption is in favor of the right of plaintiff in error to exercise the powers distinctly granted in its charter, and that the right will not be abridged unless the legislature has clearly transcended its constitutional authority. In other words, unless the grant of the right of eminent domain is not clearly in violation of the constitutional inhibition, the act will be upheld." Fallsburg Power & Manufacturing Co. v. Alexander, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194.

⁶⁹ Mobile & G. R. Co. v. Alabama Midland Ry. Co., 87 Ala. 501, 6 So. 404; Waterbury v. Platt Bros. & Co., 75 Conn. 387, 60 L. R. A. 211, 96 Am. St. Rep. 229, 53 Atl. 958.

"The delegated power can be ex-

ercised only within the strict terms of the grant." Kinney v. Citizens' Water & Light Co., 173 Ind. 252, 26 L. R. A. (N. S.) 195, 90 N. E. 126. See also Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422.

That a corporation will make an improper use of the rights obtained as a result of condemnation proceedings is no ground for an injunction, at the suit of the property owner, against the exercise by it of its power of eminent domain. Lea v. Louisville & N. R. Co.,—Tenn.—, 188 S. W. 215.

^{69a} The right of eminent domain granted to a railroad company remains in it notwithstanding a lease of its road. Mayor, etc. v. Norwich, etc., R. Co., 109 Mass. 103, 114; In re Metropolitan Elev. R. Co., 2 N. Y. Supp. 278. See also Beckman v. Lincoln & N. W. R. Co., 79 Neb. 89, 112 N. W. 348; Glaser v. Glenwood R. Co., 208 Pa. St. 328, 57 Atl. 713; State v. Superior Court of King County, 31 Wash. 445, 72 Pac. 89.

"By its lease, the lessor company in no respect escapes from or lessens its corporate duty to the state, but is continuing the performance of that

its lessee with the right to exercise such power^{69b} otherwise than in the lessor's name.^{69c}

§ 1500. — Foreign corporations. Whatever power of eminent domain a private corporation may have under the statutes of the state creating it, it cannot as of right exercise such power in a foreign state,⁷⁰ the private property which a state can take for public use,

duty through the agency of its lessee, and may at any time, through the failure of the latter to perform its covenant obligations, or by its absolute loss of corporate life and existence, become repossessed of its line and property, and bound to operate it for itself; and * * * to the proper performance of its duty by itself, or through its lessee, the acquisition of lands or terminal facilities may be necessary and essential." In re New York, L. & W. Ry. Co., 99 N. Y. 12, 1 N. E. 27.

Proceedings to condemn land are not affected by the leasing by the petitioning railroad company of its road and property for a long term of years, especially in view of a statute authorizing condemnation proceedings by either the company to which the power of eminent domain was granted or its lessee. *Kip v. New York, etc., R. Co.*, 67 N. Y. 227, 230.

The owner of land, taken by a railroad company, in the exercise of its right of eminent domain, for its right of way which right of way it afterwards conveyed to another railroad company which was authorized to purchase, cannot maintain ejectment against the grantee company on the ground of an abandonment of the public use when such company is operating its road over the right of way across the land in question. *Crolley v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 541, 16 N. W. 422.

^{69b} *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S. 594, 49 L. Ed. 332.

"A lessee of a corporation cannot exercise the power of eminent domain, conferred by the Legislature on the lessor, without legislative authority for that purpose." *Harrold v. Central of Georgia R. Co.*, 144 Ga. 199, 86 S. E. 552.

Under a provision giving a consolidated corporation the rights, franchises, privileges, and property of the consolidating corporations, or without such a provision, and in the absence of provision to the contrary, it has been held that a consolidated corporation acquired the power of eminent domain enjoyed by one or both of the consolidating corporations. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171, 49 N. W. 1110; *South Carolina R. Co. v. Blake*, 9 Rich. Law (S. Car.) 228.

^{69c} "The question is of the necessity for the public use of what is sought to be taken — whether it be needed for the operation of this railroad. Whether it be leased or not, or by what particular corporation or corporations the road may be actually operated, does not affect the question. As respects this matter, the needs of the lessees are those of the lessor company, and any condemnation for their wants may proceed in such latter company's name, and it all the while stands responsible for the running of the road." *Chicago, etc., R. Co. v. Illinois Central R. Co.*, 113 Ill. 156, 165.

⁷⁰ *Saunders v. Bluefield Waterworks & Improvement Co.*, 58 Fed. 133. See also *Cumberland Telephone & Telegraph Co. v. Yazoo & M. V. R. Co.*, 90

either directly or through an agent, being limited to that found within its own boundaries.⁷¹ No power to take private property in a foreign state under the right of eminent domain exists as a matter of comity.⁷² Manifestly, however, this fact in no way militates against the power of a corporation created by one state to acquire, by act of the legislature of another state, the right to appropriate private property therein, or against the power of such legislature to delegate that right to such corporation. The legislature may, in the absence of constitutional restrictions, select the agents through which it will exercise the right of eminent domain,⁷³ and, there being no such restrictions, may, it is generally held, delegate such right to a foreign corporation.⁷⁴

Miss. 686, 44 So. 166; Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453.

In the absence of fraud, a domestic corporation is not precluded from exercising its power of eminent domain by reason of the fact that it was organized for the purpose of assisting a foreign corporation in carrying out the latter's objects. Postal Tel. Cable Co. of Idaho v. Oregon Short Line R. Co., 104 Fed. 623, 625. See also Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co., 23 Utah 474, 90 Am. St. Rep. 705, 65 Pac. 735.

⁷¹ Holyoke Water-Power Co. v. Connecticut River Co., 20 Fed. 71, 79; Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co., 208 Ill. 419, 422, 70 N. E. 357; McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 14 L. R. A. 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116, 65 Atl. 489.

⁷² Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422; Holbert v. St. Louis, K. & N. R. Co., 45 Iowa 23; Abbott v. New York & N. E. R. Co., 145 Mass. 450, 15 N. E. 91.

"It is axiomatic in the jurisprudence of this country that the comity, agreeable to which a corporation created by one state or nation is

permitted to conduct its business within the territory of another, does not extend so far as to permit the exercise by the foreign corporation of powers that are in contravention of the public policy of the state in which such business is conducted, or that are in derogation of common right. And as the power of eminent domain is of the latter class, it follows that it cannot be exercised by a foreign corporation as a matter of comity, but only by virtue of an express grant of authority from the state in which it is exercised." Southwestern Tel. Co. v. Kansas City, S. & G. R. Co., 108 La. 691, 32 So. 958.

⁷³ See § 1499, *supra*.

⁷⁴ **Alabama.** Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co., 186 Ala. 622, 65 So. 287.

Arkansas. Russell v. St. Louis S. W. R. Co., 71 Ark. 451, 75 S. W. 725.

California. San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson, 164 Cal. 221, 128 Pac. 924.

Georgia. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422.

Illinois. Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co., 208 Ill. 419, 422, 70 N. E. 357,

The important question in determining the legality of a delegation of the right of eminent domain is the one whether the proposed use is a public one⁷⁵ for the benefit of the people of the state in which the right is to be exercised,⁷⁶ and when the intended use is otherwise

Iowa. *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 886.

Massachusetts. *Abbott v. New York & N. E. R. Co.*, 145 Mass. 450, 15 N. E. 91.

Missouri. *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453.

Montana. *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055, 88 Pac. 773.

New York. *In re Townsend*, 39 N. Y. 171, 175.

Ohio. *State v. Sherman*, 22 Ohio St. 411, 434.

Pennsylvania. *New York & E. R. Co. v. Young*, 33 Pa. St. 175.

West Virginia. *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86.

There being "nothing in the constitution of the state which limits the legislature in the exercise of the right of eminent domain" and "no restraint upon its selection of a corporation created by another state as an instrument to carry the appropriation to the public use into effect," the right of eminent domain may be conferred by the legislature on a foreign corporation. *New York, N. H. & H. R. Co. v. Welsh*, 143 N. Y. 411, 42 Am. St. Rep. 734, 38 N. E. 378, aff'g 69 Hun (N. Y.) 615, 23 N. Y. Supp. 195.

"It is not necessary that a railroad corporation shall be the creature of the state in the sense that its stockholders must be residents in order to enable the state to confer upon it the right of eminent domain." *Rogers v. Cosgrave*, 98 Neb. 608, 153 N. W. 569.

Under a statute providing that when cities or towns shall authorize

the construction and operation of waterworks "by individuals or corporations, they may confer, by ordinance, upon such person or corporation, the power to take and appropriate private property for said purpose," a city, contracting with a foreign corporation, may confer on such corporation by ordinance the power to condemn and appropriate the necessary private property. *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 886.

⁷⁵ See § 1502.

⁷⁶ "It seems to be an admitted fact generally, that the power [of eminent domain] inheres in a state for domestic uses only, to be exercised for the benefit of its own people, and cannot be extended merely to promote the public uses of a foreign state, yet this doctrine has never been carried so far as to deprive a state of the capacity of empowering a foreign corporation from taking lands for public uses, to be carried out within its own borders. It is not the instrumentality employed for operating the public use, but the use itself, that satisfies the Constitution. The fact that the use is public and the public may have the privilege of enjoying it, is the controlling principle. * * * This right [of a foreign corporation to condemn land] is not to be denied where public uses are to be subserved in the state granting condemnation, because in connection therewith, public uses in another state may be likewise promoted. While a state will take care to use this power for the benefit of its own people, it will not refuse to exercise it for such purpose, because the inhabitants of a neighboring state may incidentally partake of

of such character, it is none the less so because the corporation which is to operate it is of foreign origin.⁷⁷

Not only may the legislature when not restrained by the constitution authorize such foreign corporations as it chooses to take private property within the state for a public use to be operated in favor of the citizens thereof, but foreign corporations, provided their charters permit them to do, or, at least, do not prohibit them from doing, business outside of the state by which the charters were granted,⁷⁸ may accept a delegation of the right of eminent domain and exercise such right pursuant to such delegation, notwithstanding the fact that they do not possess such right in the state of their creation.⁷⁹

In any event, affirmative authority from the state is necessary in order that a corporation of foreign origin may exercise the right of eminent domain therein.⁸⁰ Such authority, however, need not always be express. Thus it has been held that a statute extending to foreign corporations the same rights, powers and privileges that are conferred

the fruits of its exercise. Such refusal would violate the principles of a just public policy, and the neighborly comity which should exist between states." *Columbus Waterworks Co. v. Long*, 121 Ala. 245, 25 So. 702. See also *Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 Pac. 682; *Grover Irrigation & Land Co. v. Lovella Ditch Reservoir & Irrigation Co.*, 21 Wyo. 204, Ann. Cas. 1915 D 1207, 131 Pac. 43.

⁷⁷ *Abbott v. New York & N. E. R. Co.*, 145 Mass. 450, 15 N. E. 91.

⁷⁸ See *Southwestern Tel. Co. v. Kansas City, S. & G. R. Co.*, 108 La. 691, 32 So. 958, to the point that "if * * * a state, in creating a corporation, imposes territorial restrictions upon it, those restrictions are not affected by the laws of other states, enacted for the benefit of corporations not so restricted."

⁷⁹ *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453. See also *Hagerla v. Mississippi River Power Co.*, 202 Fed. 776, 784.

⁸⁰ *Chestatee Pyrites Co. v. Cavers Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422; *Great Northern R. Co. v. McCord*, 143 Wis. 589, 128 N. W. 432.

Where the act, giving foreign railroad companies the right to purchase domestic lines and, upon purchasing, the right to exercise the power of eminent domain, expressly provides that it "shall not be construed so as to permit any railroad company to purchase any parallel or competing line" in the state, a foreign company, purchasing a domestic line which parallels a competing line operated by it in another state, the two lines being separated only by the navigable river which forms the boundary line between the two states, cannot claim the power of eminent domain under such act. *Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co.*, 208 Ill. 419, 70 N. E. 357, distinguishing *Thomas v. St. Louis, B. & S. R. Co.*, 164 Ill. 634, 46 N. E. 8.

upon domestic corporations, created for the same purpose, on compliance with the provisions of law relating to foreign corporations desiring to do business in the state, and subjecting them to the same regulations, restrictions and liabilities that are imposed upon like domestic corporations, gives to a foreign corporation, in a proper case, the right of eminent domain to be exercised for the public use of the citizens of the state.⁸¹ So again it has been held that where the legislature had the power to confer the general right of eminent domain on a foreign railroad company which was given only a limited right by the special act whereby it was permitted to enter the state, the general right will be deemed to have been conferred by a subsequent general railroad act which granted such right to "all existing railroad corporations within this state," and by the later general act which gave it to "every railroad corporation."⁸²

⁸¹ *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86. See also *Howard v. Illinois Cent. R. Co.*, — Ind. —, 115 N. E. 50; *San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, 93 Tex. 313, 49 L. R. A. 459, 77 Am. St. Rep. 884, 55 S. W. 117; *Gulf, C. & S. F. R. Co. v. Southwestern Telegraph & Telephone Co.*, 25 Tex. Civ. App. 488, 61 S. W. 406.

⁸² *New York, N. H. & H. R. Co. v. Welsh*, 143 N. Y. 411, 42 Am. St. Rep. 734, 38 N. E. 378, aff'g 69 Hun (N. Y.) 615, 23 N. Y. Supp. 195. See also *In re Marks*, 25 N. Y. St. Rep. 502, 6 N. Y. Supp. 105.

"Any corporation" held to include foreign corporations. *Northwestern Elec. Co. v. Zimmerman*, 67 Ore. 150, Ann. Cas. 1915 C 927, 135 Pac. 330. Arguing to this point the court said: "Defendants contend that the right of eminent domain is not extended to foreign corporations in the state of Oregon. Plaintiff relies exclusively upon section 6245, L. O. L., which provides: 'A right of way and privilege to any person, persons, or corporation to construct, maintain, and operate telegraph lines, telephone lines, and lines and wires for the purpose of con-

veying electric power or electricity, along the public roads, highways, and streets of the state,' etc. Provision is thereafter also made for securing rights of way therefor. Plaintiff contends that this statute includes foreign corporations. The act was originally passed in 1862, granting the right to telegraph lines only, and was amended in 1901 to include telephone lines and lines for conveying electricity. The act at least by implication authorized the persons and corporations named to do business in the state and to exercise the right of eminent domain when necessary for that purpose; and the only question is whether it includes foreign corporations. No doubt when first enacted it was intended to include foreign telegraph companies, as the language naming the persons to whom the privilege is extended is general. * * * And it has been acted upon since that time as including them. Our statute (sections 6726, 6727, 6728, L. O. L.) provides when foreign corporations may do business within the state; and it may be considered as an invitation to foreign corporations to come into the state, to enter upon the business for which incorporated, and to that extent, when

When a foreign railroad company consolidates with a domestic one under a statute, compliance with which was intended to give a foreign corporation meeting its requirements a domestic status, such foreign company becomes "a body corporate, pursuant to and in accordance with the laws" of the state within the meaning of the provision of the state constitution that "no railroad corporation organized under the laws of another state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have the power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws in this state."⁸³

the conditions are complied with, the corporations, by implication, are extended all the powers and privileges necessary to carry out such business. Such a compliance with the statute has now become a prerequisite to foreign corporations entering the state under section 6245, *supra*. * * * We are of the opinion that the privileges granted by section 6245, *supra*, extend to foreign corporations."

"Any corporation" held not to include foreign corporations. *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174, 46 S. E. 422. Said the court: "Our Code declares that 'any * * * corporation who may be actually engaged in the business of mining' certain metals or minerals shall have the right to condemn private property. This language seems very broad—broad enough to include both domestic and foreign corporations doing business of the designated kind in any state or country; but * * * statutes conferring the right of eminent domain must be construed strictly, and courts will never assume, in the absence of affirmative legislation, that it was intended to grant such powers over which the legislature had no control. Since the adoption of the Code of 1863, the legislature has reserved to itself the right to change or modify the charters of corporations of its

creation, and to control the conduct of such corporations. It has no such powers with regard to a foreign corporation. In an act governing procedure, or of a remedial nature, such words as are used in these Code sections would probably be held to embrace all corporations, foreign and domestic, for such an act would receive a liberal construction. But acts granting powers in derogation of common right must always be construed strictly, and these words held not to include foreign corporations."

But, on the other hand, a statute authorizing "any person" to exercise the right of eminent domain, etc., was held to include foreign corporations generally without regard to another statute expressly conferring such right on foreign railroad corporations. *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 164 Cal. 221, 128 Pac. 924.

⁸³ *State v. Chicago, B. & Q. R. Co.*, 25 Neb. 156, 2 L. R. A. 564, 41 N. W. 125. In *Rogers v. Cosgrave*, 98 Neb. 608, 153 N. W. 569, which also involved the right of the defendant in *State v. Chicago, B. & Q. R. Co.*, *supra*, to exercise the power of eminent domain in Nebraska, the court, after quoting from such case and stating that "another case [*State v. Missouri Pac. Ry. Co.* 25 Neb. 164, 41 N. W. 127] was also then decided [by mem-

Again, it has been held that a domestic railroad company may exercise the right of eminent domain for the benefit of a foreign corporation to which, under statutory authority, it has leased or is about to lease its road, notwithstanding the exercise of such right is denied or not extended to foreign corporations.⁸⁴ On this point, however,

orandum] holding the same view," said: "The plaintiff argues that as the statute authorizing such consolidation and conferring the right of eminent domain upon filing the articles of consolidation with the secretary of state was enacted after the consolidation in question took place, such consolidation was not a compliance with the statute. But we cannot presume that this court was ignorant of the time the statute was enacted, and that the court would have decided that the fact that the defendant company had done all of those things required by the act would not entitle it to the benefits of the act, because they had already been done when the statute was enacted, especially as this court reached the same conclusion about 10 years after the statute was enacted, and quoted *State v. Chicago, B. & Q. R. Co.*, supra, as authority for that holding without criticizing and without suggesting that the fact that the statute was enacted after the consolidation was worthy of consideration. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171, 49 N. W. 1110. The writer of the opinion in the former case expressed the idea that becoming a domestic corporation under our statute would constitute the defendant a citizen of this state, so that it could not remove litigation to the federal courts on the ground of diverse citizenship, but this was not necessary to a determination of the case, and in the latter case the court expressly reserved any opinion on that question. Afterwards the question was decided by the Supreme Court of the United States in *St. Louis & S. F. R. Co. v. James*, 161 U.

S. 545, 40 L. Ed. 802 [Chap. 13, supra, q. v.]. * * * Under the federal statute the stockholders of a corporation are conclusively presumed to be residents of the state from which the corporate existence is derived, and the corporation is a citizen of that state for the purpose of construing the law giving jurisdiction to the federal courts on the ground of diverse citizenship. But under the state statute allowing a railroad corporation of another state having connected lines in this state to improve its lines and exercise the right of eminent domain in this state the residence of its stockholders and the origin of its charter are alike immaterial. Under our statute and the early decisions this defendant has exercised the right of eminent domain for many years, and the question must be regarded as settled." See also *State v. Chicago, St. P., M. & O. R. Co.*, 25 Neb. 165, 41 N. W. 128 (memorandum decision) as being another case decided on the authority of *State v. Chicago, B. & Q. R. Co.*, supra.

A corporation formed by the consolidation of a domestic corporation and a foreign one will be deemed a domestic corporation as far as its being entitled to exercise the right of eminent domain is concerned (*Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271, 273), notwithstanding it has its general offices in the state by which the component foreign corporation was created. *St. Paul & N. P. Ry. Co. v. Minnesota, C. & W. Ry. Co.*, 36 Minn. 85, 30 N. W. 432.

⁸⁴ *Lower v. Chicago, B. & Q. R. Co.*, 59 Iowa 563, 13 N. W. 718; *In re New*

the courts differ, the contrary view having been adopted by the Supreme Court of Nebraska, the Constitution of which state expressly prohibits the exercise of the right of eminent domain by a foreign railroad company, doing business in the state, until it shall have become a corporation under the laws of the state.⁸⁵

§ 1501. Exercise of right or power by de facto corporation. On the question of whether a corporation must have a de jure existence before it can exercise the right or power of eminent domain which has been delegated to it and whether the lack of such existence can be availed of by the property owner to defeat condemnation proceedings, the courts are divided. One line of cases applies the rule that corporate existence is not subject to collateral attack, and answers the question in the negative. The other line would make the matter not a collateral attack on corporate existence in the strict sense of the words but merely a matter of the strict construction of the delegating statute, and answers the question in the affirmative. This subject, however, is thoroughly treated in another chapter of this work⁸⁶ wherein an exhaustive citation of the authorities holding to each view will be found, and hence it will not be gone into further at this point.

§ 1502. Public use—Necessity. Except, perhaps, under the constitutions of some of the western states which provide in substance that private property shall not be taken for private use except for purposes of irrigation, etc.,⁸⁷ the acid test of the right to take private

York, L. & W. R. Co., 35 Hun (N. Y.) 220, aff'd 99 N. Y. 12, 1 N. E. 27.

⁸⁵ Koenig v. Chicago, B. & Q. R. Co., 27 Neb. 699, 43 N. W. 423; State v. Scott, 22 Neb. 628, 36 N. W. 121.

⁸⁶ See Chap. 10, § 310, supra.

⁸⁷ "Constitutions that provide that private property shall not be taken for public use (except upon just compensation) have been uniformly construed, so far as we know, to prohibit by negation the taking of private property for private use. Under such Constitutions private property can be taken for public use only. 'Public use,' instead of having a common definition, because of local conditions, has acquired at least two meanings;

one is user or right of use by the general public without the consent of the owner, and the other is public welfare, or public benefit or advantage. These definitions have been adopted in the different jurisdictions as the local conditions and necessities demanded, and very properly so. For to give the words their popular meaning in the arid West would often mean the prevention of the reclaiming of desert areas there found or the development of other of its paramount resources, such as mining, lumbering, or stock raising. The strained or unnatural construction given the words in some jurisdictions have been imperative to the development and pros-

property under the right or power of eminent domain is, always and invariably, whether the property is proposed to be put to a public

perity of the country. In other words, the exigencies of the cases were such as to require the courts to declare what was in fact a private use to be a public use; otherwise the right of eminent domain was denied, private enterprises paralyzed, and natural resources left dormant. Such a strained construction disregards the plain intent of the Constitution that forbids by implication the taking of private property for private use; but no such necessity exists under our Constitution, for that instrument, in section 17, art. 2, provides that: 'Private property shall not be taken for private use except for private ways of necessity, and for drains, flumes or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation. * * *' This definition of the right of eminent domain found in our Constitution, if approved and followed, authorizes the lawmaking body to enact legislation providing for the condemnation of private property for private use, to wit, 'private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, * * * purposes.' Without such constitutional sanction or authority, Nevada in *Dayton Mining Co. v. Seawall*, 11 Nev. 394, Utah in *Nash v. Clark*, 27 Utah 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953, 1 Ann. Cas. 300, and *Highland Boy Gold Min. Co. v. Strickley*, 28 Utah 215, 78 Pac. 296, 1 L. R. A. (N. S.) 976, 107 Am. St. Rep. 711, 3 Ann. Cas. 1110, and the Supreme Court of the United States in *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171, and *Strickley v. Highland Boy*

Gold Min. Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174, have decided that private property may be taken for private use in connection with irrigation and mining. It is true that such courts have indulged the fiction that a private use is a public use, simply because it was for the general welfare or of public utility or benefit, but this conceit, however pardonable, does not change the use from private to public. The fact is that the above cases hold that private property may be taken for private uses in the particular instances passed upon, and our Constitution in providing in certain cases that private property may be taken for private uses is in line with those decisions. * * * The Washington and Wyoming and Arizona Constitutions, so far as the present question is concerned, are so alike that any construction of the eminent domain provisions of their Constitutions by the former two states should be very persuasive to this court. The Wyoming court, in *Grover Irrigation & Land Co. v. Lovella Ditch Reservoir & Irrigation Co.*, 21 Wyo. 204, 131 Pac. 43, decided in April, 1913, * * * said: 'We are not required in this case to discriminate between a public use and a private use with reference to the taking of property under the power of eminent domain, for, whether our Constitution is to be understood as authorizing such taking for a use distinctly private, as distinguished from a public use, when the purpose thereof is irrigation, or as declaring that any taking for irrigation purposes is for a public use, it clearly authorizes a taking for such purpose. It is provided in the Constitution as follows: "Private property shall not be taken for private use unless by

use.⁸⁸ That private property cannot be condemned for private use is, at least in the absence of a constitutional provision to the contrary, the universally accepted rule in this country.⁸⁹ "It is true there is

consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation." Article 1, § 32. "Private property shall not be taken or damaged for public or private use without just compensation." Article 1, § 33. It was said in Washington, referring to a provision like that contained in section 32: "Here is an inference so strong as to amount almost to an affirmative declaration that private property may be taken for private use when the use is confined to the purposes enumerated in the provision, one of which is ditches on or across the land of others for agricultural purposes; and it is no strained construction of the provision to say that this includes ditches for irrigation purposes, in view of the vast extent of arid land within our state and the benefits of irrigation thereto in the increase of its productiveness and value. The very thought of agriculture in connection with this vast arid portion of our state suggests irrigation in connection therewith." *State v. Superior Court for Spokane County*, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893. * * * A private use for any of the purposes mentioned in section 32 is given the same force and effect as a public use, and no greater.' The eminent domain provisions of the Colorado Constitution and ours are very much the same. In *Lamborn v. Bell*, 18 Colo. 346, 20 L. R. A. 241, 32 Pac. 989, that court said: 'It is apparent from the foregoing provisions that our Constitution is, in certain particulars touching the right

to take private property for private use, exceptional; and, for certain enumerated uses, changes the accepted rule that the use to which private property may be condemned must be public. The right of eminent domain is an exercise of sovereign power, and is generally conferred by legislative act; yet a constitutional provision that, in express terms, affirmatively confers the right for particular uses, is likewise an expression of the sovereign will, and grants the right as effectually as if expressed in an act of the Legislature, and can be enforced when such grant is supplemented by an act of the Legislature providing the means for its exercise.' In other words, it is not the public or private character of the use to which the property is to be devoted that authorizes its taking, but rather the public policy as announced in the Constitution, or, in the absence of constitutional limitation, as announced by the legislative body." *Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 144 Pac. 277.

⁸⁸ In the absence of a statutory remedy, a court of equity may restrain a corporation from taking private property for a private use. *Mountain Park Terminal R. Co. v. Field*, 76 Ark. 239, 88 S. W. 897.

⁸⁹ *Arkansas. Ozark Coal Co. v. Pennsylvania Anthracite R. Co.*, 97 Ark. 495, Ann. Cas. 1912 D 1000, 134 S. W. 634.

Indiana. Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765.

Minnesota. State v. District Court of Fourth Judicial Dist., 133 Minn. 221, 158 N. W. 240.

neither in our Constitution nor in the Constitution [s] of the other states any express provision forbidding that private property should be taken for the private use of another, or any constitutional provision forbidding the legislature to pass laws, whereby the private property of one citizen may be taken and transferred to another for his private use, without the consent of the owner. It was doubtless regarded as unnecessary to insert such a provision in the Constitution or Bill of Rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another, without his consent, was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive nor judicial department can possess unlimited

Nebraska. *Vetter v. Broadhurst*, 160 N. W. 109.

New York. *Pocantico Water-Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246.

North Carolina. *Cobb v. Atlantic Coast Line R. Co.*, — N. C. —, 89 S. E. 807.

Ohio. *Cincinnati v. Louisville & N. R. Co.*, 88 Ohio St. 283, 102 N. E. 951.

Pennsylvania. *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 21 L. R. A. (N. S.) 410, 69 Atl. 870.

Rhode Island. *In re Rhode Island Suburban Ry. Co.*, 22 R. I. 455, 48 Atl. 590.

Tennessee. *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913 E 153, 148 S. W. 662.

West Virginia. *Varner v. Martin*, 21 W. Va. 534, 548.

"The right of eminent domain does not * * * imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer." *Beekman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.) 45, 73, 22 Am. Dec. 679.

"The right of eminent domain is conferred primarily for the public welfare, to be exercised and used for that

purpose, and under governmental control." *Johnson City Southern R. Co. v. South & W. R. Co.*, 148 N. C. 59, 61 S. E. 683.

"As the power of eminent domain is an inherent sovereign right, the words 'public use' in this connection are equivalent to governmental use, and * * * as the state itself cannot take private property except for a governmental use, so it cannot delegate to a private person or corporation the power of eminent domain except for a use which might properly be administered by the state itself, or by some political subdivision thereof." *Connecticut College for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 634.

"In appropriating the property of a citizen or a class of citizens for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use." *People v. Smith*, 21 N. Y. 595, 598.

power. Such a power as that of taking the private property of one and transferring [it] to another for his own use, is not in its nature legislative, and it is only legislative power, which by the Constitution is conferred on the legislature. Such an act if passed by the legislature would not in its nature be a law, but would really be an act of robbery; the exercise of an arbitrary power not conferred on the legislature. * * * There is an entire concurrence of all the authorities in the proposition, that private property cannot be taken for private use, either with or without compensation.”⁹⁰

⁹⁰ Varner v. Martin, 21 W. Va. 534, 548, 549. See also Boyd v. C. L. Ritter Lumber Co., 119 Va. 348, L. R. A. 1917 A 94, 89 S. E. 273; Fallsburg Power & Manufacturing Co. v. Alexander, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194.

“A taking of private property for private use is opposed to the elemental conception of individual ownership, and forbidden by the organic law of the state and the United States.” Harrold Bros. v. Americus, 142 Ga. 686, 83 S. E. 534.

“There is no prohibition in the Constitution of this state, or in any of the state constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The Constitution vests in the senate and general assembly the legislative, or law making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another, is not making a law or rule of action; it is not legislation, it is simply robbery. This power was not necessary or useful to be given to the legislature for any of the purposes for which the government was instituted; and it was not given. It is the principle of all free governments, that no right of the citizen should be surrendered to the

sovereign, that is not necessary for the purposes of government. This maxim pervades all republican governments as well as monarchies; for the tyranny of a majority, or of corrupt representatives, is just as oppressive, and far more odious, than that of a monarch. This is the aim of all our constitutional restrictions. The first declaration in the Bill of Rights, that forms the first article of our state Constitution, affirms, that one of the unalienable rights of every man is that of acquiring, possessing, and protecting property; and the last declaration therein says that such enumeration of rights shall not be construed to deny others retained by the people. This shows that the right of private property was made sacred by the Constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given by that instrument. Again, the sixteenth declaration of the Bill of Rights, which declares that private property shall not be taken for public use without just compensation; and the ninth provision of the seventh section of the fourth article of the Constitution, the article defining and restricting legislative power, which declares that individuals and private corporations shall not be authorized to take private property for public use without compensation first made to the owners; both show, by inevitable implication, that it was

But should it be contended that this argument is insufficient as a basis for the rule, it has also been said that the common constitutional provision that private property shall not be taken for public use without just compensation is an implied denial of the right to take private property for private use even though compensation be made.⁹¹ Under this rule, the character of the agency exercising the right or power is, generally speaking, immaterial, and the use to which the property is to be put is everything.⁹²

not intended to confer on the legislature the power of taking private property for private use at all. And on this point the authorities and decisions, of which there are not a few, are uniform, without an exception." *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 63, aff'd 18 N. J. Eq. 518, 90 Am. Dec. 634. See also *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585, 64 N. W. 343; *Welton v. Dickson*, 38 Neb. 767, 22 L. R. A. 496, 41 Am. St. Rep. 771, 57 N. W. 559.

"It has been uniformly held by the courts in our own state as well as in other jurisdictions that under the right of eminent domain private property can only be taken for a public use, and that it is not within the power of the legislature to invest either an individual or a corporation with the right to take the property of a private owner for the private use of some other individual or corporation, even if a method is provided for ascertaining the damages and paying what shall be deemed just compensation. The underlying principle is that the owner of property has the right to the uninterrupted use and enjoyment of it against all the world, subject, however, to the sovereign right of the state to take so much of it as may be necessary to serve the various public uses to which it may be properly subjected." *Philadelphia Clay Co. v.*

York Clay Co., 241 Pa. 305, 88 Atl. 487.

⁹¹ *United States. Cole v. La Grange*, 113 U. S. 1, 28 L. Ed. 896.

Connecticut. Connecticut College for Women v. Calvert, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633.

Maine. Brown v. Gerald, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

Nebraska. Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co., 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585, 64 N. W. 343.

New York. Buffalo & N. Y. C. R. Co. v. Brainard, 9 N. Y. 100, 108.

Tennessee. Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

Virginia. Boyd v. C. L. Ritter Lumber Co., 119 Va. 348, L. R. A. 1917 A 94, 89 S. E. 273.

West Virginia. Varner v. Martin, 21 W. Va. 534, 549.

⁹² "The question of public use * * * is not affected by the agency employed [to exercise the right of eminent domain], for it may be vested in private persons who may be actuated solely by motives of private gain, if the use to be made thereof is for the benefit of the public." *Pocantico Water-Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246.

"It is the purpose for which the land is taken, and not the particular corporation which the state authorizes to take it, that determines whether

Thus it has been said that "it is the character of the use for which the property is taken, and not the means or agencies by which it is taken, which determines the question whether it is legally taken under the legitimate exercise of the right of eminent domain."⁹³

And again: "The question is not whether the corporation sought to be endowed with the right of eminent domain is public or private, but whether the property sought to be condemned is to be used for a public purpose. If it is to be so used, the right of condemnation can be bestowed upon any private corporation; but, if not to be so used, it cannot be conferred either upon a private or public corporation."⁹⁴

§ 1503. — What constitutes. While the general rule is that the necessity, expediency or propriety of permitting the taking of private property for a particular public use is a legislative question, the determination of which is not open to review by the courts,⁹⁵ and

the use is public or not." *Crolley v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 541, 16 N. W. 422.

⁹³ *Fallsburg Power & Manufacturing Co. v. Alexander*, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; *Varner v. Martin*, 21 W. Va. 534, 544.

⁹⁴ *Great Falls Power Co. v. Webb*, 123 Tenn. 584, 133 S. W. 1105; *Alfred Phosphate Co. v. Duck River Phosphate Co.*, 120 Tenn. 260, 22 L. R. A. (N. S.) 701, 113 S. W. 410.

"In considering the right to [exercise the power of] eminent domain, the charter statute, or whether the corporation was organized as a private, or quasi public corporation, is not important. The prime and exclusive test may be said to be: Is the purpose, or proposed use, a public one? If the use is calculated to promote the public welfare, the law will not stop to inquire whether the applicant is organized under this or that statute authorizing such organization. * * * It is the business, and not the statute, of organization, that determines the right of eminent domain." *F. W.*

Cook Inv. Co. v. Evansville Terminal Ry., 175 Ind. 3, 93 N. E. 279.

⁹⁵ *Connecticut. Waterbury v. Platt Bros. & Co.*, 78 Conn. 435, 56 Atl. 856. *Illinois. South Park Com'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 21 Ann. Cas. 127, 93 N. E. 910.

Indiana. Great Western Natural Gas & Oil Co. v. Hawkins, 30 Ind. App. 557, 66 N. E. 765.

Maine. Rumford & Mexico Bridge Dist. v. Mexico Bridge Co., 98 Atl. 625.

Massachusetts. Boston v. Talbot, 206 Mass. 82, 91 N. E. 1014.

Minnesota. Webb v. Lucas, 125 Minn. 403, 147 N. W. 273.

Nebraska. Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co., 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585, 64 N. W. 343.

New York. In re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429.

North Carolina. Jeffress v. Town of Greenville, 154 N. C. 490, 70 S. E. 919.

Oregon. Apex Transp. Co. v. Gar-

the use for which the legislature authorizes the exercise of the right or power of eminent domain will be regarded as *prima facie* a public one,⁹⁶ the final determination of the public nature of such use, even in the absence of a constitutional or statutory declaration⁹⁷ to such

bade, 32 Ore. 582, 62 L. R. A. 513, 52 Pac. 573.

Tennessee. Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

West Virginia. Pittsburg Hydro-Electric Co. v. Liston, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86.

"This doctrine covers the principle that the legislature may determine what kind of an estate it is necessary to take to accomplish the public purpose for which the taking is made." Boston v. Talbot, 206 Mass. 82, 91 N. E. 1014.

"When once the court has determined, that the use for which property is condemned is a public use, its judicial function is gone, and the legislative discretion is unrestrained. Whether the proposed plan will accomplish the end proposed, or to what extent it will be beneficial to the public, are not matters to be determined by the courts; these are matters belonging to the legislative discretion, and the courts are called upon to sustain and do sustain statutes, which may be palpably improvident and hasty." Varner v. Martin, 21 W. Va. 534, 552.

⁹⁶Sexauer v. Star Milling Co., 173 Ind. 342, 347, 26 L. R. A. (N. S.) 609, 90 N. E. 474; Albright v. Sussex County Lake & Park Commission, 71 N. J. L. 303, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48, 57 Atl. 398; Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 Atl. 487; Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

When the legislature has declared a certain use to be a public one, the

courts will so hold it unless it manifestly appears that it is not such. Welton v. Dickson, 38 Neb. 767, 22 L. R. A. 496, 41 Am. St. Rep. 771, 57 N. W. 559.

"If in a particular class of cases it be doubtful, whether the use, for which the legislature has authorized land to be condemned, is a public use or is only [a] private use, the leaning of the courts will be rather in favor of its being a public use, as otherwise they must hold such act unconstitutional and void, and this they will not do * * * unless the court is of opinion, that the act is clearly unconstitutional." Varner v. Martin, 21 W. Va. 534, 551.

"It has been said that if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court * * * which, however, is but the application of a fundamental principle of our system, viz. the independence of each department of the government within its own domain." Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co., 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585, 64 N. W. 343.

⁹⁷A constitutional provision that "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public," does not mean that in judicially determining the question of public use the court is to lose sight of

effect, is generally regarded as a judicial function,⁹⁸ provided, of

constitutional definitions of what constitutes such a use; and the court in determining the question will do so with reference to such provisions. *State v. Superior Court for Spokane County*, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429.

98 United States. *Hairston v. Danville & W. R. Co.*, 208 U. S. 598, 52 L. Ed. 637, 13 Ann. Cas. 1008.

Arkansas. *Ozark Coal Co. v. Pennsylvania Anthracite R. Co.*, 97 Ark. 495, Ann. Cas. 1912 D 1000, 134 S. W. 634.

Connecticut. *Board Water Com'rs City of Hartford v. Manchester*, 89 Conn. 671, 96 Atl. 182.

Georgia. *Nolan v. Central Georgia Power Co.*, 134 Ga. 201, 208, 67 S. E. 656.

Illinois. *South Park Com'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 21 Ann. Cas. 127, 93 N. E. 910.

Indiana. *Gary v. Much* (Ind. App.), 94 N. E. 583.

Kentucky. *Fitzpatrick v. Warden*, 157 Ky. 95, 162 S. W. 550.

Maine. *Rumford & Mexico Bridge Dist. v. Mexico Bridge Co.*, 98 Atl. 625.

Maryland. *Van Witson v. Gutman*, 79 Md. 405, 24 L. R. A. 403, 29 Atl. 608.

Massachusetts. *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014.

Minnesota. *Webb v. Lucas*, 125 Minn. 403, 147 N. W. 273.

Nebraska. *Welton v. Dickson*, 38 Neb. 767, 22 L. R. A. 496, 41 Am. St. Rep. 771, 57 N. W. 559.

New Jersey. *Albright v. Sussex County Lake & Park Commission*, 71 N. J. L. 303, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48, 57 Atl. 398.

New York. *In re Burns*, 155 N. Y. 23, 49 N. E. 246.

North Carolina. *Cobb v. Atlantic Coast Line R. Co.*, 89 S. E. 807.

Oregon. *Apex Transp. Co. v. Garbade*, 32 Ore. 582, 62 L. R. A. 513, 52 Pac. 573.

Pennsylvania. *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487.

Rhode Island. *In re Rhode Island Suburban Ry. Co.*, 22 R. I. 455, 48 Atl. 590.

South Dakota. *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. D. 63, 144 N. W. 724.

Tennessee. *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913 E 153, 148 S. W. 662.

Texas. *Borden v. Trespalacios Rice & Irrigation Co.*, 98 Tex. 494, 107 Am. St. Rep. 640, 86 S. W. 11.

Virginia. *Boyd v. C. L. Ritter Lumber Co.*, 119 Va. 348, L. R. A. 1917 A 94, 89 S. E. 273.

West Virginia. *Gauley & S. R. Co. v. Vencill*, 73 W. Va. 650, 80 S. E. 1103.

Wisconsin. *State v. Bancroft*, 148 Wis. 124, 38 L. R. A. (N. S.) 526, 134 N. W. 330.

A private use cannot be made a public one by legislative declaration. *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765; *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; *In re Rhode Island Suburban Ry. Co.*, 22 R. I. 455, 48 Atl. 590; *Alfred Phosphate Co. v. Duck River Phosphate Co.*, 120 Tenn. 260, 22 L. R. A. (N. S.) 701, 113 S. W. 410; *Boyd v. C. L. Ritter Lumber Co.*, 119 Va. 348, L. R. A. 1917 A 94, 89 S. E. 273.

"The legislature by its general act declares in the first place what is a 'public use,' for which private property may be condemned; but in the very nature of the case this determination of the legislature in the first instance cannot be conclusive on the

course, the constitution has not, after the manner of the constitutions

courts. If it were, the provision of our Bill of Rights, that private property shall not be taken for public uses, except on the payment of just compensation, implying as it does, that private property shall not be taken except for public use, would be of little practical value. It was intended as a protection to the citizen against the abuse of power by the different departments of the government. This constitutional provision was more expressly intended to control the legislative department of the government. How can this control be exerted or made available, if the legislature is the sole judge of the extent of its power in authorizing this exercise of the right of eminent domain? Would not the so holding render the legislature omnipotent in this respect, when the Constitution shows it was deemed a dangerous power, which needed to be restrained to prevent injustice to the individual citizen? Both reason and authority lead us to the conclusion, that the existence or non-existence of a public use in any given class of cases in which the legislature has authorized private property to be condemned must be determined by the courts." *Varner v. Martin*, 21 W. Va. 534, 550.

"It has been contended that the legislature, as they are the judges of the expediency of exercising the right of eminent domain for public purposes, are also the sole judges of what are public purposes, and that, as they have declared in the preamble of this act, that this will be a public work, the courts cannot review and consider it. If this were so, the restrictions of the Constitution would be of little avail; the legislature, who determined to exceed their power to gratify some favorite, only need to recite that it would be a great public benefit to

have L's hotel transferred to S, and they could make the grant. * * * But the clear and decided weight of authority is with Chancellor Kent [2 Kent's Com. *340], that the mere grant, or recital that it is for a public purpose, by the legislature, will not take from the courts the power of inquiring whether the object is a public use." *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 67, aff'd 18 N. J. Eq. 518, 90 Am. Dec. 634, holding that the statements of Chancellor Walworth, in *Beekman v. Saratoga & S. R. Co.*, 3 Paige (N. Y.) 45, 73, 22 Am. Dec. 679, and in *Varick v. Smith*, 5 Paige (N. Y.) 137, 160, 28 Am. Dec. 417, do not, when properly construed, support the contention made. And see, as committing the Court of Appeals of New York to the generally accepted view of the matter, *In re Townsend*, 39 N. Y. 171, 174, in which such court said: "It has, indeed, been said, that the right of eminent domain implies the right in the sovereign power to determine the time and occasion and as to what particular property it shall be exercised. (*Heyward v. The Mayor*, 7 N. Y. 325.) This can hardly be supposed to import, that the legislature can, by its mere declaration, override the Constitution; that, by declaring the use to be public, when it is within the Constitution a private use, it can authorize the property of one citizen to be taken from him and given to another, for a compensation to be ascertained * * * but only that, where the use for which the property is desired is in its nature public, the legislature are the supreme and final judges of the question whether the public necessity or benefit is such as to call for the exercise of the power; whether the time is a fitting one; what particular property may be taken, and in what manner in respect to the in-

of some of the western states in declaring certain uses to be public, expressly designated it as such.⁹⁹

strumentalities to be employed for the purpose,—whether state officers, individuals or corporations. All these are purely matters of discretion, within the exclusive cognizance and jurisdiction of the legislature, and in those matters I apprehend no court can review its action.”

“The legislature are restricted by the requirement that the use shall be public and lawful, and the power cannot be abused to the injury of well-recognized private rights. The legislature cannot authorize the taking of the property of the citizen for illegal uses, and the courts are not without power to determine that question. A use might be public, in the broadest sense, as being open to all alike upon the same terms and conditions, and the right of the public to use and enjoy the property taken from the citizen be an absolute right and not a mere favor, and yet the use be against public policy because destructive of the health, morals and welfare of society, or subversive of natural or constitutional right. The courts have a right to determine such questions, and may decide whether the use to which it is sought to appropriate the property is a public use; whether such use or purpose would justify the exercise of the compulsory taking of private property under the statute and Constitution; and, where the power is attempted to be exercised by a corporation, whether the power has been delegated to the corporation by the legislature, and whether the uses and purposes for which the power is sought to be exercised fall within the legislative grant of powers.” *South Park Com’rs v. Montgomery Ward & Co.*, 248 Ill. 299, 21 Ann. Cas. 127, 93 N. E. 910.

“It is for the legislature to say

whether any given use is governmental in its nature or not, subject to review by the courts only in exceptional cases of extreme wrong. * * * But the question whether in any given instance the use is or will be administered as a public or as a private use is a question which must of necessity be determined by the courts in accordance with the facts of the particular case in hand.” *Connecticut College for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633.

In *Oneonta Light & Power Co. v. Schwarzenbach*, 164 N. Y. App. Div. 548, 150 N. Y. Supp. 76, the court makes the statement that “when the legislature has determined the necessity for the exercise of the right of eminent domain to acquire use * * * the validity of the act is not open to question on the ground that the use is not public,” and cites *In re Burns*, 155 N. Y. 23, 49 N. E. 246, as authority therefor, thereby charging the court in *In re Burns* with announcing a rule of law—namely, that a legislative declaration of necessity is per se conclusive on the question of the public nature of the use, which is not sanctioned by the authorities generally. Reference to the cited case, however, reveals the fact that what the court therein intended to say was merely that the validity of the act involved, which granted the power of eminent domain for a particular purpose, was not open to question on the ground that the use was not public, and no question of the necessity could be raised since the matter was one for the determination of the legislature and since it had actually been determined in the affirmative.

⁹⁹ Whether the court, in *State v. White River Power Co.*, 39 Wash. 648,

That the courts have diligently applied themselves to their task of determining what constitutes a public use, there cannot be the slightest doubt, but notwithstanding this fact, they have been unsuccessful so far as reducing the matter to a universally recognized formula is concerned. In the words of the Supreme Court of the United States: "When we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion."¹ It has been said that the term "public use" is not subject to exact definition;² again, that it is more easily defined by negation than otherwise,³ and still again, that courts have avoided defining it lest the definition formulated "prove an embarrassment in subsequent cases, and work mischief in practical application."⁴

Some of the courts have declared the term to be a flexible one,⁵ the

2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987, 82 Pac. 150, by its use of the word "constitutional," made too broad its statement that "a state is powerless, by statute or by constitutional provision, to declare a use public which is essentially and inherently private," *quaere*.

¹ *Hairston v. Danville & W. R. Co.*, 208 U. S. 598, 52 L. Ed. 637, 13 Ann. Cas. 1008.

² *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

³ *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429.

"The term 'public use' when applied to the law of eminent domain is not easily defined. It has often been said that it is more easily defined by negation than otherwise. In determining the question of public use, courts have always been influenced to a greater or less extent by legislative declarations, and by local customs and conditions and local necessities." *State v. White River Power Co.*, 39 Wash. 648, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987, 82 Pac. 150.

⁴ *Ryan v. Louisville & N. Terminal*

Co., 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

⁵ *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; *Stewart v. Great Northern R. Co.*, 65 Minn. 515, 33 L. R. A. 427, 68 N. W. 208; *Great Falls Power Co. v. Webb*, 123 Tenn. 584, 133 S. W. 1105.

"The question of what constitutes a public use should not be dealt with in a critical or illiberal spirit, or made to depend upon a close construction adverse to the public." *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429.

"The term 'public use' * * * cannot be limited to the public use known at the time of the forming of the Constitution." *Stewart v. Great Northern R. Co.*, 65 Minn. 515, 33 L. R. A. 427, 68 N. W. 208.

The term "public use" has a meaning in the law of eminent domain different from that which it has in the law of taxation. *Styles v. Newport*, 76 Vt. 154, 56 Atl. 662. See also *Rutland Railway, Light & Power Co. v. Clarendon Power Co.*, 86 Vt. 45, 44 L. R. A. (N. S.) 1204, 83 Atl. 332.

meaning of which varies and expands with the development of new public utilities⁶ and the accompanying change in the needs of society.⁷ As has been said: "The ever-varying condition of society is constantly presenting new objects of public importance and utility; and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being. The great principle remains. There must be a public use or benefit; that is indisputable: but what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule."⁸

As generally regarded, at least by the courts of those states the constitutions of which contain the common provision relative to the right or power of eminent domain, the term is not synonymous with "public benefit," though authority to the contrary is to be found.⁹

⁶ *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

⁷ *Ryan v. Louisville & N. Terminal Co.*, 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

⁸ *Scudder v. Trenton Delaware Falls Co.*, 1 Saxt. (N. J. Eq.) 694, 23 Am. Dec. 756. See also *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585, 64 N. W. 343; *Fallsburg Power & Manufacturing Co. v. Alexander*, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194.

"It is obvious * * * that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which character of the use is questioned." *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369. See also *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

⁹ *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

"It must be conceded, however, that there are quite a number of decisions to the effect that the phrase

'public use' should be construed to be synonymous with 'public benefit,' and that, when it is determined that the use is of great benefit to the public at large, condemnation of private interests should be guaranteed, even though the use is not by the state, or through any of its agencies. One of the most prominent and direct decisions thus holding is *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394. There the broad doctrine was announced that any appropriation of private property under the right of eminent domain, for any purpose of great public benefit, interest, or advantage to the community, is a taking for public use; the application in that case being to condemn a strip of land in order to transport the wood, lumber, timbers, and other materials to enable it to conduct and carry on its business of mining. The law granting this privilege was sustained on the ground that mining was one of the leading industries of the state, and the principles above announced were applied. This is, in substance, the contention of the appellant in this case. It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon

In like manner the courts have taken the view that the term "public

private rights, which the Constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. Under such a rule, an act might be construed to be legal one year, because a certain business was found to be profitable to the community at large, and the next year held void because it appeared that the business was not a paying one. The Constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform, and to constitute a check on the more mutable sentiment and actions of members of different legislatures. And it seems to us that the result of such a construction would be a virtual removal of any constitutional inhibition on legislative power in this respect, leaving the legislative will as free and untrammelled as in those states where the legislatures are permitted to act in consonance with the inherent power of sovereignty, and no constitutional enactments have intervened. It was, no doubt, for the purpose of preventing enthusiastic legislation, practically destroying this limitation, that the question of public use was especially submitted to the courts, who are and should be ever watchful in maintaining inviolate the constitutional rights of the citizen. It cannot be that, within the meaning of the Constitution, the distinction between public policy and public use is to be obliterated. It might be of unquestionable public policy, and for the best interests of the state, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade,

increase property values, and thereby increase the revenues of the state, even if the enterprise were purely private, for such is the relation, under our form of government, between public and private prosperity, that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the Constitution, and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy. It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction, the brewer could successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the cultivation of hops. Condemnation would be in order for gristmills and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. Tanneries, woolen factories, oil refineries, distilleries, packing houses, and machine shops of almost every conceivable kind would be entitled to some consideration for the same reasons; thereby actually destroying any distinctions between public and private use, for the principle in one instance is the same as in the other. The difference is only in degree. So many of the cases cited by both appellant and respondents have been decided on so many different theories and branches of the law that it is unprofitable to specially notice them here. There are, however, many cases that directly deny the doctrine laid down in the Nevada case, *supra*, and we think that

use" is not equivalent to the terms "public interest,"¹⁰ "public good,"

the consensus of judicial opinion is opposed to such liberal construction." *Healy Lumber Co. v. Morris*, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac. 681. See also *State v. White River Power Co.*, 39 Wash. 648, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987, 82 Pac. 150.

"When * * * we leave those classes of cases which are universally regarded as public, and come to those which stand on debatable ground, we find that the doctrine that public benefit and utility is a justification for the exercise of the right of eminent domain has been asserted more especially in four classes of cases: Those relating to the development of water power for mills under general or special mill or flowage acts; those arising under drainage acts for the reclamation of wet and marshy lands; those relating to the irrigation of arid lands; and those relating to the promotion of mining. Of the mining acts, outside of states whose constitutions in terms recognize mining as a public use, it may be said that the authorities differ as to the effect of the mere public benefit. *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Consolidated Channel Co. v. C. P. R. Co.*, 51 Cal. 269. And it was held in *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56, that the irrigation acts of the Western states are sustainable on the ground of a regulation of the common interests of the owners—a doctrine applied elsewhere to drainage acts." *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785. But see *Aldridge v. Tusculumbia, C. & D. R. Co.*, 2 Stew. & P. (Ala.) 199, 202, 23 Am. Dec. 307, in which the court said: "The distinction taken, between public use and public benefit,

does not seem to me sustained by reason; nor has precedent attached a different meaning to the terms: in practical application, they are convertible terms. * * * Whatever is beneficially employed for the community, is of public use, and a distinction cannot be tolerated." See also *Davis v. Tusculumbia, C. & D. R. Co.*, 4 Stew. & P. (Ala.) 421, 440.

10 Indiana. *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765.

Maine. *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

New York. *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429.

Washington. *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 36 L. R. A. (N. S.) 522, 117 Pac. 864.

West Virginia. *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

"When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us." *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313 (by Tracy, Senator).

"From a consideration of all the

"general welfare,"¹¹ "public purposes," "public enjoyment"¹² or "corporate purposes."¹³

Generally speaking, a use, in order to be a public one, need not be one that is open to "the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates."¹⁴ It is the character of the use and not its extent

authorities, and from our own views on construction, we are of the opinion that the use under consideration must either be a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state." *Healy Lumber Co. v. Morris*, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964, 74 Pac. 681. See also *State v. White River Power Co.*, 39 Wash. 648, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987, 82 Pac. 150.

¹¹ *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

That the general prosperity of the community is promoted by the use is not sufficient to make such use a public one. *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765.

"What is and what is not a public use has been decided in various ways by the states of the Union, but the great weight of authority, both of the decisions and the text-writers, is against any loose construction of the term such as has been given to it in a few of the decided cases." *Boyd v. C. L. Ritter Lumber Co.*, 119 Va. 348, L. R. A. 1917 A 94, 89 S. E. 273.

"The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they be without the domain of public uses for which private

ownership may be displaced by compulsory proceedings." In re *Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429. See also *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410.

¹² "For public use" implies an idea of utility, of usefulness, which is not necessarily inherent in "for public enjoyment," "for public purposes," or generally "for the public." *Albright v. Sussex County Lake & Park Commission*, 71 N. J. L. 303, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48, 57 Atl. 398.

¹³ Everything that is necessary for "corporate" purposes is not per se necessary for "public" purposes. In re *Rhode Island Suburban Ry. Co.*, 22 R. I. 457, 52 L. R. A. 879, 48 Atl. 591.

¹⁴ *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 68, aff'd 18 N. J. Eq. 518, 90 Am. Dec. 634. See also *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 31 L. R. A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; *Welton v. Dickson*, 38 Neb. 767, 22 L. R. A. 496, 41 Am. St. Rep. 771, 57 N. W. 559; *Albright v. Sussex County Lake & Park Commission*, 71 N. J. L. 303, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48, 57 Atl. 398; *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 21 L. R. A. (N. S.) 410, 69 Atl. 870; *Tennessee Coal, Iron & Railroad Co. v. Paint Rock Flume & Transportation Co.*, 128 Tenn. 277, 160 S. W. 522.

"To make a use public * * *

that is the material consideration.¹⁵ "The term [public use] implies 'the use of many,' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common, and not for a particular individual."¹⁶

Where each person in the community has an equal right to avail himself of the use on equal terms with every other person, the fact that all do not choose to take advantage of such use does not prevent its being a public one.¹⁷ Even the fact that at the time the right of eminent domain is sought to be exercised there is no one who desires to avail himself of the use to which the land is intended to be put does not prevent such use from being public in character.¹⁸

If the intended use of an improvement is not restricted to private parties nor private interests but is open to the public at large, it is no objection to the statute authorizing the exercise of the right of eminent domain in the accomplishment of such improvement that the latter will benefit one person or class of persons more than others, nor that it originated in private interests and was intended in some degree to subserve private purposes.¹⁹ "An enterprise organized to meet a

it is not necessary that the whole community or any large portion thereof may actually participate in it, but only that a right to its enjoyment may exist in the general public. If a use is public in this sense the courts will not be justified in refusing to acknowledge and sanction such public use merely because of an incidental private advantage." *Sexauer v. Star Milling Co.*, 173 Ind. 342, 347, 26 L. R. A. (N. S.) 609, 90 N. E. 474.

¹⁵ *State v. Superior Court for Pacific County*, 56 Wash. 214, 105 Pac. 637.

¹⁶ *Pocantico Water-Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246.

¹⁷ *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86.

¹⁸ *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 21 L. R. A. (N. S.) 410, 69 Atl. 870 (holding that the purpose for which a corporation for "the supplying, storage or transportation of water and water power for commercial and manufacturing purposes" was incorporated was a public

use although "by reason of the nature of the surrounding country very few, if any, individual citizens either are, or will be engaged in commercial or manufacturing enterprises, and hence no considerable portion of the inhabitants of the community can be supplied with water"); *Deemer v. Bells Run R. Co.*, 212 Pa. 491, 61 Atl. 1014 (holding that the fact that there were no villages, communities or settlements along the proposed line of railroad, no passengers to carry, no stations at the termini of the proposed road, etc., was not sufficient to support a claim that, in taking the land for such road, the railroad company was taking it for a private use).

¹⁹ *In re Burns*, 155 N. Y. 23, 49 N. E. 246; *Oneonta Light & Power Co. v. Schwarzenbach*, 164 N. Y. App. Div. 548, 150 N. Y. Supp. 76.

"The authorities are convincing to the effect that the mere possession of incidental charter powers to engage in private enterprises will not be held to deprive a corporation of the right

public demand is not reduced in its character because the parties instituting it have primarily in view private profit; notwithstanding this, it is still impressed with a public use,"²⁰ if—and herein lies a

of eminent domain given it to effectuate its public purposes, in a particular case where it is seeking to exercise this right for the promotion of the public uses which it is authorized to undertake." *Great Falls Power Co. v. Webb*, 123 Tenn. 584, 133 S. W. 1105. See also *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 171 N. C. 248, 88 S. E. 349; *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N. C. 314, 78 S. E. 297; *State v. Superior Court for Pacific County*, 56 Wash. 214, 105 Pac. 637.

"The constitutional authority of the Legislature to delegate the power of eminent domain to private corporations does not depend solely on the character of their corporate purposes as to whether they are governmental in their nature or not, but, as is universally agreed, depends also upon the common and equal right of the public to the benefit of the service rendered, free from unreasonable discrimination, with the exception * * * that in some states, including Connecticut, an exception is made in favor of the owners of lands so situated that their economic value to the state cannot be developed without subjecting adjoining lands to some easement necessary for that purpose." *Connecticut College for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633.

That the statute granting the right of eminent domain to a public service corporation authorizes the taking of land for "corporate" purposes instead of expressly permitting a taking only for "public" purposes does not render such statute unconstitutional. In re *Rhode Island Suburban Ry. Co.*, 22 R. I. 455, 48 Atl. 590.

²⁰ *Ryan v. Louisville & N. Terminal Co.*, 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

"If the use is governmental in its nature, and the public right to the promised benefit is secured, it is immaterial whether the corporate purpose is administered as a public charity or for profit." *Connecticut College for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633.

"The fact that private individuals or private corporations having a special interest in the construction of a railroad subscribe to its capital stock does not deprive the road of its public character. The road, when constructed, will be a public service corporation, and must serve the public, regardless of the individuality of its stockholders or the business in which they may be engaged." *State v. Superior Court for Pacific County*, 56 Wash. 214, 105 Pac. 637.

A railroad corporation is none the less such and, hence, none the less entitled to exercise the power of eminent domain because of the fact that its road is of a tap character and that it sustains a close relationship to an industrial corporation, certain of the stockholders of which constituted the majority of its organizers and make up the majority of its stockholders, from which it is separate and distinct both in law and in fact. *Vicksburg, A. & S. R. Co. v. Louisiana & A. R. Co.*, 136 La. 691, 67 So. 553.

In filing its petition to condemn certain lands, a corporation vested with the power of eminent domain, will not be presumed to be acting in bad faith in that such lands will be put to a private rather than a public use. *Great Falls Power Co. v.*

very important qualification—the public may participate in the use as a matter of right and not merely as a matter of favor. Upon the necessity of this fact, the courts generally, with the exception of those of certain of the western states, the constitutions of which contain peculiar provisions on the subject of eminent domain,²¹ lay great

Webb, 123 Tenn. 584, 133 S. W. 1105. See also *Wadsworth Land Co. v. Piedmont Traction Co.*, 162 N. C. 314, 78 S. E. 297; *Deemer v. Bells Run R. Co.*, 212 Pa. 491, 61 Atl. 1014.

It should not be presumed that the corporation desires the land sought to be condemned for a private use when it alleges "that its purpose is to serve the public." *Pittsburg Hydro-Electric Co. v. Liston*, 70 W. Va. 83, 40 L. R. A. (N. S.) 602, 73 S. E. 86.

21 "It is the law in this state, as it appears to be of many western states having large areas of arid land capable of being reclaimed or rendered more productive by irrigation, that the test of public use in the acquiring of water rights and rights of way for canals and ditches to convey water to land for the purpose of irrigating the same, is not necessarily the service the parties seeking to acquire such rights may be compelled to render to the public in connection therewith. Section 16, art. 1, of our state Constitution, provides: 'Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.' Here is an inference so strong as to amount almost to an affirmative declaration that private property may be taken for private use when the use is confined to the purposes enumerated in this provision, one of which is ditches on or across the land of others for agricultural purposes; and it is no strained construction of the provision to say

that this includes ditches for irrigation purposes, in view of the vast extent of arid land within our state, and the benefits of irrigation thereto in the increase of its productiveness and value. The very thought of agriculture in connection with this vast arid portion of our state suggests irrigation in connection therewith. These facts and conditions were well known at the time of the making of our Constitution, and it seems idle to doubt that they were in the minds of both the Constitution framers and the people in the making and adoption of that instrument as the fundamental law of the state. The Constitution further provides in section 1, art. 21: 'The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use.'

* * * We have quoted the constitutional provision which clearly indicates that property may be taken under the power of eminent domain for certain enumerated private uses, among which are ways for ditches for agricultural purposes. While this provision in terms seems to give the power to take for private use, it was evidently adopted upon the theory that the public would be sufficiently benefited by the taking for such a purpose, to warrant the taking; that is, though it be seemingly called a private use by these words of the Constitution, it is also in effect a public use in view of the necessities of a state like ours having vast areas of arid land." *State v. Superior Court for Spokane County*, 59 Wash. 621, 140 Am. St. Rep. 893, 110 Pac. 429, distinguishing *State v. White River*

emphasis. "A use to the public * * * must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of the property cannot be said to be public if it can be gained, denied, or withdrawn by the owner. The public use must dominate the private gain."²² It is not the necessity of the use nor the

Power Co., 39 Wash. 648, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987, 82 Pac. 150.

"What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons, and the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit." *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757.

²² *Boyd v. C. L. Ritter Lumber Co.*, 119 Va. 348, L. R. A. 1917 A 94, 89 S. E. 273.

"The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by permission. The test is, not what the corporation owning [taking] the land may choose to do, but what under the law it must do, and whether a public trust is impressed on the land." *Twelfth-St. Market Co. v. Philadelphia & R. Terminal R. Co.*, 142 Pa. St. 580, 587, 21 Atl. 902. See also *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765; *Neitzel*

v. Spokane International R. Co., 65 Wash. 100, 36 L. R. A. (N. S.) 522, 117 Pac. 864.

"Clearly, the words [public use] do not mean that every use is a public use from which the public may incidentally and temporarily derive an advantage, or benefit, or convenience, during the pleasure of the owner of the property, and from which they may be excluded at the mere caprice of the owner. If this definition were accepted, any man's property might be taken upon the shallowest pretence of a public use." *Twelfth-St. Market Co. v. Philadelphia & R. Terminal R. Co.*, 142 Pa. St. 580, 586, 21 Atl. 902.

"If the property is to be privately administered, and the public has not and cannot acquire a right to its use or benefit, the power of eminent domain cannot, upon principle and upon authority, be delegated in aid of a governmental use, unless, as in the development of the natural resources of the state, a direct benefit to the state results from the taking, which benefit continues to exist although the property taken be subsequently used for a private use, and then only when such benefit cannot otherwise be fully realized." *Connecticut Collège for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633.

"That the public must, to some extent, be entitled to use or enjoy the property taken, not by favor, but as a matter of right, is conceded. This, however, does not necessarily imply

fact of use but the right to use that is controlling.²³ Moreover, this right to use must be an actual—not merely a theoretical—one,²⁴ and one which is definite and fixed.²⁵

direct participation in that particular property; it is enough if that property contributes directly to the part of the business in which the public does participate.” *Rutland Railway, Light & Power Co. v. Clarendon Power Co.*, 86 Vt. 45, 44 L. R. A. (N. S.) 1204, 83 Atl. 332.

An act making it optional whether the land, acquired under the power of eminent domain conferred, be devoted to a public or a private use would be unconstitutional and void, but an act will not be construed as so doing, although such a construction at first glance would be the natural one, when a construction neither forced nor unreasonable would make the act require without any choice in the matter that the land be devoted to a public use. *Stewart v. Great Northern R. Co.*, 65 Minn. 515, 33 L. R. A. 427, 68 N. W. 208.

²³ *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. D. 63, 144 N. W. 724.

“It is necessary that every one, if he has occasion, shall have the right to use.” *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785.

In *Bedford Quarries Co. v. Chicago, I. & L. R. Co.*, 175 Ind. 303, 35 L. R. A. (N. S.) 641, 94 N. E. 326, it is said that “the character of the use in the case of a railroad or railroad track does not depend on the amount of business or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have the right to use it, it is a public interest, although the number who require its use may be small.” But see *Connecticut College for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.)

485, 88 Atl. 633, in which the court said: “The term ‘public use,’ as related to condemnation proceedings, has been strictly limited in some states to uses governmental in their nature when administered so that the public has a common right upon equal terms to the use or benefit of the property taken. * * * In Connecticut and some other states it has been defined as including also uses governmental in their nature, although administered for a private interest, when the taking itself is for purposes of great advantage to the community. * * *

These two definitions correspond to the active and passive significance of the word ‘use,’ as meaning enjoyment, or as meaning utility—the second definition comprehending both significations—and they lead to the same results in their application to specific cases, except in respect of the much controverted question whether the public benefit to be derived from the development of the material resources of the state will justify the delegation of the power of eminent domain in favor of private owners of lands so situated that their economic value cannot otherwise be realized. The cases dealing with this special problem have arisen under flowage acts, acts in aid of mining, of the drainage of swamp lands, the irrigation of arid lands, and similar statutes, and may properly be classified in a separate group.”

²⁴ *Brown v. Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; *Twelfth-St. Market Co. v. Philadelphia & R. Terminal R. Co.*, 142 Pa. St. 580, 586, 21 Atl. 902.

²⁵ *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 557, 66 N. E. 765; *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 21 L. R. A.

Specifically, "the proposed improvement * * * must in some way enlarge the resources, increase the industrial energies, promote the productive power of, or afford increased facilities for, the rapid exchange of thought or trade, or otherwise answer the growing needs of the community as such, before the use becomes public, and the agency controlling passes under governmental control."²⁷

(N. S.) 410, 69 Atl. 870; Neitzel v. Spokane International R. Co., 65 Wash. 100, 36 L. R. A. (N. S.) 522, 117 Pac. 864.

Where the property sought to be condemned will not be under the direct control and will not be used directly by the government or by public officers, or, what is practically the same thing, will not be used and occupied directly by the public at large, the corporation claiming the right of eminent domain must show that it is "possessed of each and all of these three qualifications. First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the * * * private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature; second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property." Varner v. Martin, 21 W. Va. 534, 552, 556. See also Alfred Phosphate Co. v. Duck River Phosphate Co., 120 Tenn. 260, 22 L. R. A. (N. S.) 701, 113 S. W. 410; Boyd v. C. L. Ritter Lumber Co., 119 Va. 348,

L. R. A. 1917 A 94, 89 S. E. 273; State v. White River Power Co., 39 Wash. 648, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987, 82 Pac. 150; Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410.

"It is said this is a private enterprise because the act on which the charter rests fixes no rates to be charged by the corporation for the use of its tracks, etc. This is immaterial. The corporation and its property, being affected by a public use, will be under governmental control, and the legislature may at any time fix rates, and make more specific the duties clearly implied from the act of incorporation." Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744. See also Great Falls Power Co. v. Webb, 123 Tenn. 584, 133 S. W. 1105.

²⁷Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744. See also Tennessee Coal, Iron & Railroad Co. v. Paint Rock Flume & Transportation Co., 128 Tenn. 277, 160 S. W. 522; Great Falls Power Co. v. Webb, 123 Tenn. 584, 133 S. W. 1105.

"Any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities would be a public use." Stewart v. Great Northern R. Co., 65 Minn. 515, 33 L. R. A. 427, 68 N. W. 208.

"If private property is to be taken, it must be for a use by the public. Thus, in condemnations for highways

It has been said to be "settled that the use of water for sale, rental, and distribution to the public generally is a public use."²⁸

That the ordinary commercial railroad, carrying both passengers and freight or either of them, is not a public use is a suggestion that could not be made with any degree of seriousness at this late day.²⁹

or railroads, the public use the land by traveling over it; for depots, public buildings, and parks, by resorting to them; for waterworks and drains, by employing their service. These are cases where the public use is direct and obvious; but there is a class of cases where the public does not use the land itself, and yet the public necessity is so direct and obvious as to imply a public use. Such, for example, are cases of taking land for engine houses, car houses, and repair shops on steam railroads. These buildings must necessarily be contiguous to the railroad, and, while the public may not use the buildings as such, yet they are of such a character that, without them, the public could not adequately use the railroad itself. They are in fact a part of the railroad." In *re Rhode Island Suburban Ry. Co.*, 22 R. I. 457, 52 L. R. A. 879, 48 Atl. 591.

²⁸ *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 164 Cal. 221, 128 Pac. 924.

²⁹ *California*. *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 367, 371 (holding that "on this subject there is no room for controversy at this day, if respect is paid to the adjudications of the highest courts of the land").

Connecticut. *New York, N. H. & H. R. Co. v. Offield*, 77 Conn. 417, 59 Atl. 510 (holding that this fact "is firmly settled").

Florida. *Moody v. Jacksonville, T. & K. W. R. Co.*, 20 Fla. 597, 606 (holding that this "is a legal proposition so well established in this country that it is certainly unnecessary to do more than state that such is the law").

Illinois. *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268, 275, 14 Am. Rep. 99 (stating that "the courts have uniformly held" to this effect).

Nevada. *Gibson v. Mason*, 5 Nev. 283, 308 (stating that "it has been held in every state in the Union, where a railroad has been built, that it is a public work").

New York. *Porter v. International Bridge Co.*, 200 N. Y. 234, 21 Ann. Cas. 684, 93 N. E. 716 (stating that the fact "that a railroad use is a public use is no longer seriously to be doubted").

That a company assumes in its articles of association the character of an ordinary railroad company and organizes under the general railroad act, which provides for the formation of corporations for the purpose of constructing, maintaining and operating railroads for public use in the conveyance of persons and the transporting of property and permits corporations so organized to take the lands necessary to the construction of their roads, does not preclude the court from inquiring into whether the operation by such company of the road proposed will be a public use, and from denying it the right to exercise the power of eminent domain upon a finding in the negative. In *re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429.

An action in which a village seeks to condemn certain land for a public street has no bearing upon a subsequent proceeding by a foreign railroad company to condemn the same land for railroad purposes, the question in the former being whether the land

A spur track to be built by a railroad company has been held to be a public use.³⁰ Likewise a spur track to be built by a mining company

was needed for a street, and in the latter whether it is needed to provide adequate facilities for the railroad company's traffic. *New York, N. H. & H. R. Co. v. Welsh*, 69 Hun (N. Y.) 615, 23 N. Y. Supp. 195.

An elevated railroad company will not be denied the right to condemn land on which to erect stations because of the fact that small portions of the several stations are to be used as news stands. In re *Metropolitan Elev. Ry. Co.*, 2 N. Y. Supp. 278.

"It is insisted * * * [that the act] is unconstitutional because it provides that a terminal corporation may keep at its passenger station an hotel or restaurant, or both, and also a news stand; thus converting the use which might otherwise be a public use into a private use. This objection is not well taken. By its terms the corporation is organized for terminal purposes only. The power of acquiring real estate by purchase or by condemnation is confined to these purposes. Among these, neither expressly nor by implication, is included that of keeping an hotel, restaurant, or news stand. It is only where such a corporation has acquired property to serve the objects of its creation that, in the construction of its passenger station, if it deems best; it may exercise the purely incidental right to provide these accommodations for the public. This neither renders the act unconstitutional nor converts the undertaking into a mere private enterprise." *Ryan v. Louisville & N. Terminal Co.*, 102 Tenn. 111, 45 L. R. A. 303, 50 S. W. 744.

Under the law of Louisiana, a street railway is a railroad as far, at least, as its having the right to cross another railroad by eminent domain pro-

ceedings is concerned. *Shreveport Traction Co. v. Kansas City, S. & G. R. Co.*, 119 La. 759, 44 So. 457. See also *Vicksburg, A. & S. R. Co. v. Louisiana & A. R. Co.*, 136 La. 691, 67 So. 553.

³⁰ *Harrold Bros. v. Americus*, 142 Ga. 686, 83 S. E. 534; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 66 L. R. A. 387, 57 Atl. 1001 (stating that "the tests decisive of this question, as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one and the legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track; and if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity with these requirements, then the power granted by the legislature may be exercised in that particular case"); *Illinois Cent. R. Co. v. East Sioux Falls Quarry Co.*, 33 S. D. 63, 144 N. W. 724; *Union Lime Co. v. Railroad Commission of Wisconsin*, 144 Wis. 523, 129 N. W. 605. See also *Ozark Coal Co. v. Pennsylvania Anthracite R. Co.*, 97 Ark. 495, Ann. Cas. 1912 D 1000, 134 S. W. 634.

has been held to be a public use.³¹ So also a side track to be built by a railroad company to lands containing building stone³² and a lateral railroad to be built by a stone quarrying company have been held to be public uses.³³ A logging railroad may be a public use under a constitutional provision making the use of land necessary to the complete development of the material resources of the state a public one.³⁴ Stock pens to be built by a railroad company have been held to be a public use.³⁵ A freight depot has been held to be a public use.³⁶

A power house, coal pockets and a water supply for an electric suburban railroad company have been held not to be public uses.³⁷

"The furnishing of electricity for light and power * * * may be a public use,"³⁸ and electric light poles proposed to be erected by a company empowered to generate and distribute electricity,³⁹ and an electric power transmission line have been held to be public uses.⁴⁰ The generation of electricity by water power for distribution and sale to the general public on equal terms, subject to governmental control, has been held to be a public use.⁴¹ So also a telephone transmission wire has been held to be a public use.⁴² Likewise, a gas pipe line has been held to be a public use.⁴³

³¹ Greasy Creek Mineral Co. v. Ely Jellico Coal Co., 132 Ky. 692, 116 S. W. 1189.

³² Bedford Quarries Co. v. Chicago, I. & L. R. Co., 175 Ind. 303, 35 L. R. A. (N. S.) 641, 94 N. E. 326. See also State v. Chicago, M. & St. P. R. Co., 115 Minn. 51, 131 N. W. 859.

³³ Westport Stone Co. v. Thomas, 175 Ind. 319, 35 L. R. A. (N. S.) 646, 94 N. E. 406.

³⁴ Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 581, 155 Pac. 680.

³⁵ Chicago, I. & L. R. Co. v. Baugh, 175 Ind. 419, 94 N. E. 571.

³⁶ Cloth v. Chicago, R. I. & P. R. Co., 97 Ark. 86, Ann. Cas. 1912 C 1115, 132 S. W. 1005.

³⁷ In re Rhode Island Suburban Ry. Co., 22 R. I. 457, 22 L. R. A. 879, 48 Atl. 591, doubted in Rockingham County Light & Power Co. v. Hobbs, 72 N. H. 531, 66 L. R. A. 581, 58 Atl. 46.

³⁸ McMillan v. Noyes, 75 N. H. 258, 72 Atl. 759. See also Tuttle v. Jefferson Power & Improvement Co., 31 Okla. 710, 122 Pac. 1102.

³⁹ Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 460.

⁴⁰ Rockingham County Light & Power Co. v. Hobbs, 72 N. H. 531, 66 L. R. A. 581, 58 Atl. 46, distinguishing Fallsburg Power & Manufacturing Co. v. Alexander, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194. See also Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 Pac. 992.

⁴¹ Nolan v. Central Georgia Power Co., 134 Ga. 201, 208, 67 S. E. 656. See also Rutland Railway, Light & Power Co. v. Clarendon Power Co., 86 Vt. 45, 44 L. R. A. (N. S.) 1204, 83 Atl. 332.

⁴² Mitchell v. Southern New England Tel. Co., 90 Conn. 179, 182, 96 Atl. 966.

⁴³ Calor Oil & Gas Co. v. Wither's

A cartway may be a public use although desired by the petitioner as a means of ingress to and egress from his premises.⁴⁴

Although the higher education of women is in its nature a public use, a college devoted thereto cannot be granted the right of eminent domain when such college, under its charter, is not required to admit to its privileges all qualified candidates to the extent of its capacity without religious, racial or social distinction, but, on the other hand, has authority to select the objects of its beneficence.⁴⁵

§ 1504. Property which may be taken. Generally speaking, no private property,⁴⁶ unless it be money,⁴⁷ is exempt, in a proper case,

Adm'r, 141 Ky. 489, 492, 133 S. W. 210; Johnston's Appeal (Pa.), 7 Atl. 167 (stating that "it is a curious objection to set up against the act * * * in view of the present consumption of natural gas, that its use is not a public one, and that, therefore, those corporations which are engaged in its transportation may not be vested with the right of eminent domain. As well might this objection be urged against the vesting of this power in those companies which have been incorporated for the purpose of supplying our towns and villages with water, in which the public interest is found, not in the transportation, but in the use of that fluid after it has, by these agencies, been transported"); Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410.

⁴⁴ *Mueller v. Supervisors of Town of Courtland*, 117 Minn. 290, 135 N. W. 996.

⁴⁵ *Connecticut College for Women v. Calvert*, 87 Conn. 421, 48 L. R. A. (N. S.) 485, 88 Atl. 633.

⁴⁶ Public land, the legal title to which is held by the state, is by nature without the scope of eminent domain proceedings (*Imperial Irrigation Co. v. Jayne*, 104 Tex. 395, Ann. Cas. 1914 B 322, 138 S. W. 575) there being no necessity of its "resuming" a title with which it has not parted.

⁴⁷ In *People v. Mayor, etc., of*

Brooklyn, 4 N. Y. 419, 424, 55 Am. Dec. 266, the court said: "It may be proper here, although not strictly necessary, to express the opinion that money cannot be exacted by the government by right of eminent domain, excepting, perhaps, for the direct use of the state at large, and when the state at large is to make the compensation. The exigencies of a state government can seldom require the taking of money by virtue of this power even in time of war, and never in time of peace. The framers of the Constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary. Money can always be had by taxation; lands cannot; and therefore lands may be taken by right of eminent domain, but money may not. The * * * Constitution, confirms this construction of the power. It directs the compensation for private property so taken, to be ascertained by a jury, or by commissioners. This is an appropriate mode when lands or goods are taken, because their value is uncertain; but not when money is taken, because its value is already fixed." See also *Kimball v. Grantsville City*, 19 Utah 368, 381, 45 L. R. A. 628, 57 Pac. 1.

"Money is not that species of property which the sovereign authority can authorize to be taken in the exercise

from condemnation under the right or power of eminent domain.⁴⁸ No less an authority than the Supreme Court of the United States has declared that "the right of eminent domain * * * reaches all property, private or corporate, on a public necessity, and on making full compensation for it."⁴⁹ Not only property which is tangible but also that which is intangible⁵⁰—"rights and interests of any kind, including easements"—may be taken in the exercise of such right.⁵¹

A contract, being property, may be condemned as such,⁵² and, moreover, may be condemned without running counter to the constitutional inhibition upon the impairment of the obligation of contracts.⁵³

of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself, and the general doctrine of the authorities of the present day is, that the compensation must be either made, or a fund provided for it in advance." *Burnett v. Sacramento*, 12 Cal. 76, 84, 73 Am. Dec. 518. Compare, however, *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

⁴⁸ *Ortiz v. Hansen*, 35 Colo. 100, 83 Pac. 964; *New Haven Water Co. v. Russell*, 86 Conn. 361, 85 Atl. 636; *Portneuf Irrigating Co. v. Budge*, 16 Idaho 116, 126, 18 Ann. Cas. 674, 100 Pac. 1046.

"Under the right of eminent domain not only the lands of a corporation may be taken for such a public use as a railroad company, but their franchise also." *Twelfth-St. Market Co. v. Philadelphia & R. Terminal R. Co.*, 142 Pa. St. 580, 585, 21 Atl. 902.

⁴⁹ *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 12 L. Ed. 447. See also *United States v. Lynah*, 188 U. S. 445, 47 L. Ed. 539.

⁵⁰ *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689.

⁵¹ *South Park Com'rs v. Montgomery Ward & Co.* 248 Ill. 299, 21 Ann. Cas. 127, 93 N. E. 910.

⁵² *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed.

1165; *Wood v. Millville*, 89 N. J. L. 646, 98 Atl. 267.

⁵³ "The right of eminent domain in government in no wise interferes with the inviolability of contracts; * * * the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other. Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not

Private property, whether acquired by condemnation or otherwise, which is, at the time, being put to a public use⁵⁴ may be taken by eminent domain proceedings by another,⁵⁵ provided, at least when the public use to which it is proposed to be put by such other and the

out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely by the greatest violence of construction be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear, that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the states to the full extent in which it inheres in every sovereign government, to be exercised

by them in that degree that shall by them be deemed commensurate with public necessity." *West River Bridge v. Dix*, 6 How. (U. S.) 507, 12 L. Ed. 535.

The condemnation of tangible property as a result of which the owner cannot fulfil its contract with the condemnor does not impair the obligation of such contract but appropriates the contract as property. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165 (condemnation by city of waterworks belonging to company having contract for supply of water) followed in *Woods v. Millville*, 89 N. J. L. 646, 98 Atl. 267.

⁵⁴ See § 1503, *supra*.

⁵⁵ "All private property, both tangible and intangible, is subject to the right [of eminent domain], including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the state to some extent." *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689.

"The power of eminent domain is one of the inalienable incidents of sovereignty, which, treated simply as a question of power, may be exercised in favor of public uses over any and all private, and even public, property. In this view, the property and franchises of corporations, as well as of individuals, although dedicated to public uses, may be taken for other public uses." *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

The burden of proving the existing public use of land sought to be condemned is on the owner of such land. *Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 Pac. 992.

public use to which it has already been devoted cannot stand together, that the intended use be different from the existing one.⁵⁶

It is unquestionably true that property which is being applied to a public use by its owner cannot be condemned by another as of right although such other proposes to put it to a use equally public. Thus it is a general rule that the power to take such property must be specifically granted⁵⁷ either in express terms⁵⁸ or by necessary im-

⁵⁶ "There can be no public interest in an enterprise when the public is already being served in the same manner, and with the same commodity which is sought to be introduced. The only public interest is service, and when the public is served adequately, then it follows that there is no public interest in a new public enterprise for the same purpose sufficient so that the new enterprise may take the property of the one doing the same service. This is especially true, we think, in regard to public service corporations like water companies in this state, where such companies are controlled by the Public Service Commission. The rate is fixed, and the service enforced by that commission." *State v. Superior Court for Pacific County*, — Wash. —, 163 Pac. 15.

"Without the limitation suggested, the most absurd results would follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on ad infinitum." *Denver Power & I. Co. v. Denver & R. G. R. Co.*, 30 Colo. 204, 60 L. R. A. 383, 69 Pac. 568. See also *Lake Erie & W. R. Co. v. Board Com'rs Seneca County*, 57 Fed. 945, 947; *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602; *New York, L. & W. R. Co. v. Union Steamboat Co.*, 99 N. Y. 12, 1 N. E. 27.

The burden of proving the inconsistency of an existing public use and the public use to which it is proposed to devote the land sought to be condemned is on the condemner. *Los*

Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 Pac. 992.

Under the California Code of Civil Procedure, § 1240, property appropriated to public use "shall not be taken unless for more necessary public use than that to which it has been already appropriated." The object of the rule thus laid down, "is, not" according to the Supreme Court of California, "that there is anything sacred in the property as such, considered independent of the public use, but the protection of the use itself, in which the public as well as the owner is interested, and to save the use from annihilation." *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602.

⁵⁷ "The rule is settled that a general grant of power to condemn land does not extend to land which has been devoted to a public use. * * * To reach such land, the grant of power must be specific." *In re Newport Ave. City of New York*, 218 N. Y. 274, 112 N. E. 911.

"That property already devoted to a public use cannot be taken for another public use, without legislative authority, expressly given or necessarily implied, is the unquestioned law of this state." *Rutland Railway, Light & Power Co. v. Clarendon Power Co.*, 86 Vt. 45, 83 Atl. 332.

⁵⁸ *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 31 L. R. A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; *In re Seneca Ave.*, 163 N. Y. Supp. 503, 504.

plication.⁵⁹ "Neither the franchise of a corporation existing for a public use, in the legal and proper sense of the words, or [nor] the lands which are necessary for the enjoyment of such public use, can be taken under the delegated power of eminent domain, without a clear and express authority from the legislature to that effect, or an authority necessarily implied from the grant."⁶⁰ Especially does this rule obtain when the two uses cannot well exist contemporaneously.⁶¹ "A legislative intent to subject lands devoted to a public use, already in exercise, to one which might thereafter arise, will not be implied from a grant of power made in general terms * * * without special reference to an existing necessity for the subsequent use, where * * * it appears that both uses cannot stand together, and the latter, if exercised, must greatly endanger, if it do not destroy, the exercise of the former use."⁶²

⁵⁹ "While it is true that the state has power to delegate to corporations the right to take property for public use which has already been appropriated to such use, subject to the qualification [that the second use be different from the first, and be differently administered] * * * yet the right to take property already devoted to and in public use must be given either in express terms or by necessary implication and will not be presumed simply from a general grant of power to condemn." *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670.

Before property devoted to a public use "can be taken for another and inconsistent public use, there must be express or plainly implied legislative warrant for so doing." *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913 E 153, 148 S. W. 662. See also *Southern Pac. R. Co. v. Southern California Ry. Co.*, 111 Cal. 221, 43 Pac. 602. See also *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 368, 370.

⁶⁰ *Twelfth-St. Market Co. v. Philadelphia & R. Terminal R. Co.*, 142 Pa. St. 580, 585, 21 Atl. 902.

⁶¹ A general grant may be sufficient

to authorize the exercise of the power as to land already devoted to a public use when the existence of the later use will not materially impair the earlier one; otherwise, when such later use will impair such earlier one. *Town of Alvord v. Great Northern Ry. Co.*, — Iowa —, 161 N. W. 467.

⁶² *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144.

"In determining whether a power generally given, is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to

It would seem, however, that the "public use" which will prevent the condemnation of property must be a good faith one and not one intended merely as an obstacle in the way of subsequent eminent domain proceedings.⁶³

Moreover, property held by a corporation, affected with a public use, merely as a proprietor⁶⁴ and not in reasonable anticipation of future needs in the matter of the administration of such use⁶⁵ may be taken under the right or power of eminent domain to the same extent as the property of any other owner,⁶⁶ upon there appearing a necessity for its condemnation.⁶⁷

one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject matter of it, so that by reasonable intentment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." In re Application of City of Buffalo to Take Land for Reservoir, 68 N. Y. 167. See also *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 6 So. 404; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107.

⁶³ *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 6 So. 404.

⁶⁴ *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670.

"Lands held by a corporation, but not used for or necessary to a public purpose, but simply as a proprietor, and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner." *Rochester, H. & L. R. Co. v. Babcock*, 110 N. Y. 119, 17 N. E. 678.

⁶⁵ Property acquired in reasonable anticipation of future needs in the matter of the administration of a public use will be deemed devoted to such a use until there is an abandonment of the intention present at the time of its acquisition. *State v. Superior Court for Spokane County*, 84 Wash. 20, 145 Pac. 999, aff'd on rehearing 149 Pac. 324. See also *State v. Superior Court for Pacific County*, — Wash. —, 163 Pac. 15.

"It is not even essential that the property shall be actually in use by the railroad, if it will be needed for its purposes in the future." In re *Seneca Ave.*, 163 N. Y. Supp. 503, 504.

⁶⁶ "We think * * * that opposing corporations may be limited to the enjoyment of that property in actual use by them, and that which is reasonably necessary for the safe, proper, and convenient management of their business, and the accomplishment of the purposes of their creation." *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 31 L. R. A. 298, 50 Am. St. Rep. 508, 41 Pac. 232. See also *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107.

"It is only through the fulfillment of a public function that any property becomes immune" from condemnation. In re *Newport Ave. City of New York*, 218 N. Y. 274, 112 N. E. 911.

⁶⁷ "Necessity," as used in this con-

§ 1505. What constitutes "taking." What constitutes a "taking" of private property within the law of eminent domain is a question which has given the courts no end of difficulty, and the answer to which, as far as disposing of it by a general statement which the courts will uniformly recognize as expressive of the correct rule, is still in abeyance. A recent case, treating of the matter, makes the statement that "the authorities are not altogether in harmony on the point as to what constitutes a taking of private property for public use within the meaning of statutes conferring the right of eminent domain. According to some of the cases there must be a taking altogether, a seizure, a direct appropriation and dispossession of the owner, such a taking as divests the owner of title and control of the property taken, and an unqualified appropriation of it to the public, but the weight of authority is against this strict construction."⁶⁸ So again it has been said that any actual and material interference with private property rights,⁶⁹ which causes special and substantial injury to the owner, is a "taking" of private property within the meaning of the constitution.⁷⁰ "Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must, in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."⁷¹

nection, "does not mean an absolute or indispensable necessity, but reasonably requisite and proper for the accomplishment of the end in view under the particular circumstances of the case." *Mobile & T. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 6 So. 404. See also *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 31 L. R. A. 298, 50 Am. St. Rep. 508, 41 Pac. 232; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *Seattle & M. R. Co. v. Bellingham Bay & E. R.*

Co., 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107.

⁶⁸ *Lea v. Louisville & N. R. Co.*, 135 Tenn. 560, 188 S. W. 215.

⁶⁹ *Board Com'rs Portage Co. v. Gates*, 83 Ohio St. 19, 93 N. E. 255.

⁷⁰ *Mansfield v. Balliett*, 65 Ohio St. 451, 58 L. R. A. 628, 63 N. E. 86.

⁷¹ *Forster v. Scott*, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976. See also *People v. Murphy*, 129 N. Y. App. Div. 260, 113 N. Y. Supp. 855, 857; *Fulton Light, Heat & Power Co. v.*

In the words of the United States Supreme Court, however: "That the constitutional inhibition against the taking of private property for public use without compensation does not confer a right to compensation upon a landowner, no part of whose property has been actually appropriated, and who has sustained only those consequential damages that are necessarily incident to proximity to the railroad, has

State, 65 N. Y. Misc. 263, 121 N. Y. Supp. 536.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the control of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. (U. S.) 166, 20 L. Ed. 557.

"To constitute a 'taking of property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total

conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded on a misconception of the meaning of the term 'property,' as used in the various state constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' *Selden, J.*, in *Wynehamer v. The People*, 13 N. Y. 378, 433 * * *. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' pro tanto, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See * * * *Wells, J.*, in *Walker v. Old Colony & N. O. Ry. Co.*, 103 Mass. 10, 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, ipso facto, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership,

been so generally recognized that in some of the states (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Dakota, Texas, West Virginia, and Wyoming are, we believe, among the number) constitutions have been established providing in substance that private property shall not be taken or damaged for public use without compensation.”⁷²

whatever physical interference annuls this right takes ‘property’—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A’s unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a ‘taking of property.’ Why not the former? If, on the other hand, the land itself be regarded as ‘property,’ the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, ‘in its corporeal substance and entity,’ is ‘property,’ still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make ‘property’ valuable. Among these ele-

ments is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See *Comstock, J.*, in *Wynehamer v. The People*, 13 N. Y. 378, 396. A physical interference with the land, which substantially abridges this right, takes the owner’s ‘property’ to just so great an extent as he is thereby deprived of his right. ‘To deprive one of the use of his land is depriving him of his land’; for, as Lord Coke said, ‘What is the land but the profits thereof?’ *Sutherland, J.*, in *People v. Kerr*, 37 Barb. 257, 399; *Co. Litt.* 4 b. The private injury is thereby as completely effected as if the land itself were ‘physically taken away.’” *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147. See, however, as holding that the court in each of the two cases quoted in this note went to the very extreme in rendering its decision, *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

An actual taking of the property is contemplated by the Fifth Amendment to the Federal Constitution. *United States v. Louisville Bridge Co.*, 233 Fed. 270, 280.

“Any diminution of the value of property, directly invaded at least, which is not shared by the public generally, is a taking within the constitutional provision.” *Illinois Cent. R. Co. v. Moriarity*, 135 Tenn. 446, 186 S. W. 1053.

⁷² *Richards v. Washington Terminal Co.*, 233 U. S. 546, 58 L. Ed. 1088, L. R. A. 1915 A 887.

Construing a constitutional provision that "private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured," it has been held that "the right to damages is not dependent on physical injury to the corpus of the property affected. It is sufficient if there is a physical disturbance of a valuable right in the property. It is not necessary that there be a trespass on the owner's real estate. It is sufficient that the construction and operation of the public utility is the cause of some special pecuniary damage and though the damage is consequential the owner may recover. * * * This does not mean that the [provision] * * * gives a right of recovery for acts which under general rules of law do not constitute actionable wrong. The purpose of the [provision] * * * is not to change the substantive law of damages or to enlarge the definition of that term. It was rather the purpose to make the law of damages uniform so that a property owner may recover against persons or corporations having power of eminent domain under the same circumstances that would have authorized recovery against one not armed with that power." 73

73 *Stuhl v. Great Northern Ry. Co.*, — Minn. —, 161 N. W. 501.

The words "or damaged" in a constitutional provision that "private property shall not be taken or damaged for public use without just compensation" have been held to indicate a deliberate purpose not to confine a recovery to cases in which there is a physical invasion of the property affected, but to make the damaging of private property, without regard to the means by which the injury was effected, the test of liability. *Musko-gee v. Hancock*, — Okla. —, 158 Pac. 622. See also *Chicago v. Taylor*, 125 U. S. 161, 31 L. Ed. 638, concurring in the interpretation placed upon such a provision, in the Illinois Constitution, by *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511, and *Rigney v. Chicago*, 102 Ill. 64. See, in connection with these Illinois cases, *Barnard v. Chicago*, 270 Ill. 27, 110 N. E. 412, and *Otis Elevator Co. v. Chicago*, 263 Ill. 419, 52 L. R. A. (N. S.) 192, 105 N. E. 338.

"Upon principle, * * * as well

as upon authority, we hold that anything done by a state or its delegated agent, * * * which substantially interferes with the beneficial use and ownership of land, depriving the owner of his lawful dominion over it or any part of it, not within the general police power of the state, as commonly understood, is a taking or damaging of the property * * * within the meaning of our Constitution." *Fruth v. Board of Affairs City of Charleston*, 75 W. Va. 456, 84 S. E. 105.

"Anything which destroys or subverts any of the essential elements [of property, namely, the rights of use, enjoyment, and disposal] * * * is a taking or destruction pro tanto of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the locus in quo. * * * The use of a given object is the most essential and beneficial quality or attribute of property. Without it, all other elements which go to make up property would

§ 1506. Compensation. The right of the owner of property taken for public use to compensation therefor is not a right of constitutional origin, it having existed in England under the common law before the day of American constitutions.⁷⁴ What the provision in the Fed-

be of no effect." *St. Louis v. Hill*, 116 Mo. 527, 21 L. R. A. 226, 22 S. W. 861.

74 "The history of the right to recover for the taking or damaging property under the power of eminent domain, like the history of such power itself, extends back long prior to our Constitutions, either federal or state. * * * Long before the founding of the American Colonies it had become thoroughly established, as part of the English law, that it was unlawful to take the property of an individual for even a public use without making due compensation therefor. The taking of private property without compensation must have been especially repugnant to a people such as those who founded our present government—the very corner stone of which is the equality of men before the law. * * * The framers of the federal Constitution did not even think it necessary to place therein any guaranty of this right to recover damages, thus showing that this right was fully recognized. The guaranty will be found in the fifth amendment. Very few of the Colonies had any such guaranty in their fundamental laws, and most of them had none until long after statehood, while one, North Carolina, has never seen fit to place such a guaranty in her Constitution. Sooner or later the sovereign authority, the people, protected themselves from any attempt upon the part of their legislatures to deprive them of their right to recompense by enacting the several constitutional provisions now in force." *Hyde v. Minnesota*, D. & P. R. Co., 29 S. D. 220, 48 L. R. A. (N. S.) 48, 136 N. W. 92.

In an early New York case decided under the New York Constitution of 1777 which contained no provision on the subject of eminent domain, it was said that "to render the exercise of the power [of eminent domain] valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice. *Grotius*, *De Jur. B. & P.*, b. 8, c. 14, s. 7, *Puffendorf*, *De Jur. Nat. et Gent.*, b. 8, c. 4, s. 7, and *Bynkershoek Quaest. Jur. Pub.*, b. 2, c. 15, when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses, when public necessity or utility requires it; but they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. The last of those jurists insists, that private property cannot be taken on any terms without consent of the owner for purposes of public ornament or pleasure; and he mentions an instance in which the Roman senate refused to allow the prætors to carry an aqueduct through the farm of an individual against his consent, when intended merely for ornament. The sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose,

eral Constitution and in the state constitutions generally, touching the matter, was intended to do was to render such right secure from legislative impairment.⁷⁵ "The duty of making compensation may be

without the interposition of the legislature. And how does the legislature interpose and compel? 'Not,' says Blackstone, 1 Com. 139, 'by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.' I may go further and show that this inviolability of private property, even as it respects the acts and wants of the state, unless a just indemnity be afforded, has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the Bill of Rights annexed to the Constitutions of the states of Pennsylvania, Delaware and Ohio; and it has been incorporated in some of the written constitutions adopted in Europe (constitutional charter of Louis XVIII., and the ephemeral, but very elaborately drawn, Constitution de la Republique Francaise of 1795). But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the Constitution of the United States, 'that private property shall not be taken for public use, without just compensation.' I feel myself, therefore, not only authorized,

but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property." *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526.

"The condition of compensation has generally been held annexed to the right of taking private property for public use under the most arbitrary governments, in which the powers of the sovereign are not trammelled by any positive constitutional restrictions." *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, 63, aff'd 18 N. J. Eq. 518, 90 Am. Dec. 634, citing *Sinnickson v. Johnson*, 2 Harr. (N. J.) 129, 34 Am. Dec. 184.

⁷⁵ *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. (U. S.) 166, 20 L. Ed. 557. See also *Mansfield v. Balliett*, 65 Ohio St. 451, 58 L. R. A. 628, 63 N. E. 86.

"The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise." *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165.

"The question of negligence has nothing whatever to do with the question of right to recover damages, where such damages have resulted from the exercise of the power of eminent domain. The delegating to a person or corporation of the power of eminent domain can never, in any manner, absolve the person or corporation exercising such powers from liability for any negligence on his or its part either in the exercise of such power or in the carrying on of any enterprise after the exercise of such

regarded as a law of natural justice, which has its sanction in every man's sense of right, and is recognized in the most arbitrary governments. To suppose that the legislature under our Constitution [which contains no provision requiring just compensation] possessed the power of divesting the citizen of his right to property without first providing in some equitable mode for ascertaining its value, and making him compensation for it and could exercise this power without restraint, would be subversive of the government and equivalent to revolution and anarchy, since it would defeat one of the primary objects for which the government was established."⁷⁶

While it is thus settled that the right to compensation exists, what is comprehended by such right and what constitutes a discharge of the condemner's correlative duty of making compensation are questions which the courts have not answered in a uniform manner. Nor will the scope of this work permit the setting out in detail of the various views of the several courts on the subject, nor any attempt to classify, reconcile, or distinguish the decisions.⁷⁷

On the question of what constitutes "just compensation," it has been said that "those words, as used in the Constitution, mean exactly the same that they mean when used in every day business transactions between man and man, they are not circumscribed by any technical definition that places them beyond the comprehension of men of ordinary intelligence."⁷⁸ Again, Mr. Justice Brewer, speaking for the

power, and any action for damages resulting from negligence can in no manner raise any question based upon the exercise of the power of eminent domain, whether such action be brought prior to an alleged exercise of the power or afterwards. The damages to be recompensed for under the law of eminent domain are, from the very necessity of things, only those flowing from injuries that cannot reasonably be avoided even by the use of due care in the exercise of the power of eminent domain, and are, ordinarily, only such as could be anticipated by a jury in the trial of an action brought before the 'damage' had taken place." *Hyde v. Minnesota, D. & P. R. Co.*, 29 S. D. 220, 40 L. R. A. (N. S.) 48, 136 N. W. 92.

⁷⁶ *Ex parte Martin*, 13 Ark. 198, 58 Am. Dec. 321.

⁷⁷ For an exhaustive treatment of the subject, see *Lewis' Eminent Domain* (3rd Ed.), § 671 et seq.

⁷⁸ *St. Louis, M. & S. E. R. Co. v. Continental Brick Co.*, 198 Mo. 698, 96 S. W. 1011.

"The definition of the word 'just' is 'conformable to rectitude and justice; not doing wrong to any; violating no right or obligation; not transgressing the requirements of truth and propriety; rendering to each his due'; and of the word 'compensation,' 'that which compensates for loss or privilege; a recompense for some loss.'" *Champlain Stone & Sand Co. v. State*, 66 N. Y. Misc. 434, 123 N. Y. Supp. 546.

The compensation must be just both from the standpoint of the person whose property is taken and from that of the condemner. *Searl v.*

United States Supreme Court, has said: "The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."⁷⁹

When it comes to the matter of determining what is just compensation in a particular case, the inquiry is a judicial, and not a legislative, one.⁸⁰

Moreover, regardless of the right to set off benefits in determining what constitutes just compensation,⁸¹ the general rule is that such compensation when fixed must be made in money even though there is no provision in the constitution to that effect.⁸²

School Dist. No. 2, Lake County, 133 U. S. 553, 33 L. Ed. 740.

⁷⁹ *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463.

It has been held, however, that the refusal to permit the property owner to prove, on an application for the appointment of a committee to assess damages, that his damage on the taking of his property as contemplated would be of such a nature that it could not be compensated, was not error, the court assigning as its reason for so holding that "all property is held subject to its condemnation for a public use, and the damages awarded will be just compensation as nearly as the nature of the property will admit of." *New Haven Water Co. v. Russell*, 86 Conn. 361, 85 Atl. 636.

⁸⁰ *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. Ed. 463; *Waterbury v. Platt Bros. & Co.*, 78 Conn. 435, 56 Atl. 856.

"The right of the legislature of the

state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so." *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300, 315.

⁸¹ See, as to the existence of such right, *Lewis' Eminent Domain* (3rd Ed.), § 687 et seq.

⁸² See *Lewis' Eminent Domain*, §§ 682, 756.

CHAPTER 37

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I. GENERAL CONSIDERATIONS

§ 1507. Introductory. As an introduction to this chapter it is deemed advisable to show briefly the matters to be considered in reading the decisions of the courts, and the method of treatment of the subject in this chapter. Individual decisions connected with this question are often misleading. They sometimes arrive at the right conclusion but err in the basis for the decision, and often apply the rule applicable only to a different state of facts from the ones presented.

§ 1508. — **Matters to be considered.** First of all, it is to be noted that the courts have used the term “ultra vires” as meaning a multitude of things, as hereafter noted in defining the term.¹ In fact the term has been misapplied so often, and used in such a loose sense, that Mr. Morawetz, in his book on Corporations, eliminated it, and in his preface stated that “the expression ‘ultra vires’ has not been used in the text, partly because it is too vague to serve any useful purpose, and partly because the variety of meanings attributed to it lead to inevitable confusion of thought.” However, if the courts and textbook writers would confine the term “ultra vires” to acts not within the express or implied powers of the corporation, it would then have a fixed meaning so that there would be no uncertainty as to what was meant thereby. And that is the meaning of the term as used in this chapter, although incidentally contracts expressly prohibited by statute or charter have been included where treated by the courts as mere ultra vires or where the rule governing is the same regardless of whether the contract is impliedly prohibited or expressly prohibited. For the most part, however, the effect of contracts expressly prohibited by statute or charter is treated of in the next following chapter on “Illegal Contracts,” together with the effect of contracts illegal because against public policy or good morals. It follows that, in reading the decisions, it is always necessary to consider whether the contract, even if said by the court to be ultra vires, is in fact ultra vires as that term is used in its strict sense. If it is not ultra vires in the strict sense, then rules laid down in other chapters will govern instead of the rules stated herein, as hereafter noted.²

Secondly, it is necessary to determine whether the contract is wholly executory, partly executed, executed on one side only, or wholly executed. The nature of the contract in this respect often determines the rule applicable, although the courts have not always borne in mind

¹ See §§ 1511-1514, *infra*.

² See §§ 1512-1515, *infra*.

This is especially true in case of contracts against public policy or expressly prohibited by statute or charter, which are often decided, as far as their effect is concerned, according to the rules governing contracts impliedly prohibited as not within the charter, without in any way noticing the distinction generally arising between the two classes of contracts. Courts are very lax in the

use of the terms “illegal” and “ultra vires,” often referring to a merely illegal contract as ultra vires and to an illegal contract (a contract against public policy or expressly prohibited by statute or charter) as ultra vires, when as a matter of law different rules, at least to some extent, are applicable according to whether the contract is the one or the other. In this chapter, only the effect of ultra vires acts and contracts, using the term in its strict sense, is included.

the distinction between such contracts. For instance it is not uncommon for courts to refer to a contract as "executed" when what is meant is that it is executed on one side only. So, in case of contracts executed on one side only, the courts often fail to notice that one rule prevails in the federal courts and some of the state courts, while another rule prevails in other state courts, and decisions belonging to the one class are cited as authority in jurisdictions where the other rule prevails and vice versa.³ Furthermore, the right to recover on an implied contract as distinguished from an express contract is oftentimes not clearly brought out.⁴

Thirdly, the particular person by whom the question is raised must be considered. A different rule may apply according to whether the one urging ultra vires is the state,⁵ a stockholder of the corporation,⁶ a creditor of the corporation,⁷ a competitor of the corporation,⁸ a total stranger not directly interested in the act or contract,⁹ the corporation itself,¹⁰ or the other party to the alleged ultra vires contract,¹¹ although usually the same rules apply without regard to whether ultra vires is set up by the corporation or by the other party to the contract.

Fourthly, the failure to notice whether the federal rules are to be followed in state courts or whether the state rules are to be followed in the federal courts, in case of contracts fully executed on one side only, may explain some decisions apparently out of line.¹²

Fifthly, decisions relating to contracts of municipal corporations are not necessarily to be followed, since the invalidity of contracts because ultra vires is more strictly maintained in favor of municipal than of private corporations.¹³

§ 1509. — Scope of chapter and method of treatment. It is intended to treat in this chapter of the effect of ultra vires contracts, using that term in the strict sense as hereafter defined; ¹⁴ to treat in the next following chapter all questions relating to the effect of contracts which are "illegal" because against public policy or good morals

³ See §§ 1539-1557, *infra*.

⁴ See § 1604, *infra*.

⁵ See § 1524, *infra*.

⁶ See § 1526, *infra*.

⁷ See § 1529, *infra*.

⁸ See § 1528, *infra*.

⁹ See § 1527, *infra*.

¹⁰ See § 1523, *infra*.

¹¹ See §§ 1568-1570, *infra*.

¹² See § 1538, *infra*.

¹³ *Mobile v. Moog*, 53 Ala. 561.

"The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid." *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 59, 3 Am. Rep. 322.

¹⁴ See §§ 1511-1514, *infra*.

or because expressly prohibited by statute or charter, except in so far as hereinafter noticed in this chapter; to exclude all questions relating to the power of corporate officers to make contracts or the effect of such contracts where the only objection to them is that they were made by the wrong officer;¹⁵ and to exclude all questions relating to the effect of informalities in making or executing the contract.¹⁶ In preceding chapters the questions as to what particular contracts are ultra vires, in the sense of being beyond the express or implied powers of the corporation, have been considered.¹⁷ In subsequent chapters are treated the personal liability of directors and officers for ultra vires acts,¹⁸ and also the effect of ultra vires as a defense to an action against a corporation for a tort.¹⁹

In stating the law, as far as it can be ascertained, as to the effect of contracts not within the express or implied powers of the corporation (the sense in which the term "ultra vires" is used in this chapter), it is proposed to take up in order the following matters for consideration, viz.:

1. Who may urge ultra vires, and the different rules applicable as depending upon who is making the claim.²⁰

2. The effect of ultra vires contracts where wholly executory on both sides.²¹

3. Contracts executed on one side only, the question then being as to the right of the party who has not complied with the contract to set up ultra vires.²²

4. Contracts fully executed on both sides. In this phase contracts prohibited by statute, where the statute does not make the contract void, have been included because the same rules are applicable.²³ Furthermore, included herein, is the rule that only the state can object to ultra vires contracts, which is often referred to as the basis for other decisions but which, in practically every instance, where anything but mere dictum, simply means that the state is the only one that can interfere in case of wholly executed contracts which are ultra vires.

5. Contracts partly executed on both sides.²⁴

6. The next matter calling for consideration, and wherein there has been a tendency to avoid the defense of ultra vires, involves contracts apparently within the powers of a corporation but in fact outside of

¹⁵ See Chap. 42, *infra*, and Chap. 35, *supra*.

¹⁶ See Chap. 35, *supra*.

¹⁷ See §§ 782-803, *supra*.

¹⁸ See Chap. 42.

¹⁹ See chapter on Torts, *infra*.

²⁰ See §§ 1523-1529, *infra*.

²¹ See §§ 1530-1535, *infra*.

²² See §§ 1536-1558, *infra*.

²³ See §§ 1559-1584, *infra*.

²⁴ See §§ 1585-1590, *infra*.

its powers.²⁵ In this class of cases, the ultra vires is not connected with the contract itself so much as it is with the purpose of the corporation, and hence the question of the knowledge of such purpose by the other party to the contract is generally an important factor, although there is a line of decisions holding such knowledge immaterial which it is difficult to reconcile with the generally accepted rules. Moreover, some courts take this opportunity to draw a line between contracts executed on one side only which they hold may be enforced notwithstanding they are ultra vires where there is merely an "abuse" or "excess" of a corporate power, and contracts wholly beyond the corporate powers which they hold cannot be enforced.²⁶

7. Conceding that a corporation can escape liability on a contract where it is ultra vires, or that it may set aside or avoid its contracts which are ultra vires, the law steps in and says to the corporation that it cannot obtain affirmative relief unless it restores benefits received and also that it may be sued on an implied contract for benefits actually received from the performance of the contract by the opposing party. And the same reasoning applies to the other party to the contract where he is the one who has received the benefits. This is the subject of the concluding subdivision of this chapter.²⁷

§ 1510. Historical. The doctrine of ultra vires, using the term in its strict sense, has been said to be "of very modern date, and entirely the creation of the courts. * * * It affords, perhaps, the most remarkable instance in the history of English jurisprudence of the making of law by the judges; and having once been created, it is now probably saddled onto the backs of the courts, like Sinbad's Old Man of the Sea, not to be shaken off";²⁸ but the development of the law in regard thereto in recent years has largely disproved that prophecy written in 1877.²⁹

§ 1511. Definition—Strict construction. Possibly there is no term in the whole law used as loosely and with so little regard to its strict meaning as the term "ultra vires." Unfortunately this expression has been used by the courts and by writers on corporation law in more than one sense, and this has resulted in much confusion.

²⁵ See §§ 1591-1601, *infra*.

²⁶ See §§ 1591-1601, *infra*.

²⁷ See §§ 1602-1609, *infra*.

²⁸ Article in 6 Cent. Law J. 2.

²⁹ "It is of course true that in modern times there has been a steady

movement in the direction of enforcing unauthorized and prohibited contracts as between the parties." Article by George Wharton Pepper in 9 Harvard Law Rev. 255, 260.

Therefore, when the expression is used in the decision of a court, it is necessary, in order correctly to interpret the decision, to ascertain the sense in which it is used by construing it with reference to the facts of the particular case. An ultra vires contract, as the term will be used herein, and according to the strict and true construction of the term, is one not within the express or implied powers of the corporation as fixed by its charter, the statutes, or the common law.³⁰ Strictly speaking, they are "contracts not positively forbidden, but impliedly forbidden, because not expressly or impliedly authorized."³¹ The same definition applies to contracts made by municipal corporations.³² However, it includes not only contracts (1) entirely without the scope and purpose of the charter privileges and not pertaining to the objects for which the corporation was chartered, but also contracts (2) beyond the limitations of the powers conferred by the charter, although within the purposes contemplated by the articles of incorporation.³³

What acts or contracts are ultra vires and what are not ultra vires has been already stated in previous chapters.³⁴

§ 1512 — Distinguished from acts expressly prohibited or against public policy. When properly used, the words "ultra vires," as applied to the act of a corporation, mean simply an act which is beyond the powers conferred upon the corporation by its charter, as distinguished from an act which is authorized by its charter. The act need not necessarily be expressly prohibited by the charter or by any other statute. Nor need it be in any sense immoral or injurious to others. It may be an act which could be lawfully done by a natural person. It may be even praiseworthy, as in the case of a gift by a

³⁰ **Alabama.** Buck Creek Lumber Co. v. Nelson, 188 Ala. 243, 66 So. 476.

Illinois. Bradbury v. Waukegan & W. Mining & Smelting Co., 113 Ill. App. 600.

Iowa. State v. Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500.

Maryland. Pennsylvania R. Co. v. Minis, 120 Md. 461, 488, 87 Atl. 1062.

North Dakota. Tourtelot v. Whithed, 9 N. D. 407, 84 N. W. 8.

Oklahoma. Crowder State Bank v. Aetna Powder Co., 41 Okla. 394, L. R. A. 1917 A 1021, 138 Pac. 392.

Texas. First Nat. Bank of Greenville v. Greenville Oil & Cotton Co., 24 Tex. Civ. App. 645, 60 S. W. 828.

"Strictly speaking, an ultra vires act of a corporation is one which it has no power under its charter to perform." Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co., 12 Ga. App. 818, 825, 79 S. E. 45.

³¹ Tourtelot v. Whithed, 9 N. D. 467, 479, 84 N. W. 8.

³² 3 McQuillin, Mun. Corp. § 1172.

³³ American Southern Nat. Bank v. Smith, 170 Ky. 512, 186 S. W. 482.

³⁴ See Chaps. 21-34, supra.

corporation for charitable or religious purposes. Yet, if it is not authorized by the charter of the corporation, or is not an implied or incidental power, it is *ultra vires*.³⁵

The expression "*ultra vires*" is also applied to acts of a corporation which are immoral or contrary to some settled principle of public policy, or which are in violation of an express prohibition in its charter or some other statute. Such an act is *ultra vires*, of course, but it is something more. It is illegal, not merely because it is *ultra vires*, or beyond the powers conferred upon the corporation, but, as in the case of an act of a natural person, because of its immorality, or of its being contrary to public policy, or its being in violation of an express legislative prohibition.³⁶ Such acts, strictly speaking and as the term is used in this chapter, are not *ultra vires*.³⁷ As has been aptly stated,

³⁵ "When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created." *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. And see *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

³⁶ See *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *White v. Franklin Bank*, 22 Pick. (Mass.) 181.

³⁷ *United States*. *Gorrell v. Home Life Ins. Co. of New York*, 63 Fed. 371.

Dakota. *Neillsville Bank v. Tut-hill*, 4 Dak. 295, 30 N. W. 154.

Iowa. *State v. Corning State Sav. Bank*, 136 Iowa 79, 113 N. W. 500.

Maryland. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70.

Michigan. *In re Citizens' Mut. Fire Ins. Co. of Holly*, 127 N. W. 769.

New Jersey. *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828, aff'g 77 N. J. Eq. 328, 76 Atl. 1048.

New York. *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 35, 36 L. R. A. 664, 45 N. E. 390; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 269.

North Dakota. *Tourtlot v. Whithed*, 9 N. D. 467, 478, 84 N. W. 8.

Texas. *Bond v. Terrell Cotton & Woolen Mfg. Co.*, 82 Tex. 309, 313, 18 S. W. 691.

"*Ultra vires* and illegality represent totally different ideas." *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 614, 63 Atl. 70.

"An illegal contract, the same being illegal in the sense of *malum in se* or *malum prohibitum*, is *ultra vires* of anyone to make, corporation or private individual; so when the contract in question is of a corporation it would avoid confusion if the terms '*illegal*' and '*ultra vires*' were divorced, and only the latter used, especially where the question is not of its legality but purely whether or not it is *ultra vires* of the corporation

"when acts of corporations are spoken of as ultra vires, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred."³⁸ A contract may be both ultra vires, using the term in its strict sense, and also against public policy so as to be "illegal," as the term is used herein. For instance, it is often held that a sale or lease by a quasi public corporation of all its property is not only ultra vires but also against public policy.³⁹ On the other hand, a contract is not necessarily "illegal," using the term in the sense herein defined, merely because it is ultra vires, at least according to the decisions of most of the courts.⁴⁰ In other words, a contract may not be within the powers of a corporation, so that it is ultra vires, and yet not be "illegal" in the sense that it is expressly or impliedly prohibited by a statute or the charter, or against morals, or against public policy.

It would greatly facilitate a clear understanding of the law in connection with this subject if the courts and writers would not use the

making it." Note in 70 Am. St. Rep. 156, 157.

"The phrase 'ultra vires' unfortunately has been used to designate, not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy or contrary to some statute expressly prohibiting them. The latter class of acts are now termed 'illegal' and the term 'ultra vires' is confined to the former class." In re Grand Union Co., 219 Fed. 353, 363.

"Ultra vires and illegality represent totally different ideas. * * * Ultra vires contracts are strictly speaking only those which are defective solely because they are beyond the power of the corporation; when they involve some adventure or undertaking not within the scope of the charter, which is the rule of its corporate action. If the contract is illegal as in violation of established principles of public policy, it cannot, of course, be enforced, * * * and the like result will follow if the contract is repugnant to the Code."

Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 614, 60 Atl. 70.

As said in a New York case, "the inexact and misleading use of the word 'illegal,' as applied to contracts of corporations ultra vires only, has been frequently alluded to." Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390.

Rule applied to municipal contracts, see McQuillin, Mun. Corp. § 1172.

³⁸ Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

³⁹ See §§ 1216, 1237, supra.

⁴⁰ According to the federal rule, as hereafter explained (§ 1540, infra), a contract merely ultra vires is void, and hence may be considered illegal; but in most of the states a contrary rule prevails (§ 1547, infra), and even where the federal rule prevails an act or contract which on its face is not ultra vires, but is merely an "excess" of power is held, in most jurisdictions, enforceable, at least where the other party to the contract had no knowledge of the excess.

word "illegal" where an act or contract of a corporation is merely beyond its powers as distinguished from being expressly or impliedly forbidden by express words in a statute or the charter or against morals or against public policy. If an act or contract is illegal, as the term is used herein, it is doubtless *ultra vires* in the broad sense as being "without power"; but for the purpose of applying one set of rules to acts or contracts which are merely beyond the powers of the corporation, and another set of rules to acts or contracts which are not only beyond the powers of the corporation but are prohibited by statute or charter or are immoral or are against public policy, it is necessary to separate the two and treat them as involving different matters. Therefore, in this chapter an attempt is made to state the rules relating to the effect of *ultra vires* acts and contracts, not illegal in the sense already stated, except as hereinafter noted, while in the next succeeding chapter the rules as to the effect of illegal acts and contracts which are something more than merely beyond the powers of the corporation are considered.

§ 1513. — Distinguished from acts beyond powers of particular officers. The expression "*ultra vires*" has also been applied to acts done by the directors or other officers of a corporation in excess of the powers conferred upon them by the stockholders. Such an act, however, is not necessarily *ultra vires* the corporation. An act may be within the powers of a corporation and not within the powers of the directors, for the powers of the latter are derived, not from the legislature, like the powers of the corporation, but from the stockholders in their corporate capacity. A result of this distinction is that the stockholders of a corporation, while they cannot by ratification render valid an act which is beyond the powers of the corporation, may ratify an act which is within its powers, but beyond the powers of the directors.⁴¹ The courts often refer to contracts as *ultra vires* where all that is meant is that a particular officer had no power to make the contract. These questions will be considered in a subsequent chapter.⁴² In this class of cases, the question is merely one of agency and therefore governed by old and well settled rules of law relating to agency.

⁴¹ See *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

It is a misnomer to speak of acts of a corporate officer or agent, in excess of his powers but within the powers of the corporation, as *ultra*

vires. *Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 12 Ga. App. 818, 825, 79 S. E. 45; *Kelley, Maus & Co. v. O'Brien Varnish Co.*, 90 Ill. App. 287.

⁴² See Chap. 42.

§ 1514. — **Distinguished from acts done without complying with certain conditions or formalities.** Another class of corporate contracts which are sometimes said to be ultra vires, although the phrase as applied to them is inaccurate, is where the power exists to do what was done, provided the corporation does it in a certain prescribed way.⁴³ Thus, informalities in connection with the consent of stockholders to the contract are often incorrectly referred to as ultra vires, using the term in its strict sense.⁴⁴ The fact that the required consent of stockholders is not obtained does not make a contract ultra vires.⁴⁵

The effect of failure to comply with such conditions or observe such formalities has already been stated in a previous chapter.⁴⁶

§ 1515. **Classification of ultra vires acts.** Keeping in mind these general rules as already laid down, the subject of the effect of ultra vires contracts, using the word ultra vires in its strict sense,⁴⁷ subdivides itself into four divisions, each of which is governed by rules peculiar to itself, as follows:

1. Contracts executed on both sides, which the courts will not set aside or interfere with for the purpose of depriving either party of what has been acquired under them.⁴⁸

2. Contracts executory on both sides, which will not be enforced at the suit of either party, because their enforcement is not required by any equitable principle, and would be contrary to public policy.⁴⁹

3. Contracts executed on one side, and executory on the other, which the courts in some jurisdictions, although not in all, will enforce in favor of the party who has executed the same on his part against the other party who has received and retains the benefits, on the ground that equitable principles, outweighing considerations of public policy, require that the latter should not be permitted, while retaining the

⁴³ Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., 197 Fed. 347, 358.

⁴⁴ See *Drewry v. Columbia Amusement Co.*, 87 S. C. 445, 69 S. E. 879.

⁴⁵ "The statute, indeed, made it a prerequisite to the action of the board of directors that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it. The distinction between the doing by a cor-

poration of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court." *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 570, 43 L. Ed. 1081.

⁴⁶ See Chap. 35, *supra*.

⁴⁷ See §§ 1511-1514, *supra*.

⁴⁸ See §§ 1559-1584, *infra*.

⁴⁹ See §§ 1530-1535, *infra*.

benefits of the contract, to escape liability on the ground that it was *ultra vires*.⁵⁰

4. Contracts, whether wholly executory or executed on one side, apparently authorized, but in fact *ultra vires* because made for a purpose not within the scope of the business of the corporation, the *ultra vires* purpose being unknown to the other party—which contracts are enforceable against the corporation.⁵¹ This includes contracts evidenced by negotiable instruments which are valid and binding upon the corporation in the hands of a bona fide purchaser, the instrument being apparently within the powers of the corporation, but having in fact been given for an *ultra vires* purpose, or in an *ultra vires* transaction.⁵²

It is necessary, therefore, clearly to keep in mind the distinction between executed and executory contracts⁵³ although the courts have sometimes differed in applying the rule and also have occasionally applied the rule relating to executory contracts to executed contracts and vice versa.

§ 1516. *Ultra vires* acts as the acts of the corporation. The doctrine so often laid down by the courts—that a corporation has such powers only as are conferred upon it by its charter—if taken literally, would be equivalent to saying that an act done by the officers of a corporation on its behalf and in its name, but in excess of its powers, even though authorized by the stockholders in their corporate capacity, is not the act of the corporation at all, or, in other words, that it is impossible for a corporation, as distinguished from its officers and stockholders, to do an act which is not authorized by its charter; and in some of the earlier cases it was so held. In an Ohio case, for instance, where a corporation, acting *ultra vires*, had entered into a contract and taken the note of a third person indorsed by the other party to the contract, it was held that the corporation acquired no title to the note and could not enforce it. The court said: “If a fair construction of its charter does not confer the power, it is incompetent to become a party to the contract of indorsement, and without capacity to take or hold the title. As well might a dead man, by the mere act of the indorser, be invested with the legal interest, as a corporation, which only lives for the purposes and objects intended by

⁵⁰ See §§ 1536-1558, *infra*.

⁵¹ See §§ 1591-1601, *infra*.

⁵² See §§ 1595, 1596, *infra*.

⁵³ See Hammon, Contracts, §§ 11-13.

When contract of sale of personal property is executed and when executory, within statute of frauds, see

Hammon, Contracts, § 297a.

the legislature. Beyond these limits it has no existence, and its acts are neither more nor less than a nullity."⁵⁴

This view, however, cannot be sustained, and it has been expressly repudiated in a number of cases. The rule that a corporation has no powers except such as are conferred by its charter cannot and does not mean that it cannot exceed its powers. A corporation has no right or authority to do acts which are not within the powers conferred upon it by the legislature, but, as in the case of an individual, it is possible for it to do wrong. It may exceed its powers and do an ultra vires act, and the act will be, in contemplation of the law, not merely the act of the officers or stockholders, but the act of the corporation itself.⁵⁵ "Like natural persons," said Chief Justice Comstock in a New York case, corporations "can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. * * * The distinction * * * is no more to be lost sight of in respect to artificial than in respect to natural persons."⁵⁶ It follows from this that there is nothing in the "nature" of a corporation which must necessarily prevent it from acquiring rights or incurring liabilities by reason of an ultra vires act.

As we shall presently see, an ultra vires act of a corporation is a violation of its charter by the corporation, for which the state may institute proceedings to forfeit the charter. A conveyance or transfer of property to or by a corporation may transfer the title, though the corporation has no power under its charter to hold or transfer the property.⁵⁷ When an ultra vires contract with a corporation is fully executed by both parties, the courts will not interfere at the instance of either party to deprive the other of the rights acquired under the contract.⁵⁸ Actions quasi ex contractu may be maintained under some circumstances, by or against a corporation, for money or property loaned, paid or delivered under an ultra vires contract.⁵⁹ And in some states, but not in all, when an ultra vires contract with a corporation has been fully performed by one of the parties, and the

⁵⁴ *Straus v. Eagle Ins. Co.*, 5 Ohio St. 60. See also *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

⁵⁵ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; *Bis-*

sell v. Michigan Southern & N. I. R. Co., 22 N. Y. 258; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 31.

⁵⁶ *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 259.

⁵⁷ See §§ 1561-1575, *infra*.

⁵⁸ See § 1559, *infra*.

⁵⁹ See §§ 1602-1609, *infra*.

other has received the benefit of such performance, the latter is estopped to set up the ultra vires character of the transaction to defeat an action on the contract itself.⁶⁰

Torts and crimes are always ultra vires, and yet it is well settled that a corporation may commit a tort and be liable in damages therefor,⁶¹ and it may be guilty of a misdemeanor, and be indicted, convicted, and fined therefor.⁶² This is sufficient to show beyond any doubt that a corporation may exceed its powers.

The ability of a corporation to contract cannot be attacked, in an action by the corporation on the contract, by defendant who is the other party to the contract.⁶³

§ 1517. Estoppel to deny power to contract. As was shown in a previous chapter, an association which assumes to exercise corporate powers and enters into a contract as a corporation and persons who contract with it as a corporation are estopped, in an action on the contract, to deny its corporate existence.⁶⁴ This principle, however, does not apply where the question is whether a contract is within the powers conferred upon a corporation by its charter; and in such case neither the corporation nor the person contracting with it is estopped, merely by reason of entering into the contract, from pleading that it is ultra vires.⁶⁵ A corporation is not estopped to show that a contract was beyond its power to make,⁶⁶ and hence, since estoppels must be mutual, the other party to the contract is not estopped to set up that the contract was beyond the powers of the corporation. In other words, the mere act of entering into the contract does not estop either party to show that the contract is ultra vires. If it did, ultra vires could not be set up as against a contract wholly executory, whereas

⁶⁰ See §§ 1543-1547, *infra*.

⁶¹ See chapter on Torts, *infra*.

⁶² See chapter on Penalties and Crimes, *infra*.

⁶³ *Belvidere Water Co. v. Town of Belvidere*, 88 N. J. L. 696, 92 Atl. 365.

⁶⁴ See Chap. 11, *supra*.

⁶⁵ *United States. Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081.

Illinois. National Home Building & Loan Ass'n v. Home Sav. Bank, 181 Ill. 35, 64 L. R. A. 399, 72 Am. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303.

Indiana. Huter v. Union Trust Co., 51 N. E. 1071.

Michigan. Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

Minnesota. Nicollet Nat. Bank v. Frisk-Turner Co., 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

⁶⁶ *Oregonian Ry. Co., Ltd. v. Oregon R. & Nav. Co.*, 23 Fed. 232; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

the rule that wholly executory contracts may be attacked as ultra vires is one of the few rules as to which there is no contention.⁶⁷ All this, however, does not mean that either party to the contract may not, by his acts, be estopped from setting up ultra vires.

Power on the part of a manufacturing corporation to enter into a contract of speculation, said Chief Justice Cooley in a Michigan case, "being withheld on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the state for general reasons has withheld from it."⁶⁸

As we shall presently see, however, it is held in some states that a corporation may be estopped to deny its power to enter into a particular contract, where the contract is apparently within its powers, and is rendered ultra vires because of extraneous facts peculiarly within the knowledge of the corporation, and not known to the other party.⁶⁹ And in some states, although not in all, the contention that a contract is ultra vires, either against the corporation or against the other party, where the contract has been performed by one of the parties and the other has received the benefit of such performance, is said to be precluded on the theory of an estoppel.⁷⁰

§ 1518. Ratification. A corporation may ratify the acts of its officers or agents, provided they are not ultra vires;⁷¹ and ratification may confirm a voidable act but not one wholly void.⁷² But if a contract is ultra vires, in the strict sense of the word, it cannot ordinarily be ratified so as to make it valid.

In a preceding chapter, the question whether the consent of all the stockholders to an act of the corporation can make such act within the powers of the corporation has been considered at some length.⁷³ It may be stated as a general rule that the ratification by the corporation of an ultra vires act does not validate it,⁷⁴ and this is also true

⁶⁷ See §§ 1530-1535, *infra*.

⁶⁸ *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

⁶⁹ See §§ 1591-1601, *infra*.

⁷⁰ See § 1554, *infra*.

⁷¹ See chapter on Officers and Agents, *infra*.

⁷² *Schwab v. E. G. Potter Co.*, 194 N. Y. 409, 419, 87 N. E. 670, *aff'g* 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439; *Pollitz v. Wabash R. Co.*, 150 N. Y. App. Div. 709, 135 N. Y. Supp. 785.

⁷³ See § 801, *supra*.

⁷⁴ *United States v. Watkins Salt Co. v. Mulkey*, 225 Fed. 739, 745; *Rich-*

as to ratification by the stockholders.⁷⁵ A fortiori, all the stockholders cannot so ratify a contract as to make it valid as against creditors injured thereby.⁷⁶

However, there is some authority tending to hold the contrary in case of ratification by stockholders, at least where the rights of the state or of creditors are not involved.⁷⁷ Thus, in a suit to foreclose a mortgage, it was held in New Jersey that the corporate mortgagor was estopped to set up the defense that the secured accommodation notes were ultra vires, where given with the consent of all the stockholders;⁷⁸ all on the theory that where no question of public policy is concerned, and therefore the rights of the state or of the public are

mond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co., 126 Fed. 712, rev'g on other grounds 119 Fed. 709.

Illinois. Durkee v. People, 53 Ill. App. 396, aff'd 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626.

Maine. Bangor Boom Corporation v. Whiting, 29 Me. 123.

Michigan. Taymouth v. Koehler, 35 Mich. 22.

New Jersey. National Trust Co. v. Miller, 33 N. J. Eq. 155.

Utah. Davis v. Flagstaff Silver Min. Co. of Utah, 2 Utah 74.

So an ultra vires contract of a municipal corporation cannot be ratified. 3 McQuillin, Mun. Corp. § 1256.

⁷⁵ Alabama Great Southern R. Co. v. Loveman Compress Co., — Ala. —, 72 So. 311; First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 533, 70 L. R. A. 79, 86 S. W. 109 (dicta); Pitcher v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608, 614, 81 Pac. 1047.

The consent of all the stockholders to the performance of an ultra vires act does not estop the corporation from challenging the act as void because prohibited by a statute forbidding corporate contracts except such as are necessary in legitimately carrying into effect the objects and purposes of the corporation. Savannah Ice Co. v. Canal-Louisiana Bank &

Trust Co., 12 Ga. App. 818, 79 S. E. 45.

When a corporation enters into a contract which it has no power to make under any circumstances, such contract is void as to its creditors, although assented to by all of its stockholders. Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 174, 52 Pac. 1067.

⁷⁶ In re Prospect Worsted Mills, 126 Fed. 1011.

⁷⁷ Where a contract is ultra vires, but is not malum prohibitum or malum in se, and only the interests of the stockholders are concerned, the corporation cannot rely on the defense nor can it be made to do so by the stockholders when all of them consented to the making of the contract. Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & Trust Co., 169 Ky. 840, 185 S. W. 156; Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167.

⁷⁸ "To permit stockholders of corporations to unanimously make a disposition of the corporate property, where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud." Perkins v. Trinity Realty Co., 69 N.

not involved, and where no creditors exist, and all the stockholders have assented to the action, there is no basis for the defense of ultra vires.⁷⁹ In a decision in Kentucky, the rule is laid down that "where a contract is ultra vires, and does not conflict with any interest of the state, and is not against any principle of public policy, and where only the interests of the stockholders are involved, the corporation cannot rely upon this defense, nor can it be made to do so by the stockholders when all of them consented for the contract to be made."⁸⁰

However, in case of ultra vires contracts of a municipal corporation, they may be ratified by an act of the legislature,⁸¹ and this rule has been applied to contracts of a private corporation.⁸²

§ 1519. Nature of corporation as material. It has been said that "the courts, in considering the effect of ultra vires acts, have always recognized the distinction between business and trading corporations and corporations whose purposes are largely fiduciary," such as banks,⁸³ but apparently all that is meant thereby is that acts of the latter may be contrary to public policy and hence void where perhaps like acts on the part of other corporations would be ultra vires but not against public policy.⁸⁴

§ 1520. Defense not favored. It is the policy of the law to look with disfavor upon the defense of ultra vires,⁸⁵ especially when interposed by a corporation to avoid an obligation otherwise legal and

J. Eq. 723, 732, 61 Atl. 167, aff'd without opinion in 71 N. J. Eq. 304, 71 Atl. 1135.

⁷⁹ Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 731, 61 Atl. 167, aff'd without opinion in 71 N. J. Eq. 304, 71 Atl. 1135.

⁸⁰ Lincoln Court. Realty Co. v. Kentucky Title Sav. Bank & Trust Co., 169 Ky. 840, 849, 185 S. W. 156, where all the stockholders consented to the giving of a note and mortgage to furnish money for another corporation, and in an action on the note and to foreclose the mortgage it was held that the consent of all the stockholders precluded the plea of ultra vires.

⁸¹ 4 McQuillin, Mun. Corp. § 1894.

⁸² See In re Buffalo, N. Y. & E. R. Co., 74 N. Y. St. Rep. 345, 37 N. Y. Supp. 1048.

⁸³ Gause v. Commonwealth Trust Co., 196 N. Y. 134, 154, 24 L. R. A. (N. S.) 967, 89 N. E. 476, aff'g 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080.

⁸⁴ See Nassau Bank v. Jones, 95 N. Y. 115, 120, 47 Am. Rep. 14.

⁸⁵ Wykes v. City Water Co. of Santa Cruz, 184 Fed. 752, aff'd 202 Fed. 357; Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039; National Surety Co. v. Hall-Miller Decorating Co., 104 Miss. 626, 46 L. R. A. (N. S.) 325, 61 So. 700; Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co., — Tex. Civ. App. —, 184 S. W. 238.

equitable.⁸⁶ It has been said by an English judge that "the safety of men in their daily contracts requires that this doctrine of ultra vires should be confined within narrow bounds."⁸⁷

So it is a very common thing for the courts to say that the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it will defeat the ends of justice or work a legal wrong;⁸⁸ but this glittering generality is of very little value in its practical working, since the courts seem not to agree as to when such a plea will advance justice or work a legal wrong. So it is sometimes said that "the claim that a contract is void because beyond the charter powers of a corporation is seldom recognized as a defense to an agreement otherwise unobjectionable, and never except as a shield against wrong."⁸⁹ What is meant by "a shield against wrong"? What would be a "wrong" in the eyes of a stockholder in a corporation sought to be held on an ultra vires contract might well be a "right" in the eyes of the other party to the contract seeking to enforce it, and vice versa.

§ 1521. Contracts ultra vires in part only. If the contract is separable, it may be sustained and enforced as to the part not ultra vires, and held invalid as to the part ultra vires.⁹⁰ For example, securities taken by a corporation, though ultra vires as to some of the debts secured, may be enforced as to those debts for which the

⁸⁶ *Seamless Pressed Steel & Manufacturing Co. v. Monroe*, 57 Ind. App. 136, 106 N. E. 538.

⁸⁷ *Eastern Counties Ry. Co. v. Hawks*, 5 H. L. Cas. 331, 371, quoted and approved in *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 534, 70 L. R. A. 79, 86 S. W. 109.

⁸⁸ *Burke Land & Livestock Co. v. Wells, Fargo & Co.*, 7 Idaho 42, 61, 60 Pac. 87; *Hopkins County v. St. Bernard Coal Co.*, 114 Ky. 153, 24 Ky. L. Rep. 942, 70 S. W. 289; *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 526, 70 L. R. A. 79, 86 S. W. 109.

"The passages cited by the plaintiff from *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267, and *San Antonio v. Mehaffy*, 96 U. S. 312, 315, are no more than a passing remark that 'the doctrine of ultra vires, when

invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong,' and a repetition, in substance, of the same remark, adding 'if such a result can be avoided.'"
Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 55, 35 L. Ed. 55.

⁸⁹ *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 120, 46 Atl. 1054.

⁹⁰ *First Nat. Bank of Wallace v. Callahan Min. Co.*, 28 Idaho 627, 155 Pac. 673; *Calumet & C. Canal & Dock Co. v. Conkling*, 273 Ill. 318, L. R. A. 1917 B 814, 112 N. E. 982; *Grand Gulf Bank v. Archer*, 16 Miss. 151; *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

corporation was authorized to take them.⁹¹ And where a corporation issues bonds and executes a mortgage to secure the same, the bonds are valid, if within the powers of the corporation, though the mortgage may be ultra vires.⁹² The rule also applies where a corporation executes a mortgage covering property which it has no power to mortgage, as well as property which it may mortgage. The mortgage is valid as to the latter.⁹³ Thus, a conveyance or mortgage by a corporation of its franchises and property is not invalid as to such property as it could convey or mortgage because it is invalid as to the franchises and as to property necessary to enable it to perform its duty to the public.⁹⁴ And a mortgage to secure debts lawfully contracted by the corporation is not invalid as to these because it also covers alleged indebtedness under ultra vires contracts.⁹⁵

The same rule applies to contracts of municipal corporations.⁹⁶

§ 1522. Contracts for undisclosed principal. When a corporation acts as agent of an undisclosed principal, so as to be itself liable as a principal, it is entitled, when such liability is sought to be enforced, to all the rights and privileges which the law would give it if it occupied the position of principal in fact as well as in law. And therefore, when a corporation is sued upon a contract entered into by it as agent for an undisclosed principal, its plea that the contract was ultra vires cannot be avoided on the ground that the contract is one which the undisclosed principal could have made.⁹⁷

II. WHO MAY URGE ULTRA VIRES

§ 1523. In general. As already noted, the question as to the effect of ultra vires acts often depends on who is urging ultra vires. Thus

⁹¹ *Kansas Valley Nat. Bank v. Rowell*, 2 Dill. (U. S.) 371, Fed. Cas. No. 7,611. In this case it was held that a real estate mortgage to a national bank, to secure a debt previously contracted, might be enforced to this extent, although it also secured future advances, for which, under the National Bank Act, it could not take a mortgage on real estate.

⁹² *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197; *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574.

⁹³ *Hendee v. Pinkerton*, 14 Allen

(Mass.) 381; *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211.

⁹⁴ *Hendee v. Pinkerton*, 14 Allen (Mass.) 381. And see *Butler v. Rahm*, 46 Md. 541; *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43; *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. St. 13, 21 Atl. 211.

⁹⁵ *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43, 51.

⁹⁶ 3 *McQuillin*, Mun. Corp. § 1250.

⁹⁷ *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264.

the state may have the right to urge it, although neither of the parties to the contract may urge it, as in the case of an executed contract.⁹⁸ So a party to the contract may, under some circumstances, urge ultra vires in a case where a total stranger would not have that right.⁹⁹ Likewise, dissenting stockholders sometimes sue to enjoin the execution or performance of an ultra vires contract where neither party to the contract could set up the claim.¹ All these, as well as other matters, will be considered herein.

The selling company or its stockholders cannot, it has been held, urge the objection that the purchasing corporation had no power to purchase.²

Leaving out of consideration the so-called estoppel to set up ultra vires where the party urging it has received and still retains the benefits of the contract, as declared in some jurisdictions,³ it seems that the general rules of estoppel are applicable, and that either party to an ultra vires contract, may, under some circumstances at least, be estopped by his or its conduct, to urge ultra vires.⁴ So the right to raise the defense of ultra vires may be lost by laches.⁵

The receiver of a corporation stands in the shoes of the corporation, it seems, as far as the right to urge the effect of ultra vires acts or contracts is concerned.⁶

§ 1524. State—General rules. A court of equity does not administer punishment or enforce forfeitures for transgressions of law, but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had at law; and therefore a court of equity has no jurisdiction of a bill or information by the attorney or solicitor general in the name or on behalf of the state to restrain a corporation from engaging in transactions which are prohibited or not authorized by its charter, if this is the only ground for relief.⁷ In such a case the remedy of the state is at law

⁹⁸ See §§ 1561 et seq., *infra*.

⁹⁹ See § 1527, *infra*.

¹ See § 1526, *infra*.

² *Hinds & Adams Counties v. Nathecz, J. & C. R. Co.*, 85 Miss. 599, 629, 107 Am. St. Rep. 305, 38 So. 189.

³ See § 1543 et seq., *infra*.

⁴ *North Chicago St. R. Co. v. Chicago Union Traction Co.*, 150 Fed. 612.

⁵ *Patterson v. Northern Trust Co.*, 230 Ill. 334, 341, 82 N. E. 837, *aff'd* 132 Ill. App. 208.

⁶ See chapter on Receivers, *infra*.

⁷ *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *Independent Order of Foresters v. United Order of Foresters*, 94 Wis. 234, 68 N. W. 1011.

There is an exception in the case of corporations created for the purpose of administering a charitable trust, the beneficiaries of which are so

by an information in the nature of quo warranto, either to forfeit the charter of the corporation, or to oust it from the exercise of the unauthorized or prohibited powers.

When the state creates a corporation, the grant of the charter is on the implied condition that the corporation shall act within the powers conferred upon it. Ultra vires acts, whether otherwise wrong or not, are a breach of this condition. Such an act does not of itself put an end to the existence of the corporation, but it is, subject to qualifications which will hereafter be explained, ground for a direct proceeding by the state to obtain a judgment of forfeiture.⁸

When a corporation is guilty of exercising powers not authorized by its charter, the state, instead of proceeding against it to obtain a judgment forfeiting its charter, may proceed by quo warranto, to obtain a judgment merely ousting it from the further exercise of the unauthorized powers.⁹

numerous as to render it necessary for a court of equity to interpose at the suit of the state for the purpose of enjoining or redressing breaches of trust. *Attorney General v. Garrison*, 101 Mass. 223.

Action by attorney general to enjoin ultra vires acts of municipal corporations, see 5 McQuillin, *Mun. Corp.* § 2580.

⁸ *Mississippi*. *State v. Mississippi Cotton Oil Co.*, 79 Miss. 203, 30 So. 609.

Missouri. *State v. Delmar Jockey Club (Mo.)*, 92 S. W. 185.

New York. *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843. 24 N. E. 1099.

North Carolina. *Attorney General v. Holly Shelter R. Co.*, 134 N. C. 481, 46 S. E. 959.

Ohio. *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258.

Virginia. *South & W. R. Co. v. Com.*, 104 Va. 314, 51 S. E. 824.

See generally, chapter on Forfeiture, Dissolution, etc., *infra*.

The mere fact that a corporation is guilty of an ultra vires act does not,

ipso facto, terminate its existence. *People v. Board of Railroad Com'rs*, 101 N. Y. App. Div. 251, 91 N. Y. Supp. 977, where the court pointed out that a charter of a railroad corporation did not cease merely because it had built its line beyond a boundary specified, giving to the road a longer line than that upon which its capitalization was founded.

That the state should not interfere, see article in 11 *Harvard Law Rev.* 387.

⁹ *Maryland*. *Maryland Trust Co. v. National Merchants' Bank*, 102 Md. 608, 63 Atl. 70.

Massachusetts. *Attorney-General v. Salem*, 103 Mass. 138.

Michigan. *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

Nebraska. *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 92 N. W. 123.

New Jersey. *Borough of Mountain-side v. Board of Equalization of Taxes of New Jersey*, 81 N. J. L. 583, 80 Atl. 488.

New York. *New York Cement Co. v. Consolidated Rosendale Cement Co.*, 178 N. Y. 167, 70 N. E. 451; *People v.*

§ 1525. — Exception to rule where act a public nuisance or endangering public interests. There is an exception to the injunction rule where the unauthorized acts of the corporation, which it is sought to enjoin, constitute or create or threaten to create a public nuisance, or otherwise injuriously affect or endanger the public interests. In such a case a court of equity has jurisdiction to enjoin the nuisance or injury, and its jurisdiction is not defeated by the fact that the acts of the corporation are a violation of its charter or *ultra vires*.¹⁰ For example, it has been held in England that an information in equity by the attorney general will lie to restrain a railroad company from the *ultra vires* and unlawful obstruction of a public highway,¹¹ or from the unauthorized opening of a line which will be unsafe to the public.¹² And in Massachusetts it was held that such an information would lie to restrain a corporation from *ultra vires* acts which would result in an unauthorized drawing of water from a public pond, so as to impair the rights of the public in the use of the pond for fishing, boating, and other lawful purposes, and so as to create and expose on the shores of the pond slime, mud, and offensive vegetation detrimental to the public health.¹³

The jurisdiction of a court of equity to abate or prevent a nuisance

Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

Pennsylvania. Minersville Borough v. Schuylkill Elec. R. Co., 205 Pa. 402, 54 Atl. 1053.

Quo warranto as remedy to test validity of municipal contract, see 5 McQuillin Mun. Corp. § 2352.

¹⁰ Attorney General v. Jamaica Pond Aqueduct Corporation, 133 Mass. 361; Attorney General v. Great Northern Ry. Co., 4 De Gex & S. 75; Attorney General v. Oxford, W. & W. Ry. Co., 2 Wkly. Rep. 330. See also Attorney General v. Cohoes Co., 6 Paige (N. Y.) 133, 29 Am. Dec. 755; Attorney General v. Leeds Corporation, 5 Ch. App. 583; Attorney General v. Mid-Kent Ry. Co., 3 Ch. App. 100; Attorney General v. Great Eastern Ry. Co., 11 Ch. Div. 449; Attorney General v. Great Northern Ry. Co., 1 Drew. & S. 154.

¹¹ Attorney General v. Great Northern Ry. Co., 4 De Gex & S. 75.

¹² Attorney General v. Oxford, W. & W. Ry. Co., 2 Wkly. Rep. 330.

¹³ Attorney General v. Jamaica Pond Aqueduct Corporation, 133 Mass. 361.

In Attorney General v. Mid-Kent Ry. Co., 3 Ch. App. 100, a mandatory injunction was granted upon the information of the attorney general to compel a railroad company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter.

And in Attorney General v. Great Northern Ry. Co., 1 Drew. & S. 154, the vice chancellor restrained a railroad company from trading in coal in large quantities, upon the ground that there was danger that, if it were allowed to go on, it might get into its hands the coal trade of the whole district through which its railroad ran, and thus acquire a monopoly injurious to the public.

at the suit of the attorney general is limited to such public nuisances as affect and endanger the public safety or convenience, and require immediate judicial interposition, and where the relief sought cannot be otherwise obtained with equal facility. And it has been held, therefore, that the attorney general cannot maintain a suit against a gas-light company, a contractor with it, and one of its officers, to restrain the laying of gas pipes in the streets of a city, on the ground that the powers of the company have ceased because of failure on its part to commence business within the time prescribed by its charter, and that the laying of the pipes will be an injury to the highway and a public nuisance.¹⁴

Where a corporation, engaged in a business that is affected with a public interest, contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, such contract may be restrained in equity at the suit of the state, without regard to whether or not actual injury has resulted to the public.¹⁵

§ 1526. Stockholders. A nonassenting stockholder may enjoin a threatened ultra vires contract.¹⁶

¹⁴ *People v. Equity Gas Light Co.*, 141 N. Y. 232, 36 N. E. 194. See also *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264; *Attorney General v. Bay State Brick Co.*, 115 Mass. 431, 438; *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227; *Attorney General v. Sheffield Gas Consumers' Co.*, 3 De Gex, M. & G. 304.

¹⁵ *McCarter v. Firemen's Ins. Co.*, 74 N. J. Eq. 372, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048, 73 Atl. 80, rev'g 70 N. J. Eq. 291, 61 Atl. 705, holding business of fire insurance one affected with a public interest, and that contract in restraint of trade between fire insurance companies, fixing and regulating prices within a certain area, thereby limiting competition, was against public policy.

The state may enjoin an ultra vires act on the part of a quasi public corporation, as distinguished from a

strictly private corporation, where it will operate to impair its ability to properly discharge its public duties. *McCarter v. Pitman*, *Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

Rule applied to issuance of stock by gas company for property purchased in excess of the value of the property. *McCarter v. Pitman*, *Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

¹⁶ *Schwab v. E. G. Potter Co.*, 194 N. Y. 409, 87 N. E. 670, aff'g 129 N. Y. App. Div. 36, 113 N. Y. Supp. 439; *Victor v. Louise Cotton Mills*, 148 N. C. 107, 16 L. R. A. (N. S.) 1020, 16 Ann. Cas. 291, 61 S. E. 648.

A nonassenting stockholder may sue to set aside an ultra vires sale by the corporation of all its property for stock in the purchasing corporation. *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513.

A stockholder may institute pro-

The stockholders of a corporation have a right to expect and to insist that its funds shall not be diverted either by giving them away or by employing them in an ultra vires business or transaction, and any stockholder, therefore, has such an interest that he may apply to a court of equity for an injunction to prevent such a diversion, even though all the other stockholders may consent to the ultra vires act. Thus, it was held in a leading English case that a shareholder in a railroad company could maintain a bill in equity to enjoin the company from taking proceedings to form a steam packet company to run a line of packets beyond the terminus of its road, and guaranteeing a certain dividend on the stock of the packet company.¹⁷ In like manner a stockholder may sue to enjoin a corporation from using its funds in the ultra vires purchase of shares of stock in another corporation.¹⁸ However, a stockholder may be precluded from attacking an act as ultra vires by his laches.¹⁹ In other words, as said by a New Jersey court, if a stockholder "wants protection against the consequences of an ultra vires act he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others."²⁰ Furthermore, it need hardly be stated that where the stockholder has himself participated in the ultra vires act, or consented thereto, he will be estopped from maintaining legal proceedings to secure the an-

ceedings to have his corporation restrained from ultra vires acts operating to his injury. That a majority of the stockholders attempt to ratify the ultra vires act of the directors or officers does not bind a minority stockholder. *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

Taxpayer's suit to enjoin ultra vires acts of municipal corporations, see 5 *McQuillin*, Mun. Corp. § 2590.

¹⁷ *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1.

¹⁸ *Central R. Co. v. Collins*, 40 Ga. 582. See also *Byrne v. Schuyler Elec. Mfg. Co.*, 65 Conn. 336, 28 L. R. A. 304, 31 Atl. 833.

¹⁹ *Bridges v. Southern Bell Telephone & Telegraph Co.*, 136 Ga. 251, 254, 71 S. E. 161; *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87, 127 N. W. 226; *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102

Am. St. Rep. 731, 77 S. W. 1070. But see *Holt v. California Development Co.*, 161 Fed. 3. See, generally, chapter on Stock and Stockholders, *infra*.

"And the doctrine of laches also applies to acts alleged to be ultra vires. The illegality of corporate acts must be promptly exposed, and relief will be denied the corporators who wait until the evil has been done and the interest of innocent third parties has become involved." *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 582, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

A stockholder will be estopped by not objecting to the acts of a corporation which are not illegal, although they be ultra vires, where the rights of innocent persons have intervened. *State Nat. Loan & Trust Co. v. Fuller*, 26 Tex. Civ. App. 318.

²⁰ *Rabe v. Dunlap*, 51 N. J. Eq. 40, 48, 25 Atl. 959.

nulment of the consequences thereof.²¹ So, also, a stockholder may be barred from asserting the invalidity of a transaction whereby a corporation has borrowed money beyond the limit of its authorized indebtedness where the money has been expended for the benefit of the stockholders and the corporation.²² These questions are further considered, and more in detail, in a subsequent chapter.²³

Where a lessee of property from a corporation brings an action of forcible entry and detainer to obtain possession from a stockholder who refused to vacate, defendant cannot urge that the lease was ultra vires.²⁴ The purchaser of shares of stock cannot avoid ultra vires acts of the corporation authorized by his vendor, except those done after the purchase.²⁵

§ 1527. Strangers—General rules. Except where it is otherwise provided by statute,²⁶ it is a general rule, subject to certain exceptions, that a plea of ultra vires cannot be interposed by a stranger not a party to the contract,²⁷ at least if he is not injured by such acts

²¹ *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329; *McC Campbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070; *Gilman v. Druse*, 111 Wis. 400, 87 N. W. 557.

Where the objection to the acts of a corporation is that they are ultra vires, without being either mala prohibita or mala in se, a stockholder cannot sue to restrain such acts where he himself, with knowledge of the character of the acts, has accepted pecuniary benefits thereunder. *Wormser v. Metropolitan St. Ry. Co.*, 184 N. Y. 83, 112 Am. St. Rep. 596, 6 Ann. Cas. 123, 76 N. E. 1036, aff'g 98 N. Y. App. Div. 29, 90 N. Y. Supp. 714, holding also that it was immaterial that benefits were not received until after commencement of action; *Treadwell v. United Verde Copper Co.*, 134 N. Y. App. Div. 394, 119 N. Y. Supp. 112.

²² *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 99 N. W. 290.

²³ See chapter on Stock and Stockholders, *infra*.

²⁴ *Kelley v. Forney*, 80 Kan. 145, 101 Pac. 1020.

²⁵ *McC Campbell v. Fountain Head R. Co.*, 111 Tenn. 55, 75, 102 Am. St. Rep. 731, 77 S. W. 1070.

²⁶ *Martindale v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 508, and see this section, *infra*.

²⁷ *Peru Plow & Implement Co. v. Harker*, 144 Fed. 673; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762, 768; *Burke Land & Livestock Co. v. Wells, Fargo & Co.*, 7 Idaho 42, 60, 60 Pac. 87; *Lechenger v. Merchants' Nat. Bank of Houston* (Tex. Civ. App.), 96 S. W. 638.

"The rule seems to be based upon the proposition that he only can invoke the doctrine of ultra vires who can show the violation of some duty owing to himself." *State Ins. Co. of Des Moines v. Farmers' Mut. Ins. Co.*, 65 Neb. 34, 41, 90 N. W. 997.

The question of an alleged ultra vires transaction may not be set up by a stranger to promote his personal interests at the expense of the corporation. *Peru Plow & Implement Co. v. Harker*, 144 Fed. 673; *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

or contract.²⁸ As stated by Justice Peckham when he sat as a judge of the New York Court of Appeals, the rule is that "in general, no private citizen has the power to question, by resort to legal proceedings, the action of a corporation as being ultra vires where he has no other interest therein than any other citizen."²⁹ For instance, although the act of a corporation in acquiring a cause of action is ultra vires, yet the want of power to engage in such business cannot be interposed as a defense when the corporation seeks to enforce such cause of action.³⁰ Thus, the maker of a note cannot defend upon the

A second mortgagee seeking to foreclose cannot have the first mortgage held void, in the foreclosure suit, on the ground that the assignment of the first mortgage to a corporation was ultra vires. *Daniels v. Belvidere Cemetery Ass'n*, 193 Ill. 181, 61 N. E. 1031, aff'g 96 Ill. App. 387.

The fact that a corporation may perform ultra vires acts does not authorize individuals to seize and hold its property, and is no defense in an action of forcible entry and detainer by the corporation to recover possession of the property. *Woodlawn Social Entertainment Ass'n v. Anderson*, 187 Ill. App. 507, 513.

The owner of a nearby lot cannot enjoin a railroad company from allowing a house to be built and occupied by its licensee for storage of goods to be forwarded over its line, on the ground that such action is ultra vires of the company. *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126.

An abutting owner cannot enjoin the ultra vires act of a railroad company in constructing an elevated side track to the place of business of an industrial establishment, on the ground that the city has not granted permission for the proposed construction. *Thornton v. Stevens Coal Co.*, 117 Ill. App. 376, 382.

²⁸ *Fourth Nat. Bank of Fayetteville, N. C. v. Consolidated Steamboat Co.*, 12 Ga. App. 864, 76 S. E. 1057.

"No rights of the plaintiff have been invaded, and the complaint is simply this, that the defendant corporation is acting ultra vires. The defendant's stockholders and the state may complain, but the plaintiff cannot base a cause of action alone on any such a ground. He must show that some duty owing to him is being violated before he can maintain this suit because the defendant is exceeding its charter powers." *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 209, 8 L. R. A. 801, 13 S. W. 822.

"A stranger to the agreement or transaction has no right to question its validity, whether it was entered into between corporations or natural persons. To obtain a standing in a court of justice to make such inquiry, a party must show that he is interested in the question, and that the execution of the agreement operates to his injury or prejudice." *Ehrman v. Union Life Ins. Co.*, 35 Ohio St. 324, 337.

²⁹ *Starin v. Edson*, 112 N. Y. 206, 215, 19 N. E. 670.

³⁰ *Southern Lumber Co. v. Holt*, 129 La. 273, 55 So. 986; *Farwell Co. v. Wolf*, 96 Wis. 10, 37 L. R. A. 138, 65 Am. St. Rep. 22, 71 N. W. 109, 70 N. W. 289. Contra, see *Pueblo v. Shutt Inv. Co.*, 28 Colo. 524, 89 Am. St. Rep. 221, 67 Pac. 162.

Where a corporation purchases a chose in action and sues upon it, de-

ground that the contract whereby the note was transferred was ultra vires,³¹ or on the ground that the payee had no power to indorse it for transfer.³² So if a person is in possession of real property and an action is brought against him by a corporation to recover it or to quiet title or the like, defendant cannot set up that the title of plaintiff was acquired ultra vires, where defendant was a stranger to the original transaction alleged to be ultra vires,³³ and the rule is often stated that no one but the state can attack the title of a corporation to real property,³⁴ which rule, stated in other words, is merely that where a transfer of real property is wholly executed on both sides, neither a party to the contract, a stranger, nor any one else other than the state can attack the transfer as ultra vires; a stranger occupying the same position as a party to the transfer.

In Pennsylvania, a statute enacted in 1871 authorizes a private citizen, by bill in equity, to call upon a corporation to show, by its charter, that it has the power to do a certain act which involves some right of the complainant;³⁵ but such statute applies to direct interference with rights and not to consequential injury to interests,³⁶ and does not authorize investigation by such citizen into causes of for-

feudant cannot urge that the corporation had no power to make such purchase. *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 Tex. Civ. App. 555, 107 S. W. 609.

³¹ *Quinn v. First Nat. Bank of Fitzgerald*, 8 Ga. App. 235, 68 S. E. 1010.

³² *Winer v. Bank of Blytheville*, 89 Ark. 435, 444, 131 Am. St. Rep. 102, 117 S. W. 232.

³³ *Butte Hardware Co. v. Cobban*, 13 Mont. 351, 361, 34 Pac. 24.

Want of power of a corporation to hold real estate cannot be urged "by a stranger claiming the property unless, perhaps, such inability results from express statutory prohibition. Such merely ultra vires acts can be questioned only by persons directly interested in the corporation, or by the state, whose charter and franchises are exceeded or abused." *Illinois Steel Co. v. Warras*, 141 Wis. 119, 126, 123 N. W. 656.

³⁴ See § 1561, *infra*.

³⁵ *Germantown Passenger Ry. Co. v. Citizens' Passenger Ry. Co.*, 151 Pa. St. 138, 24 Atl. 1103, holding that under the 1871 statute, a street railway could enjoin another company from unlawfully laying tracks in a street already occupied by the complainant.

Where a statute provides that upon injury resulting from invasion of the rights of an individual by a corporation claiming to have the right to do the act complained of, the court shall ascertain whether the corporation possesses such right, and where it has found that it does not, shall restrain such wrongful act upon suit of private parties, a railroad corporation may be enjoined at the suit of an owner of abutting property from constructing a line of railroad on a street where the right so to do is expressly withheld from such corporation by statute. *Mory v. Oley Valley Ry. Co.*, 199 Pa. 152, 48 Atl. 971.

³⁶ *Blankenburg v. Philadelphia Rapid Transit Co.*, 228 Pa. 338, 77 Atl.

feiture other than those which may appear from the conditions and limitations of the charter.³⁷

§ 1528. — Competitors in business. A stranger whose rights have not been infringed by an ultra vires act of a competitor corporation cannot urge ultra vires to prevent the latter from acting beyond its powers, unless the right to do so is given by a statute. In other words, a competitor cannot attack acts of a corporation as ultra vires, merely on the ground of injurious competition, it is generally held,³⁸ where such acts are neither public nuisances nor trespasses.³⁹ For instance, in a case in the Supreme Court of the United States, a wharfinger sued a railroad company to enjoin the execution of a contract giving the latter certain wharfage rights free from the municipal control exercised over public wharves. In discussing this question as to whether the wharfinger had such a legal interest as to entitle him to sue, the court said: "If he has such interest it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the railroad company. But if the competition in itself, however injurious, is not

506; *Pennsylvania R. Co. v. Greenburg, J. & St. Ry. Co.*, 176 Pa. St. 559, 36 L. R. A. 839, 35 Atl. 122.

³⁷ *In re Western Pennsylvania R. Co.*, 104 Pa. St. 399.

³⁸ *New Orleans, M. & I. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015; *Golconda Northern Ry. v. Gulf Lines Connecting R. of Illinois*, 265 Ill. 194, Ann. Cas. 1916 A 833, 106 N. E. 818; *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 283; *Camblos v. Philadelphia & R. R. Co.*, 4 Brewst. (Pa.) 563, Fed. Cas. No. 2,331.

A corporation not directly and specially injured by the acts of a rival corporation cannot urge ultra vires as a ground for enjoining the latter company. *New Hartford Water Co. v. Village Water Co.*, 87 Conn. 183, 189, 190, 87 Atl. 358.

³⁹ See *Burns v. St. Paul City R. Co.*, 101 Minn. 363, 12 L. R. A. (N. S.) 757, 112 N. W. 412.

Where a corporation lacking power to manufacture and sell gas to consumers nevertheless lays gas mains, thereby creating a public nuisance which will result in special and irreparable injury to a private party, the lack of power of the corporation to engage in such business may be invoked by the party so injured as the basis for injunction. That the gas mains were laid under an implied license from the municipal authorities does not alter the rule. *Seattle Gas & Electric Co. v. Citizens' Light & Power Co.*, 123 Fed. 588, 595.

a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting ultra vires? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the appellant, although the railroad company may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the state itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." ⁴⁰

So a newspaper publisher cannot litigate the question whether advertisements in street cars are ultra vires. ⁴¹

§ 1529. — Creditors. Judgment creditors may impeach an ultra vires contract as in fraud of creditors, the same as any other contract. ⁴² But creditors of the corporation, whose rights are not infringed by the ultra vires contract, cannot attack it. ⁴³ They cannot attack a corporate transaction as ultra vires unless its intent or effect is fraudulently to divert the corporate assets from their debts. ⁴⁴ It

⁴⁰ Per Justice Matthews in *New Orleans, Mobile & I. R. Co. v. Ellerman*, 105 U. S. 166, 173, 26 L. Ed. 1015.

⁴¹ *Burns v. St. Paul City R. Co.*, 101 Minn. 363, 12 L. R. A. (N. S.) 757, 112 N. W. 412.

⁴² *Bank of Berwick v. George Vinson Shingle & Manufacturing Co.*, 124 La. 1000, 26 L. R. A. (N. S.) 1068, 50 So. 823.

⁴³ *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

⁴⁴ *Force v. Age-Herald Co.*, 136 Ala. 271, 33 So. 866; *Gullege v. Woods*, 108 Miss. 233, 66 So. 536.

Simple creditors of a corporation cannot attack a contract as ultra vires unless the corporation was insolvent. *Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & Trust Co.*, 169 Ky. 840, 185 S. W. 156.

In Washington, however, it is held that "when a corporation enters into a contract which under no circumstances it has power to make, such contract is void as to its creditors, although assented to by all its stockholders." *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 174, 52 Pac. 1067.

follows that ordinarily a subsequent creditor cannot object.⁴⁵ However, it has been held that if there is no estoppel on the part of a corporation to set up ultra vires, a creditor of the corporation is not estopped.⁴⁶

III. CONTRACTS EXECUTORY ON BOTH SIDES

§ 1530. **General rule.** It is well settled that so long as an ultra vires contract is wholly executory on both sides, neither party is estopped to deny the power of the corporation to make it. It follows that no action can be based upon such a contract, either by the corporation⁴⁷ or against it,⁴⁸ and that where an ultra vires contract is still execu-

⁴⁵ *Wilson v. Mechanical Orguinette Co.*, 57 N. Y. App. Div. 158, 68 N. Y. Supp. 173, rev'd on other grounds 170 N. Y. 542, 63 N. E. 550.

⁴⁶ *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 743.

⁴⁷ *United States. Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721.

Alabama. *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180.

Georgia. *Screven Hose Co. v. Philpot*, 53 Ga. 625.

Illinois. *Leigh v. American Brake Beam Co.*, 205 Ill. 147, 68 N. E. 713.

Michigan. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

Mississippi. *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.*, 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879.

New York. *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Gause v. Commonwealth Trust Co.*, 44 Misc. 46, 89 N. Y. Supp. 723.

Wisconsin. *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781; *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 7 Wis. 59.

England. *Shrewsbury & B. Ry. Co.*

v. Northwestern Ry. Co., 6 H. L. Cas. 113.

⁴⁸ *United States.* *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787; *Easun v. Buckeye Brewing Co.*, 51 Fed. 156; *Holt v. Winfield Bank*, 25 Fed. 812.

Alabama. *United States Fidelity & Guaranty Co. v. Town of Dothan*, 174 Ala. 480, 56 So. 953; *First Nat. Bank of Lineville v. Alexander*, 152 Ala. 585, 44 So. 866; *Simmons v. Troy Iron Works*, 92 Ala. 427, 9 So. 160.

California. *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.

Illinois. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593.

Massachusetts. *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

Minnesota. *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334, 74 N. W. 160.

New Hampshire. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

Ohio. *Coppin v. Greenless & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425.

Wisconsin. *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

tory, damages cannot be recovered from the corporation for refusal to perform.⁴⁹ Where the ultra vires contract is wholly executory, it is not enforceable either by a suit for specific performance or by an action for damages for breach of contract.⁵⁰ Moreover, stockholders may enjoin a corporation from entering into such a contract.⁵¹ Thus, an ultra vires covenant by a corporation, as a railroad company, for example, to make or take a lease, so long as it is executory, is absolutely void, and an action will not lie to recover damages for its breach or to compel specific performance.⁵²

This is true even in those states in which, as we shall presently see, it is held that a contract fully executed on one side may support an action. "While executed contracts, made by corporations in excess of their legal powers," it was said in a New York case, "have, in some cases, been upheld by the courts, and parties have been precluded from setting up, as a defense to actions brought by corporations, their want of power to enter into such contracts, this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations." ⁵⁴

In Kansas, however, it has recently been held that one who executed to a gas company a lease of land to explore for oil and gas, cannot maintain a suit to cancel the portion thereof relating to oil, although the corporation had no authority to engage in the oil business, and this notwithstanding the agreement was still executory; and the court said: "But the doctrine that only the state can challenge the validity of acts done under color of a corporate charter, if accepted, must necessarily protect an executory contract from collateral attack, equally with one that has been executed. The court is convinced of the soundness of the view that, in the absence of special circumstances affecting the matter, neither party to even an executory contract should be allowed to defeat its enforcement by the plea of ultra vires. The doctrine is logical in theory, simple in application, and just in result. It, of course, does not apply to contracts which are immoral, or which are illegal (as distinguished from merely unauthorized), or to those made by public corporations. Nor does it forbid interference by a stock-

England. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

⁴⁹ *National Car Advertising Co. v. Louisville & N. R. Co.*, 110 Va. 413, 24 L. R. A. (N. S.) 1010, 66 S. E. 88.

⁵⁰ *Hotchkiss v. Third Nat. Bank of Syracuse*, 219 Mass. 234, 106 N. E. 974.

⁵¹ See § 1526, *supra*.

⁵² *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775.

⁵⁴ *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14.

holder to protect his rights as such."⁵⁵ This state stands alone in support of this rule.

§ 1531. Specific performance. Though the title to land will vest in a corporation under a conveyance to it, notwithstanding its taking of the land may not be authorized by its charter, a court of equity will not aid it in obtaining the title to land when its charter gives it no authority to hold the same.⁵⁶ In other words, where a corporation seeks specific performance of an executory contract for the purchase of lands, the vendor defendant may set up the defense of want of power to acquire such lands.⁵⁷ And a banking corporation, since it has no power to buy land for the purpose of selling it again, and cannot make a contract with another to buy land and sell and convey the same to him, cannot, after having purchased the land in pursuance of such a contract, maintain a bill in equity to compel the other party to take a conveyance and pay for it.⁵⁸

This subject is further considered in connection with the law as to ultra vires contracts partly executed.⁵⁹

§ 1532. Application of rules—Purchase of property. These rules apply to ultra vires contracts for the purchase or sale of property, in so far as they are executory on both sides. Where a corporation enters into an ultra vires executory contract to purchase property, real or personal, and refuses to take and pay for the same, the other party can neither maintain an action at law against it to recover damages for breach of contract, nor a suit in equity to compel specific performance.⁶⁰

The same rule applies where an ultra vires executory contract by a corporation to purchase real or personal property is repudiated by the other party. The corporation cannot maintain an action for breach or for specific performance.⁶¹ Likewise, a corporation cannot main-

⁵⁵ *Harris v. Independence Gas Co.*, 76 Kan. 750, 763, 13 L. R. A. (N. S.) 1171, 92 Pac. 1123.

⁵⁶ *Kohlruss v. Zachery*, 139 Ga. 625, 46 L. R. A. (N. S.) 72, 77 S. E. 812; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369.

⁵⁷ *Kohlruss v. Zachery*, 139 Ga. 625, 632, 46 L. R. A. (N. S.) 72, 77 S. E. 812.

⁵⁸ *Bank of Michigan v. Niles, Walk.* (Mich.) 99. And see *Greenville Compress & Warehouse Co. v. Planters'*

Compress & Warehouse Co., 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879.

⁵⁹ See § 1590, *infra*.

⁶⁰ *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425.

⁶¹ *Wilks v. Georgia Pacific R. Co.*, 79 Ala. 180; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am.

tain an action on a bond for the conveyance of land to it, where it has no power to purchase the land.⁶²

§ 1533. — Sale of property. Where a corporation has entered into an ultra vires contract to sell and deliver property, real or personal, either party may repudiate the contract before it is executed, and neither can maintain an action for breach or for specific performance.⁶³

§ 1534. — Purchase of or subscription for shares of stock. Where a subscription by a corporation for shares of stock in another corporation, or a contract to purchase shares of stock in another corporation, or shares of its own stock, is ultra vires, and is wholly executory, no action will lie against the corporation, either at law or in equity, to enforce the contract or to recover damages for its breach.⁶⁴ Nor will an action lie by the corporation to enforce such a contract. Thus in a New York case, where a banking corporation entered into an ultra vires contract with a person, under which the latter agreed to subscribe for shares of stock in another corporation in part for and on account of the bank, and he subscribed for the stock in his own name, it was held that, as the contract was executory, the bank could not maintain an action to compel him to transfer shares to it or account for them, in accordance with the contract.⁶⁵

§ 1535. — Suretyship and guaranty. An action cannot be maintained against a corporation on a contract of suretyship or guaranty which is clearly beyond the powers conferred upon it by its charter.⁶⁶ This applies equally well to an action by a cosurety for contribution⁶⁷ or to enforce security given for its obligation.⁶⁸

Rep. 14; *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425.

⁶² *Coleman v. San Rafael Turnpike Road Co.*, 49 Cal. 517.

⁶³ *Simmons v. Troy Iron Works*, 92 Ala. 427, 9 So. 160; *Bank of Michigan v. Niles, Walk.* (Mich.) 99, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

⁶⁴ *New Orleans, F. & H. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173, 26 Am. Rep. 90; *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, 43 Am. Rep. 425; *Trevor v. Whitworth*, 12 App. Cas. 409.

⁶⁵ *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14.

⁶⁶ *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Best Brewing Co. v. Klassen*, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464.

⁶⁷ *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771.

⁶⁸ *First Nat. Bank of Gadsden v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 351.

IV. CONTRACTS EXECUTED ON ONE SIDE ONLY

§1536. **General considerations.** There is a direct conflict of opinion as to whether, when an ultra vires contract has been performed on one side, the party on whose side it has been fully performed may maintain an action against the other on the contract, or whether the sole remedy is quasi ex contractu, in disaffirmance of the contract, to recover money paid under it, or the value of property delivered or services rendered.⁶⁹ There are three lines of decisions as to the right to urge ultra vires as against the other party to a corporate contract where the latter has fully performed his side of the contract.

First, that the performance never precludes the other party from urging ultra vires. This is the rule of the Supreme Court of the United States and is hereinafter referred to as the federal rule.⁷⁰ It is followed by a few, but rejected by most, of the state courts.

Second, that performance precludes the right to urge ultra vires in all cases where the party urging it has received the benefit of the contract.⁷¹ This rule is based largely on decisions of the courts of New York; has been followed without question in most of the state courts; and may be stated to be the prevailing rule in the United States.

Third, that if the contract relates to a matter wholly outside the scope of the authority of the corporation, as would appear by an inspection of the charter of the corporation, ultra vires cannot be urged; but that if the contract involves merely an excessive use of power conferred, then ultra vires may be urged.⁷² This view is the basis of the later Illinois decisions, and is often referred to by courts as an additional reason for their holdings without expressly adopting the rule.

It has very recently been said that "in view of the important place which is occupied by corporations in the commercial, financial and industrial affairs of modern communities, it may safely be affirmed that no other single topic of jurisprudence is of greater practical interest than a determination of the relative correctness of" these three rules; and that "the momentous question involved is in effect whether the doctrine of ultra vires shall or shall not be virtually nullified, so

⁶⁹ See articles by Judge Seymour D. Thompson in 28 Am. Law Rev. 376, and by George Wharton Pepper in 9 Harvard Law Rev. 255.

⁷⁰ See §§ 1539-1542, *infra*.

⁷¹ See §§ 1543-1557, *infra*.

⁷² See §§ 1591-1601, *infra*.

far as regards actions upon contracts which have been performed on the side of the parties seeking to enforce them.”⁷³

§ 1537. Practical effect of difference between rules. The only difference between the federal rule, also adopted in some of the state courts, and the rule in most of the state courts, is that under the former it is held that when one party to an ultra vires contract has rendered services or parted with value for the benefit of the other, he cannot recover upon the contract itself but may sue upon an implied contract,⁷⁴ while under the latter rule it is held that a recovery may be had upon the contract itself on the theory of estoppel or otherwise.⁷⁵ Whatever difference of view there may be as to the effect of ultra vires on corporate contracts executed on one side only, a corporation cannot, in any jurisdiction, retain what it has received under such a contract and refuse to perform the contract.⁷⁶ The effect of this difference in the two rules has been stated as follows: “In a great many cases the difference between the law prevailing in the federal courts and that in our own would lead to great difference in results. In this case, however, as the plaintiff disclaims any right to recover beyond the amount actually received by the defendant, the result is exactly the same whether we adopt one rule or the other.”⁷⁷

§ 1538. State courts as bound to follow federal courts and vice versa. The Supreme Court of the United States seems never to have decided whether it is bound to follow state decisions as to the effect of ultra vires where a contract is fully executed on one side only, and the corporation is one created under state laws. But in the lower federal courts, there are a few cases holding that the federal courts, in regard to the effect of ultra vires contracts, should follow the decisions of the state court, where a corporation created under the state laws is concerned,⁷⁸ except where there is no settled rule laid down by

⁷³ See extended note in *L. R. A.* 1917 A 749, 753.

⁷⁴ See §§ 1604-1607, *infra*.

⁷⁵ See § 1602, *infra*.

⁷⁶ *Appleton v. Citizens' Central Nat. Bank of New York*, 190 N. Y. 417, 421, 32 L. R. A. (N. S.) 543, 83 N. E. 470.

⁷⁷ *Appleton v. Citizens' Central Nat. Bank of New York*, 190 N. Y. 417, 421, 32 L. R. A. (N. S.) 543, 83 N. E. 470.

To same effect, see *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.*, 70 Miss. 669, 676, 35 Am. St. Rep. 681, 13 So. 879.

⁷⁸ *Ward v. Joslin*, 105 Fed. 224, 228.

It has been held that the effect of ultra vires acts or contracts is a matter of state policy to be governed by the rule prevailing in the state courts rather than the rule prevailing in the

the highest state court.⁷⁹ However, federal courts have often decided according to the federal rule without any reference to whether the corporation involved was one created under state laws or federal laws, or to what was the law prevailing in the particular state.

On the other hand, it has been held that the state courts are governed by the federal rules relating to the effect of ultra vires in actions by or against corporations created under federal statutes.⁸⁰ Thus, where the corporation involved is one created under federal statutes, such as a national bank, the law governing the effect of ultra vires as laid down by the federal courts should govern in an action in the state courts.⁸¹ However, the contrary is held in Minnesota⁸² and Wisconsin.⁸³

§ 1539. Rule of federal courts and some state courts—In general.

Some of the courts, including the House of Lords in England, the Supreme Court of the United States, and some of the state courts, hold that a contract with a corporation which is beyond its powers, or ultra vires; though it may not be otherwise illegal, is absolutely void, on the ground that a corporation, by reason of its limited powers, is incapable of making such a contract; that the fact that the contract has been executed by one of the parties, and the other has thus re-

federal courts, in an action in the federal courts. *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 741.

⁷⁹ "A fixed and settled rule of decision in a state court of last resort establishes the law of the state, in such manner as to bind the federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City Court of Appeals, while entitled to great respect and regarded as persuasive authority, are not controlling upon the federal courts, because they do not settle the law of the state." *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 741.

⁸⁰ *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059; *Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of*

Dallas, 48 Tex. Civ. App. 301, 106 S. W. 782. Compare, however, *First Nat. Bank of Greenville v. Greenville Oil & Cotton Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828, where the state rule was applied to a national bank without any reference to the federal rule.

⁸¹ *Appleton v. Citizens' Central Nat. Bank of New York*, 190 N. Y. 417, 420, 32 L. R. A. (N. S.) 543, 83 N. E. 470.

In many cases, however, the rule prevailing in the state courts has been adopted without reference to what law governs. See *Hutchins v. Planters' Nat. Bank*, 128 N. C. 72, 38 S. E. 252.

⁸² *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 284, 96 N. W. 85. *Contra*, *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849.

⁸³ "Such questions are not federal questions." *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211, 217, 94 N. W. 74.

ceived the consideration for his or its promise, cannot give the contract any validity; that such performance by one of the parties, and receipt of the consideration by the other, does not estop the latter from setting up that the contract is ultra vires, since all persons are chargeable with knowledge of the powers of a corporation; and that no action, therefore, will lie on the contract itself by the party on whose part it has been executed, the only remedy, if there is any remedy at all, being quasi ex contractu, in disaffirmance of the contract and on an implied contract, to recover the money paid or loaned, or the value of the property delivered or services rendered under the contract. This doctrine is applied in these jurisdictions both where the contract is fully performed by the corporation and the action is brought by it,⁸⁴ and where it is fully performed by the other party and the action is brought against the corporation.⁸⁵

84 United States. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 33 L. Ed. 157.

Alabama. *Sherwood v. Alyis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307.

Maine. *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

Ohio. *Simpson v. Building & Savings Ass'n*, 38 Ohio St. 349.

Tennessee. *Buckeye Marble & Free-stone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

Wisconsin. *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781

85 United States. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Pearce v. Madison & I. R. Co.*, 21 How. 441, 16 L. Ed. 184; *Bowen v. Needles Nat. Bank*, 94 Fed. 925.

Alabama. *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122.

Illinois. *Best Brewing Co. v. Klas-*

sen, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464; *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626, aff'g 53 Ill. App. 396.

Maine. *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43, 28 Am. Rep. 9. See also *Andrews v. Union Mut. Fire Ins. Co.*, 37 Me. 257.

Massachusetts. *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

Mississippi. *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.*, 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879.

New Hampshire. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230. See also *Norton v. Derry Nat. Bank*, 61 N. H. 592.

Tennessee. See *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 20 L. R. A. 765, 21 S. W. 39.

England. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H.

This rule is generally adhered to in the lower federal courts as well as in the Supreme Court.⁸⁶ However, some of the decisions of the lower federal courts reject the federal rule, or fail to distinguish between that rule and the rule prevailing in a majority of the state courts,⁸⁷ or else attempt to distinguish the federal rule as applicable only to quasi public corporations.⁸⁸

§ 1540. — Reasons for rule. In a leading case on this question in the Supreme Court of the United States it was said by Mr. Justice Gray: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation, to take notice of the legal limit of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law." It was further said in the same case: "A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is

L. 653. See also *In re Phoenix Life Assur. Co.*, 2 Johns. & H. 441.

⁸⁶ *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642, 17 L. R. A. (N. S.) 526; *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 737.

"Rights of action or of defense cannot be predicated upon it. There is, however, nothing immoral in the transaction. The courts will strive to do justice between the parties so far as that can be done without in any wise relying upon the invalid bargain.

* * * If such a contract has been completely executed upon both sides, the courts will ordinarily refuse any relief to either. Each party has received from the other what he bargained for. Neither of them has any

cause to complain. The contract has ceased to be a living thing. The courts will leave it in its grave." *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347, 358.

⁸⁷ *St. Avit v. Kettle River Co.*, 216 Fed. 872; *Kellogg-Mackay Co. v. Havre Hotel Co.*, 199 Fed. 727; *Wayte v. Red Cross Protective Society*, 166 Fed. 372, action by attorney against corporation for services rendered. See dissenting opinion in *United States Savings & Loan Co. v. Convent of St. Rose*, 133 Fed. 354, 359.

⁸⁸ *Bowman v. Foster & Logan Hardware Co.*, 94 Fed. 592.

The Supreme Court of the United States, however, makes no such distinction.

not voidable only, but wholly void, and of no legal effect. The objection to the contract, is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

* * * A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done, consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.”⁸⁹

If the doctrine of estoppel be established in this connection, said the Alabama court, “then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature have withheld.”⁹⁰

⁸⁹ Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 35 L. Ed. 55. See also Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 33 L. Ed. 157; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 317, 30 L. Ed.

These reasons for the rule are reiterated in McCormick v. Market Nat. Bank, 165 U. S. 538, 549, 41 L. Ed. 817.

⁹⁰ City Council of Montgomery v. Montgomery & W. Plank Road Co., 31 Ala. 76.

The reason for holding ultra vires contracts void was stated by Justice Selden in an early New York case (the rule in that state now being, however, that such contracts are not void), to be "because they are made in contravention of public policy";⁹¹ and the same theory is advanced in Tennessee, to support this rule, i. e., that "any act in excess of these granted powers is an act contrary to public policy, and upon that ground, illegal and void."⁹²

§ 1541. — State courts which follow federal rule. The state courts which have adopted the rule of the federal courts, include those of Alabama,⁹³ Maine,⁹⁴ Tennessee,⁹⁵ and Vermont.⁹⁶

In Illinois, the earlier cases did not follow the federal rule,⁹⁷ but the

⁹¹ Per Judge Selden in *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 285, leading case where one theory is set forth by Judge Comstock and the other theory by Judge Selden.

New York now rejects the federal rule. See § 1547, *infra*.

⁹² *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 176, 20 L. R. A. 765, 21 S. W. 39.

⁹³ *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307. But see *First Nat. Bank of Lineville v. Alexander*, 152 Ala. 585, 44 So. 866.

⁹⁴ *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 541, 35 Am. St. Rep. 385, 25 Atl. 525. See also *Bailey v. Methodist Episcopal Church of Freeport*, 71 Me. 472; *Perkins v. Boothby*, 71 Me. 91, 97.

⁹⁵ *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 174-177, 20 L. R. A. 765, 21 S. W. 39; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427. See also *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 158, 159, 64 S. W. 29, reviewing decisions.

⁹⁶ "With regard to contracts which are ultra vires, in the strict sense,"

said the Vermont court, "the sound doctrine is that they are wholly void, and not merely voidable; that the corporation is under a perpetual disability to make them; that, therefore, there can be no ratification by the corporation; and that a corporation cannot be estopped from making the defense of ultra vires when it is sued for nonperformance on its part. The denial of corporate existence, and the claim that a corporation has not proceeded in the way or through the officers designated by law, are defenses that stand on a different and much narrower ground than the defense of ultra vires, in its full and proper sense. In some cases a corporation which has received the benefit of an ultra vires contract may be recovered from on a quantum meruit, without reference to the attempted contract. In some cases a corporation may be liable in an action of tort for acts connected with or growing out of an attempted ultra vires contract." *Metropolitan Stock Exchange v. Lyndonville Nat. Bank*, 76 Vt. 303, 308, 57 Atl. 101.

⁹⁷ *Ward v. Johnson*, 95 Ill. 215, aff'g 5 Ill. App. 30; *Darst v. Gale*, 83 Ill. 136; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Peoria Star Co. v. Cutright*, 115 Ill. App. 492.

It is not an easy matter, if it is

later cases adopt the federal rule⁹⁸ with certain modifications hereafter noted.⁹⁹

In Maryland, there are some decisions in support of the contra rule,¹ but the latest decision of that court is in favor of the federal rule,² as are other earlier cases.³

possible at all, to reconcile the cases last cited and the dicta therein with some of the other late cases in Illinois, which seem to adhere to the earlier doctrine. In *Eckman v. Chicago, B. & Q. R. Co.*, 169 Ill. 312, 38 L. R. A. 750, 48 N. E. 496, aff'g 64 Ill. App. 444, it was said: "It is a general rule that a corporation cannot avail itself of the defense of ultra vires where a contract, not immoral in itself nor forbidden by any statute, has been in good faith fully performed by the other party and the corporation has had the full benefit of its performance. And this rule applies with equal force to the other party setting up that the contract was ultra vires of the company." And it was held in this case that an employee of a railroad company, after accepting benefits for an accident from the fund of the relief department of the company, organized and managed by it, could not attack as ultra vires the organization of the relief department by the company, or his contract of membership therein, by which he agreed that the acceptance of benefits for an injury should release any claim against the company on account of the injury. See also *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593; *Kadish v. Garden City Equitable Loan & Building Ass'n*, 151 Ill. 531, 42 Am. St. Rep. 256, 28 N. E. 236, aff'g 47 Ill. App. 602; *Gibson v. O'Gara Coal Co.*, 151 Ill. App. 424; *Chicago & M. Tel. Co. v. Type Tel. Co.*, 137 Ill. App. 131, 160, aff'd 236

Ill. 476, 86 N. E. 107; *Brewer & Herman Brewing Co. v. Boddie*, 80 App. 353, aff'd 181 Ill. 622, 55 N. 49.

⁹⁸ *Mercantile Trust Co. of Illin v. Kastor*, 273 Ill. 332, 112 N. E. 9. *Calumet & C. Canal & Dock Co. Conkling*, 273 Ill. 318, L. R. A. 191' 814, 112 N. E. 982; *Converse v. Emson, Talcott & Co.*, 242 Ill. 619, 6 90 N. E. 269, aff'g 148 Ill. App. 61. *Best Brewing Co. of Chicago v. Kl sen*, 185 Ill. 37, 50 L. R. A. 765, Am. St. Rep. 26, 57 N. E. 20, rev'g Ill. App. 464; *National Home Buildi & Loan Ass'n v. Home Sav. Ba*, 181 Ill. 35, 64 L. R. A. 399, 72 A St. Rep. 245, 54 N. E. 619, rev'g Ill. App. 303; *Durkee v. People*, Ill. 354, 46 Am. St. Rep. 340, 40 E. 626, aff'g 53 Ill. App. 396; *Sm v. Bankers' Union of Chicago*, 144 App. 384; *Ross v. Saylor*, 104 Ill. A. 19, 24; *Bailey v. Farmers' Nat. Ba*, 97 Ill. App. 66; *Chicago Pneuma Tool Co. v. H. W. Jones Mfg. Co.*, Ill. App. 547; *Kelley, Maus & Co. O'Brien Varnish Co.*, 90 Ill. App. 2

⁹⁹ See § 1599, *infra*.

¹ *Black v. First Nat. Bank*, 96 M 399, 429, 54 Atl. 88; *United Germ Bank v. Katz*, 57 Md. 128, 141.

² *Western Maryland R. Co. v. B Ridge Hotel Co.*, 102 Md. 307, 3 R. A. (N. S.) 887, 111 Am. St. R 362, 62 Atl. 351, which, however, d not directly decide this point. T case is valuable as a review of earl decisions in Maryland.

³ *Maryland Hospital v. Foreman*, Md. 524.

Whether Missouri intends to follow the rule of the federal courts is not altogether clear, although the later decisions of the Supreme Court seem to do so.⁴ However, the contrary rule seems to prevail in the Court of Appeals.⁵

Other states, where there is some conflict, but where the later decisions seem to reject the federal rule, are noticed in a subsequent section.⁶

§ 1542. — Applications of rule. This doctrine was applied in a late Tennessee case where a corporation had made an ultra vires purchase of shares of stock in another corporation, and the shares had been paid for by it, and transferred to a trustee named by it. As part of the contract the seller had agreed to pay off certain liabilities of the other corporation, but he failed to do so, and the purchasing corporation, having been compelled to pay them, brought an action against him on the contract. It was held that the action could not be maintained, even though the contract had been fully performed by the corporation. "The suit," said the court, "is clearly in furtherance of the original, unlawful, and void contract. That the contract

⁴ See *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359. But see *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 527, 70 L. R. A. 79, 86 S. W. 109, expressly adopting the New York rule as "the correct rule." Compare *Anglo-American Land, Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 742, reviewing the law in Missouri.

"The defense of ultra vires is therefore bottomed upon a wise public policy to protect the stockholders (the real body of the corporation) from the acts of their own agents, where such agents clearly do acts or make contracts beyond the charter powers and rights of the corporation. Nor is such defense unfair to the other contracting party because he, with knowledge of the limited power of the corporation agents to make contracts, is particeps criminis when he enters into an ultra vires contract. In other words, he assists the agents of

the corporation to do a thing, which in law he must know to be in violation of the rights of the stockholders of the corporation." *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359.

⁵ *Miles v. Macon County Bank of Macon*, 187 Mo. App. 230, 249, 173 S. W. 713; *Hough v. St. Louis Car Co.*, 182 Mo. App. 718, 165 S. W. 1161; *Osmer v. Le May-Wegmann Brokerage Co.*, 155 Mo. App. 211, 134 S. W. 65; *York v. Farmers' Bank of Garden City*, 105 Mo. App. 127, 141, 79 S. W. 968; *Chenoweth v. Pacific Exp. Co.*, 93 Mo. App. 185; *Goodland v. Bank of Darlington*, 74 Mo. App. 365.

It is no defense to an action on a note against the maker by a corporation payee or a privy corporation that the taking of the note by the corporation was ultra vires. *Russell v. Cassidy*, 108 Mo. App. 577, 581, 84 S. W. 171.

⁶ See § 1547, *infra*.

has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it."⁷

It has also been held, in accordance with this doctrine, that a railroad company or other corporation cannot maintain an action for rent under an ultra vires lease made by it, though the contract has been performed by it and the lessee has had the benefit of the lease.⁸ Especially is it true that rent cannot be recovered where the lease is void as against public policy,⁹ or is expressly prohibited by a constitutional or statutory provision.¹⁰

And it has been held that a corporation which has entered into an ultra vires contract to purchase goods, though it has paid money under the contract, cannot maintain an action to recover damages for the other party's failure to deliver the goods.¹¹ Where a corporation made an ultra vires purchase of a steamboat to be run in connection with its road, and gave its notes therefor, it was held that an action could not be maintained on the notes, though it had received and used the boat.¹² And it has been held that the fact that an ultra vires contract by a corporation to purchase property to be manufactured for it is executed by the other party to the extent of manufacturing

⁷ *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 36 Am. St. Rep. 71, 20 S. W. 427. But see *Watts Mercantile Co. v. Buchanan*, 92 Miss. 540, 46 So. 66, where, although statute prohibited purchase of stock in another corporation, a recovery of the price was held proper.

⁸ *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 149, 43 L. Ed. 108; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.* 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525. And see *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 32 L. Ed. 837; *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.*, 118 U. S. 290, 30 L. Ed. 83.

⁹ "We think that in such cases the recovery must be had upon an im-

plied agreement to pay a reasonable rent." *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 541, 35 Am. St. Rep. 385, 27 Atl. 525.

⁹ *Cox v. Terre Haute & I. R. Co.*, 133 Fed. 371, and see § 1614, *infra*.

¹⁰ *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 Fed. 735, and see §§ 1616-1622, *infra*.

¹¹ *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

¹² *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184. And see *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 5 L. R. A. 100, 6 So. 122.

It appeared in the case first cited that the holder had notice of the circumstances under which the notes were given. The decision would no doubt have been different if he had been a bona fide purchaser without notice. See § 1595, *infra*. The plaintiff could have sued quasi ex contractu for the value of the boat. See § 1604, *infra*.

and tendering the property will not entitle him to maintain an action against it for the price.¹³

The doctrine has also been applied to contracts for services. Thus, where a railroad company employed a person in an ultra vires transaction to examine and report upon mines of which its road was the outlet, it was held that he could not maintain an action against the corporation for his compensation.¹⁴

It has also been held that an insurance company, authorized by its charter to insure against certain risks, is not liable on an ultra vires policy insuring against other risks, though it has received the premiums; the only remedy of the insured in such a case being an action to recover the premiums paid by him.¹⁵ So it was held in Illinois that where a fraternal benefit society was prohibited by its charter from taking in as a member any one over fifty-one years of age, it was not liable on the policy on the death of a member who when he became a member was over the maximum age, although the society had received the premiums.¹⁶

The doctrine has also been applied to an ultra vires subscription by a corporation in aid of other enterprises. Thus, where a corporation agreed to pay a certain amount towards defraying the expenses of a festival in the city in which it was located, it was held that no action would lie on its subscription, though the festival was held and expenses incurred thereby, and though the corporation received the benefit of the contract in an increase of its business and profits.¹⁷

In a leading Massachusetts case it was held that an action could not be maintained against a corporation on an ultra vires contract by which it guaranteed payment of a certain proportion of any deficiency to defraying the expenses of a musical festival to be held in the city in which it was located, though the festival was held and expenses

¹³ *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

¹⁴ *George v. Nevada Cent. R. Co.*, 22 Nev. 228, 38 Pac. 441, where, however, it was said that the corporation had not received the benefits of the contract, although several of its officers used the report, where such use was unauthorized and never ratified by the corporation.

¹⁵ *Andrews v. Union Mut. Fire Ins. Co.*, 37 Me. 257; *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167, 20

L. R. A. 765, 21 S. W. 39; *In re Phoenix Life Assur. Co.*, 2 Johns. & H. 441.

¹⁶ *Steele v. Fraternal Tribunes*, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121, aff'g 114 Ill. App. 194.

¹⁷ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221, where, however, a distinction seems to be drawn (p. 275) between the actual receipt of money or property, and conjectural or speculative benefits.

incurred in reliance on the guaranty.¹⁸ It has also been held that a corporation is not liable on a guaranty by it of a certain dividend on the stock of another corporation made to induce a person to subscribe to such stock.¹⁹ And in other cases liability on a guaranty has been denied.²⁰

§ 1543. Majority rule in state courts—In general. The strict doctrine applied in the federal courts and some of the state courts—that an action will not lie on an ultra vires contract even when it has been fully executed on one side—is not recognized in most of the states. On the contrary, most courts have repudiated it, and hold

¹⁸ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

¹⁹ *Memphis Grain & Package Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52.

In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081, a railroad company's guaranty of the bonds of another railroad company was held absolutely void.

²⁰ *Robert Gair Co. v. Columbia Rice Packing Co.*, 124 La. 193, 50 So. 8; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059, in which case, however, it is doubtful whether the court did not feel constrained to follow the federal decisions because a national bank was involved; *Norton v. Derry Nat. Bank*, 61 N. H. 592; *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 7 Wis. 59.

"It is said, however, that the contract has been performed on behalf of the plaintiff, and, therefore, that the defendant is estopped to deny its power to make it. We do not think that any such principle has application here. Strictly speaking, a corporation is never estopped to deny its power to make a contract where the extent of its powers and of the facts relevant thereto were or should have been known to the parties seeking to

enforce the contract when it was entered into. In cases where property has been received or money paid to the corporation seeking to avoid the obligations of an ultra vires contract, the person delivering the property or paying the money has the remedy of recovering back that which was given to the corporation on the faith of the ultra vires contract. This, however, as has been said several times by the supreme court of the United States, is not a recovery on the contract, but is, in effect, an avoiding of the contract, and a restoration of the parties to the status quo ante." *Humboldt Min. Co. v. American Manufacturing, Mining & Milling Co.*, 62 Fed. 356.

Where for a valuable consideration one corporation has guaranteed the stock of another, ultra vires, it may be compelled to surrender the consideration therefor. The mere fact, however, that it received the consideration does not bar it from pleading ultra vires as a defense to the enforcement of the guarantee. *Greene v. Middlesborough Town & Lands Co.*, 28 Ky. L. Rep. 303, 89 S. W. 228.

Where a guarantee is ultra vires, it is void and incapable of ratification, and mere acquiescence cannot give rise to an estoppel. *Wheeler v. Home Savings & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'd 85 Ill. App. 28.

that when a contract with a corporation which is merely ultra vires, and not otherwise illegal either because of its being expressly prohibited or because of its being contrary to public policy, has been fully executed by one of the parties, so that the other party has received the consideration for his or its promise, either in money, property, or services, the party on whose part the contract has been executed may maintain an action upon it, and the other party cannot defeat the action by pleading that the contract is ultra vires. It has been so held both in actions by the corporation,²¹ and in actions by the other party against the corporation.²² This rule also applies in

²¹ **Arkansas.** White River, L. & W. Ry. Co. v. Star Ranch & Land Co., 77 Ark. 128, 138, 91 S. W. 14.

California. Bay City Building & Loan Ass'n v. Broad, 136 Cal. 525, 69 Pac. 225.

Georgia. Macon & A. R. Co. v. Georgia R. Co., 63 Ga. 103.

Idaho. Meholin v. Carlson, 17 Idaho 742, 763, 134 Am. St. Rep. 286, 107 Pac. 755.

Indian Territory. Doherty v. Arkansas & O. R. Co., 5 Indian T. 537, 82 S. W. 899.

Indiana. Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Poock v. Lafayette Bldg. Ass'n, 71 Ind. 357.

Kentucky. Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 40 L. R. A. (N. S.) 857, 143 S. W. 6.

Michigan. Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; Hall Mfg. Co. v. American Ry. Supply Co., 48 Mich. 331, 12 N. W. 205.

Missouri. Franklin Ave. German Sav. Inst. v. Board of Education, Town of Roscoe, 75 Mo. 408; William R. Bush Const. Co. v. Bambrick-Bates Const. Co., 176 Mo. App. 608, 159 S. W. 738.

New Jersey. Camden & A. R. Co. v. May's Landing & E. H. City R. Co., 48 N. J. L. 530, 7 Atl. 523.

New York. Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390; Whitney Arms Co. v.

Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Steam Nav. Co. v. Weed, 17 Barb. 378.

Texas. Bond v. Terrell Cotton & Woolen Mfg. Co., 82 Tex. 309, 18 S. W. 691.

²² **Colorado.** Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

Indiana. Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; Louisville, N. A. & C. Ry. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, 17 Am. Rep. 702; Wittmer Lumber Co. v. Rice, 23 Ind. App. 586, 55 N. E. 868.

Kentucky. Underwood v. Newport Lyceum, 5 B. Mon. 129, 41 Am. Dec. 260.

Michigan. Butterworth & Lowe v. Kritzer Milling Co., 115 Mich. 1, 72 N. W. 990; Dewey v. Toledo, A. A. & N. M. Ry. Co., 91 Mich. 351, 51 N. W. 1063; Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641.

Mississippi. Prairie Lodge, No. 87, A. F. & A. M. v. Smith, 58 Miss. 301.

Missouri. Goodland v. Bank of Darlington, 74 Mo. App. 365.

New Hampshire. International Trust Co. v. Davis & Farnum Mfg. Co., 70 N. H. 118, 46 Atl. 1054.

New Jersey. Chapman v. Iron Clad Rheostat Co., 62 N. J. L. 497, 41 Atl.

an action against the corporation to recover damages for breach of the alleged ultra vires contract.²³ However, the rule does not apply to a contract made in violation of a statute and that is therefore in contravention of the lawfully declared public policy of the state, but in such case, the party who has not performed and who is sued for the breach of contract can avail himself or itself of its illegality.²⁴ This general rule applies to all classes of private corporations,²⁵ and

690; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.*, 48 N. J. L. 530, 7 Atl. 523.

New York. *Linkauf v. Lombard*, 137 N. Y. 417, 33 Am. St. Rep. 743, 33 N. E. 472; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Parish v. Wheeler*, 22 N. Y. 494; *Bissell v. Michigan Southern & N. I. R. Co.*, 2 N. Y. 258; *Milborne v. Royal Benefit Society*, 14 App. Div. 406, 43 N. Y. Supp. 1026.

Pennsylvania. *Union Trust Co. of Pittsburgh v. Mercantile Library Hall Co.*, 189 Pa. St. 263, 42 Atl. 129; *Boyd v. American Carbon Black Co.*, 182 Pa. St. 206, 37 Atl. 937; *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Oil Creek & A. River Ry. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160.

Utah. *Bear River Valley Orchard Co. v. Hanley*, 15 Utah 506, 50 Pac. 611.

Wisconsin. *Hubbard v. Haley*, 96 Wis. 578, 71 N. W. 1036; *McElroy v. Minnesota Percheron Horse Co.*, 96 Wis. 317, 71 N. W. 652.

In *Oil Creek & A. River Ry. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160, a railroad company agreed to pay an oil pipe-line company a certain sum per barrel on all oil transported by it, in consideration of a promise by the pipe-line company to deliver to it for transportation all the oil under its control. It was held that after the pipe-line company had performed its part of the agreement, the railroad company could not defeat an action for the money due by setting

up that the agreement was ultra vires.

In *McElroy v. Minnesota Percheron Horse Co.*, 96 Wis. 317, 71 N. W. 652, it was held that a corporation could not avoid a contract of agency on the ground that it was ultra vires, after it had been fully executed on the part of the agent.

Where a corporation entered into contract to pay a portion of the expense of constructing a bridge, anticipating that by the existence of the bridge the value of its real property would be enhanced, it may not refuse to comply with the terms of its contract after the bridge has been constructed, on the ground that its contract was ultra vires. *Charlotte Tp. v. Piedmont Realty Co.*, 134 N. C. 41, 49, 46 S. E. 723.

So where a trust company discounted a note, defendant who received the proceeds of the discount cannot claim that plaintiff company exceeded its corporate powers in doing a banking business and discounting the note in suit. *Mutual Trust Co. v. Stern*, 235 Pa. 202, 83 Atl. 614.

²³ *Usher v. New York Cent. & H. River R. Co.*, 76 N. Y. App. Div. 422, 78 N. Y. Supp. 508, aff'd without opinion in 179 N. Y. 544, 71 N. E. 1141.

²⁴ *West Penn Chemical & Manufacturing Co. v. Prentice*, 236 Fed. 891, 895; *President, etc., Village of Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 183, 135 N. W. 499. See also § 1616, infra.

²⁵ "It applies to religious corporations in their business transactions,

without regard to whether they are large or small.²⁶ Furthermore, this rule also applies to ultra vires contracts of a municipal corporation where the action is brought by the municipality, although there is some conflict in the decisions.²⁷

§ 1544. — **Reasons for rule.** These courts proceed on the theory that a contract with a corporation which is merely ultra vires, or beyond the powers conferred upon it by its charter, is neither *malum in se* or *malum prohibitum*, so as to be illegal in the sense of the maxim, *ex dolo malo non oritur actio*, and that public policy, as well as equity and justice, require that a party who has entered into such a contract with a corporation, and received the benefit of full performance by the corporation, or the corporation, after receiving the benefit of performance by the other party, shall be held to be estopped to set up the ultra vires character of the contract in order to escape liability upon it.²⁸ The defense of ultra vires, said the New York court, "should not as a general rule prevail, whether interposed for

the same as to banking or manufacturing corporations." *Kanneberg v. Evangelical Creed Congregation*, 146 Wis. 610, 618, 39 L. R. A. (N. S.) 138, Ann. Cas. 1912 C 376, 131 N. W. 353.

Estoppel applies to banking corporations as well as other corporations. "So far as public policy demands honesty and fair dealing on the part of corporations, we know of no reason why such a policy should include one class of corporations and exclude the other." *Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, L. R. A. 1917 A 737, Ann. Cas. 1916 D 551, 142 Pac. 670.

²⁶ "It also applies the same when the corporation is small and the amount involved is large, as where the corporation is so large and the amount involved so small that the enforcement of the contract would have no appreciable pecuniary effect upon the organization. Absolute equality before the law applies to corporations the same as individuals." *Kanneberg v. Evangelical Creed Congregation*, 146

Wis. 610, 618, 39 L. R. A. (N. S.) 138, Ann. Cas. 1912 C 376, 131 N. W. 353.
²⁷ 3 McQuillin, Mun. Corp. § 1276.

²⁸ See cases cited in preceding notes. The doctrine of estoppel is "founded on the plainest principles of justice." *Keokuk v. Ft. Wayne Elec. Co.*, 90 Iowa 67, 57 N. W. 689.

In *Chapman v. Lynch*, 156 N. Y. 551, 51 N. E. 275, it was held that where a contract under which a corporation receives a deposit and promises to repay the same on demand is ultra vires, the statute of limitations against an action to recover the deposit begins to run from the time the deposit is received. This decision, however, seems clearly to be inconsistent with the doctrine, well established in that state, that when a contract with a corporation is fully executed by the other party by the payment of money or delivery of property, leaving nothing but a promise by the corporation to pay money, the corporation, when sued on its promise, is estopped to set up that the contract was ultra vires.

or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.”²⁹ It is an “unconscionable defense,” in such a case;³⁰ “the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform the agreement on his side”;³¹ “corporations must be held to the observance of the recognized principles of common honesty and good faith.”³²

²⁹ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. See also *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48, 33 Am. St. Rep. 743, 33 N. E. 472; *Bear River Valley Orchard Co. v. Hanley*, 15 Utah 506, 50 Pac. 611.

³⁰ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

³¹ 2 *Morawetz, Priv. Corp.* § 689, quoted in *Towers Excelsior & Ginnery Co. v. Inman*, 96 Ga. 506, 510, 23 S. E. 418; *Dewey v. Toledo, A. A. & N. M. Ry. Co.*, 91 Mich. 351, 362, 51 N. W. 1063; *Goodland v. Bank of Darlington*, 74 Mo. App. 365, 371.

³² “Where a corporation makes a contract that is in excess of its chartered powers, it may well be that while the agreement remains wholly executory it cannot be enforced. So long as the contract is unexecuted it does not estop the corporation, because the power of a corporation, like that of a person under a legal disability, cannot be enlarged by the mere form of a contract which it had no capacity to make. The doctrine of ultra vires may be appealed to in such a case to resist the enforcement of a contract. It would be carrying that doctrine to an unwarranted extent, however, to hold that a corporation might obtain the money of another, and, with the fruits of the contract in its treasury,

interpose the defense of ultra vires; or, having used the money with the consent or acquiescence of its stockholders, ask that the lender be restrained from collecting it back, on the ground that the money was obtained in violation of the charter of the corporation. Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of ultra vires unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act ultra vires, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed. The most that can be said in the present case is, that there was a defect of power to engage in the transaction in which the money borrowed was used. The power to borrow money was plenary, and subject to no restrictions. In such a case, although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet if the contract between the lender and borrower is not in violation of law, or declared void by statute, the money may be recovered, unless the lender was in some way implicated in furthering the borrower's design, or accessory

In a New Jersey case, in which it was held that an action would lie against a corporation for rent due under an ultra vires lease, it was said by Judge Van Syckel: "In the conflict of judicial decision on this subject, this court may adopt and should adopt the rule which will produce the best results in the administration of justice. In my judgment the true rule is that when the transaction is complete, and the party seeking relief has performed on his part, the plea of ultra vires by the corporation, which has acquiesced in it, is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status. * * * The underlying principle is that the corporation cannot set up its own infirmity when it is unconscionable to do so. The law forbids the defense on account of the flagrant injustice which would otherwise be done. The question of corporate power is not entertained. To enable recompense to be had to this extent, the contracts are respected, not that they rest in authority, but because good conscience requires it." ³³

Whether this denial of the right to urge ultra vires be deemed to be based on the doctrine of estoppel or what not is of little practical importance at this late day when the rule itself is so well settled in nearly every state in this country.³⁴

§ 1545. — Answers to reasons for federal rule. In a Colorado case, in which it was held that a fire insurance company could not defeat an action against it on a policy insuring the plaintiff against loss of crops by hail, by setting up that the contract was ultra vires, it was said by Justice Stone, in an exceedingly able opinion: "It is argued on behalf of the appellant that the courts ought in all such cases to sustain the defense of ultra vires, here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized lim-

to the prohibited or illegal act." Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

³³ Camden & A. R. Co. v. May's Landing & E. H. City R. Co., 48 N. J. L. 530, 7 Atl. 523.

³⁴ For a very learned discussion of the objections to the theory of estop-

pel, see note in L. R. A. 1917 A 749, 856-863.

Mr. Morawetz states: "The rule is not based upon the doctrine of estoppel, as has sometimes been suggested." 2 Morawetz, Priv. Corp. § 692.

its, and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defense of ultra vires. That the public has such an interest is quite true, but whether to afford such protection the defense of ultra vires is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which would allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrong-doing. Such policy would rather seem to offer a premium for dishonest dealing. Besides, both the state which grants these corporate powers, and the stockholders for whose benefit such powers are exercised, have their remedies, the former by interfering to revoke the charter, and the latter by an action to restrain the unauthorized undertakings. While courts are inclined to maintain with vigor the limitations of corporate actions, whenever it is a question of restraining the corporations in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though ultra vires, of which they have received the benefit. If the other party proceeds to the performance of the contract, expending his money and labor in the production of values, which the corporation appropriates, such corporation will not be excused on the plea that the contract was beyond its powers. * * * Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises ex turpe. But where the act is not wrong per se, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. * * * The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract. While as a general proposition this is true, yet it

must be conceded that this constructive notice is of a very vague and shadowy character. Everyone may have access to the statutes of the states affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. * * * It was urged in argument on behalf of appellant that the state which created these corporations for public good, has such an interest in their existence and perpetuity that public policy should be interposed to keep them within the legitimate exercise of their powers. This may be true to a certain extent, and the state may interpose to revoke their charters for an abuse hereof; but we take it that it is no more the public policy of the state to protect the business of private corporations than that of its individual citizens; and to invoke public policy in a case like the one at bar, in order to prevent a corporation from doing wrong, by punishing the other party, would differ little from asking a court, on the ground of public policy, to prevent the obtaining money or goods through false pretenses by holding that the party defrauded should be punished by the loss of his money or goods. * * * If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation, having received and retained the benefit of the contract, is denied the privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.”³⁵

§ 1546. — Necessity for receipt of benefits. If the corporation which has entered into an *ultra vires* contract has received no bene-

³⁵ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

fits from the partial or full performance of the contract by the opposing party, it is not estopped to plead ultra vires.³⁶ This rule often has been applied to an ultra vires guaranty where the corporation has received no benefits from the guaranty.³⁷ So a corporation is not estopped to set up ultra vires as a defense to an action upon a stock subscription, where it has received no benefits.³⁸ In a New York case a savings bank and trust corporation undertook, ultra vires, to engage in purchasing and selling cotton for future delivery, and employed the plaintiffs, who were commission merchants and members of the cotton exchange, to act for them. The plaintiffs made purchases and sales in their own names, and afterwards brought an action against the corporation to recover commissions and for money expended. It was held that, as there had been no delivery of any cotton or property of any kind, nor the transfer of the title to any property to the corporation, the contract was executory, and that the action, therefore, could not be maintained.³⁹

Furthermore, it is held that the rule is confined to cases where the benefits of the contract are received from the other contracting party

³⁶ Clark, Mason & Co. v. Parker, Webb & Co., 131 Mich. 139, 9 Det. L. N. 295, 91 N. W. 134; Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank, 62 Neb. 472, 87 N. W. 156, aff'd on rehearing 69 Neb. 220, 95 N. W. 819; Gause v. Commonwealth Trust Co., 196 N. Y. 134, 157, 24 L. R. A. (N. S.) 967, 89 N. E. 476, aff'g 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080; Mitchell v. Hydraulic Bldg. Stone Co., 61 Tex. Civ. App. 131, 129 S. W. 148.

In a Maine case it was held that an ultra vires contract by a corporation to take and pay for stock in another corporation could not be enforced against the corporation merely because it had been executed by the other party, where no benefit had been received by the corporation upon which a quantum meruit or quantum valebat could be sustained. Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43, 28 Am. Rep. 9.

³⁷ Evans v. Johnson, 149 Fed. 978;

W. C. Bowman Lumber Co. v. Pierson, — Tex. Civ. App. —, 139 S. W. 618; Deaton Grocery Co. v. International Harvester Co. of America, 47 Tex. Civ. App. 267, 105 S. W. 556.

Where an incorporated bank becomes surety on a replevin bond in an action in which the bank had no interest, no estoppel to assert want of power to incur the obligation arises solely upon the ground that other parties have been misled and acted in reliance thereon to their disadvantage, since the obligation was so clearly ultra vires that the parties must have known it and taken their chances of the corporation carrying it out. Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville, 62 Neb. 472, 87 N. W. 156, aff'd on rehearing 69 Neb. 220, 95 N. W. 819.

³⁸ Nebraska Shirt Co. v. Horton, 3 Neb. (Unoff.) 888, 93 N. W. 225.

³⁹ Jemison v. Citizens' Sav. Bank of Jefferson, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264.

and not from third persons;⁴⁰ and that the rule of estoppel does not apply where the benefit is rendered to a third person and at his request.⁴¹

Whether it is sufficient that the other party to the contract has been prejudiced where the corporation has received no benefits from the ultra vires contract, is debatable.⁴² A detriment to the other party to the contract has been held insufficient in Massachusetts,⁴³ while in Wisconsin the contrary is held.⁴⁴

It is also held that an ultra vires contract is not binding on a corporation by way of estoppel beyond the benefits received by it thereunder, i. e., the amount of the benefits limit the amount of liability;⁴⁵ but this rule seems opposed to common sense.

If a contract for the purchase of several articles for a gross sum is entire, the resale of one of the articles and the remitting the amount received, has been held to constitute such an acceptance of the benefits

⁴⁰ *Western Maryland R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 307, 331, 3 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351.

⁴¹ *Morris v. Ernest Wiener Co.*, 65 N. Y. Misc. 18, 119 N. Y. Supp. 163.

⁴² "Possibly there may be cases where the circumstances are such that performance by one party to his detriment may estop the other from pleading ultra vires even though not benefited, but the detriment must be actual and with the latter's knowledge, not merely presumptive as in the case before us." *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 149 Iowa 141, 126 N. W. 190.

It is ultra vires for an incorporated state bank to pledge its credit by way of accommodation, executing an undertaking in replevin proceedings. And where such bank does so do, the mere claim that thereby other parties have been misled and that they have acted thereon to their prejudice is insufficient to raise estoppel against the bank, since such act on the part of a bank is so clearly beyond its powers that persons interested must be deemed to have been aware thereof and to have assumed the risk of the failure

of the bank to perform. Estoppel might arise in such case, however, if the bank had acquired and retained property by means of this ultra vires act. In discussing the matter the court said: "Where so extravagant a liability is incurred without benefit to the bank and as a mere accommodation, the interests of depositors and stockholders have to be taken into account. It would be highly impolitic to permit the money of depositors placed in a bank on the faith of its capital, to be imperiled by sanctioning such transactions. If the act is of a nature which public policy or the very nature of the corporation prohibits it from doing, there could be no ratification." *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank*, 62 Neb. 472, 87 N. W. 156, aff'd on rehearing 69 Neb. 220, 95 N. W. 819.

⁴³ *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

⁴⁴ *Kanneberg v. Evangelical Creed Congregation*, 146 Wis. 610, 618, 39 L. R. A. (N. S.) 138, Ann. Cas. 1912 C 376, 131 N. W. 353.

⁴⁵ *Gaston & Ayres v. J. I. Campbell Co.* (Tex. Civ. App.), 130 S. W. 222.

as to create liability for the balance of the price, although there was an offer to return the balance of the articles.⁴⁶

§ 1547. — States in which rule prevails. In most of the states the decisions of the courts, or at least the later decisions, clearly bind themselves to the rule that ultra vires cannot be urged where the other party to the contract has fully performed his part of the contract. However, in several states, it cannot be said with any certainty just what rule the courts therein have adopted, either because of conflict in the decisions or because the ground for particular decisions do not clearly appear. Moreover, in a few states, it seems that the appellate courts have never passed on the question, or at least not directly. There is no question, at this day, but that this rule imposing liability where one party has fully performed applies in Arizona,⁴⁷ Arkansas,⁴⁸ California,⁴⁹ Colorado,⁵⁰ Georgia,⁵¹ Idaho,⁵² Indiana,⁵³ Iowa,⁵⁴

⁴⁶ "The contract in this case was entire. Defendant has undoubtedly had part of the benefits thereof from the sale of some of the property. It could not tender back all that it purchased, and was in no position to say

"that it would abide by part of the contract and rescind the balance." Vermont Farm Machinery Co. v. De Sota Co-operative Creamery Co., 145 Iowa 491, 495, 122 N. W. 930.

⁴⁷ Leon v. Citizens' Building & Loan Ass'n, 14 Ariz. 294, Ann. Cas. 1914 D 1151, 127 Pac. 721.

⁴⁸ Bloom v. Home Ins. Agency, 91 Ark. 267, 121 S. W. 293; Western Development & Investment Co. v. Caplinger, 86 Ark. 287, 110 S. W. 1039.

⁴⁹ Kennedy v. California Sav. Bank, 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039; Argenti v. San Francisco, 16 Cal. 255; McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927. Compare Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

⁵⁰ Applies to action by stockholders, where provisions whereby they acquired their stock are claimed to be ultra vires. Lilylands Canal & Reser-

voir Co. v. Wood, 56 Colo. 130, 136 Pac. 1026.

Rule applies to corporate mortgages. Dillon v. Myers, 58 Colo. 492, Ann. Cas. 1916 C 1032, 146 Pac. 268.

⁵¹ Towers Excelsior & Ginnery Co. v. Inman, 96 Ga. 506, 23 S. E. 418.

⁵² First Nat. Bank of Wallace v. Callahan Min. Co., 28 Idaho 627, 155 Pac. 673; Darknell v. Coeur D'Alene & St. J. Transp. Co., 18 Idaho 61, 108 Pac. 536.

⁵³ Wright v. Hughes, 119 Ind. 324, 331, 12 Am. St. Rep. 412, 21 N. E. 907; Huntington Brewing Co. v. McGrew, — Ind. App. —, 112 N. E. 534; Seamless Pressed Steel & Manufacturing Co. v. Monroe, 57 Ind. App. 136, 106 N. E. 538.

⁵⁴ Marshalltown Stone Co. v. Des Moines Brick Mfg. Co., 149 Iowa 141, 126 N. W. 190; Vermont Farm Machinery Co. v. De Sota Co-operative Creamery Co., 145 Iowa 491, 122 N. W. 930; Bobzin v. Gould Balance Valve Co., 140 Iowa 744, 118 N. W. 40; State v. Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500; Fidelity Ins. Co. v. German Sav. Bank, 127 Iowa 591, 103 N. W. 958; Wisconsin Lumber

Kansas,⁵⁵ Kentucky,⁵⁶ Michigan,⁵⁷ Minnesota,⁵⁸ Nebraska,⁵⁹ Nevada,⁶⁰ New Jersey⁶¹ and New York.⁶² Other jurisdictions in which

Co. v. Greene & Western Tel. Co., 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742; Field v. Eastern Building & Loan Ass'n, 117 Iowa 185, 201, 90 N. W. 717; Marshall Field Co. v. Oren Ruffcorn Co., 117 Iowa 157, 162, 90 N. W. 618. But see Willett v. Farmers' Sav. Bank, 107 Iowa 69, 77 N. W. 519; Lucas v. White Line Transfer Co., 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771.

"The rule supported by the great weight of authority is that, unless the transaction is so specifically prohibited that it is contrary to law, or is so manifestly against public policy that it is to be deemed prohibited without express declaration, a corporation is estopped, after receiving the benefit of a transaction, from saying that it is totally void, even though it is contrary to the general provisions of statute as to the method in which the business is to be conducted." Fidelity Ins. Co. v. German Sav. Bank, 127 Iowa 591, 600, 103 N. W. 958.

⁵⁵ Hanna v. Chicago, R. I. & P. R. Co., 89 Kan. 503, 508, 132 Pac. 154; Alexandria, A. & Ft. S. R. Co. v. Johnson, 58 Kan. 175, 48 Pac. 847; Sherman Center Town Co. v. Morris, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

But it is held, on the federal theory, that where a corporation has no power to issue negotiable paper, the purchaser thereof cannot recover thereon even where the paper was taken in good faith and for value. Scott v. Bankers' Union of World, 73 Kan. 575, 85 Pac. 604.

⁵⁶ Albin Co. v. Com., 33 Ky. L. Rep. 367, 108 S. W. 299.

⁵⁷ Blackwood v. Lansing Chamber of Commerce, 178 Mich. 321, 144 N. W. 823; Rehberg v. Tontine Surety Co., 131 Mich. 135, 9 Det. L. N. 272,

91 N. W. 132; Day v. Spiral Springs Buggy Co., 57 Mich. 146, 147, 58 Am. Rep. 352, 23 N. W. 628.

⁵⁸ Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93; Seymour v. Chicago Guaranty Fund Life Society, 54 Minn. 147, 55 N. W. 907.

⁵⁹ Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb. 370, 91 N. W. 376; Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank, 62 Neb. 472, 87 N. W. 156, aff'd on rehearing in 69 Neb. 220, 95 N. W. 819.

⁶⁰ Nevada Consol. Mining & Milling Co. v. Lewis, 34 Nev. 500, 514, 126 Pac. 105.

⁶¹ Whitehead v. American Lamp & Brass Co., 70 N. J. Eq. 581, 62 Atl. 554.

⁶² Appleton v. Citizens' Central Nat. Bank of New York, 190 N. Y. 417, 420, 421, 32 L. R. A. (N. S.) 543, 83 N. E. 470; Miller v. Eagle Savings & Loan Co., — N. Y. App. Div. —, 161 N. Y. Supp. 326; Bowers v. Ocean Accident & Guarantee Corporation, 110 N. Y. App. Div. 691, 97 N. Y. Supp. 485, aff'd without opinion in 187 N. Y. 561, 80 N. E. 1105; Ring v. Long Island Real Estate Exch. & Inv. Co., 93 N. Y. App. Div. 442, 87 N. Y. Supp. 682; Curtis v. Natalie Anthracite Coal Co., 89 N. Y. App. Div. 61, 85 N. Y. Supp. 413; Booth Bros. & H. I. Granite Co. v. Baird, 83 N. Y. App. Div. 495, 82 N. Y. Supp. 432; Rebadow v. Buffalo Sav. Bank, 63 N. Y. Misc. 407, 117 N. Y. Supp. 282; Gause v. Commonwealth Trust Co., 44 N. Y. Misc. 46, 89 N. Y. Supp. 723, rev'd on other grounds in 100 N. Y. App. Div. 427, 91 N. Y. Supp. 847.

The doctrine was applied in a New York case where two railroad companies had entered into a consolidation agreement without legislative authority. It was held that after

it is recognized and applied are North Carolina,⁶³ Ohio,⁶⁴ Oklahoma,⁶⁵ Oregon,⁶⁶ Pennsylvania,⁶⁷ South Carolina,⁶⁸ South Dakota,⁶⁹ Washington,⁷⁰ and Wisconsin.⁷¹ Furthermore, it seems to prevail in Connecticut,⁷² Florida,⁷³ Louisiana,⁷⁴ and Virginia.⁷⁵ In North Da-

selling a ticket to a passenger, and receiving payment therefor, they could not escape liability for injury to him or his baggage on the ground that the consolidation and contract to carry were ultra vires. *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258.

⁶³ *Charlotte Tp. v. Piedmont Realty Co.*, 134 N. C. 41, 46 S. E. 723; *Hutchins v. Planters' Nat. Bank*, 128 N. C. 72, 38 S. E. 252.

⁶⁴ *Larwell v. Hanover Sav. Fund Society*, 40 Ohio St. 274; *Hays v. Galion Gaslight & Coal Co.*, 29 Ohio St. 330; *Siders v. Gem City Concrete Co.*, 33 Ohio Cir. Ct. 552, aff'd without opinion in 87 Ohio St. 519, 102 N. E. 1124. But see *Simpson v. Bldg. & Sav. Ass'n*, 38 Ohio St. 349, 357; *Bank of Chillicothe v. Swayne*, 8 Ohio 257, 32 Am. Dec. 707.

⁶⁵ *Western & Southern Fire Ins. Co. v. Murphey*, — Okla. —, 156 Pac. 885; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917 A 1021, 138 Pac. 392.

⁶⁶ *Roane v. Union Pac. Life Ins. Co.*, 67 Ore. 264, 135 Pac. 892.

Want of power to execute note no defense where money has been expended for corporate purposes. *Waterbury v. United Tel. Co.*, 69 Ore. 49, 138 Pac. 232.

⁶⁷ *Wrightsville Hardware Co. v. McElroy*, 254 Pa. 422, 98 Atl. 1052; *Ramble v. Pennsylvania Coal Co.*, 47 Pa. Super. Ct. 28.

⁶⁸ *Batesburg Cotton Oil Co. v. Southern R. Co.*, 103 S. C. 494, 88 S. E. 360; *Kammer v. Supreme Lodge K. P.*, 91 S. C. 572, 75 S. E. 177; *Lancaster v. Southern Life Ins. Co.*, 89 S. C. 179, 71 S. E. 864.

⁶⁹ *Dorsett v. Black Hills Traction*

Co., 30 S. D. 420, Ann. Cas. 1916 A 846, 138 N. W. 808.

⁷⁰ *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 180, 60 Pac. 141; *Tootle v. First Nat. Bank*, 6 Wash. 181, 33 Pac. 345.

⁷¹ *Kanneburg v. Evangelical Creed Congregation*, 146 Wis. 610, 617, 39 L. R. A. (N. S.) 138, Ann. Cas. 1912 C 376, 131 N. W. 353; *Eastman v. Parkinson*, 133 Wis. 375, 13 L. R. A. (N. S.) 921, 113 N. W. 649; *Interior Woodwork Co. v. Prasser*, 108 Wis. 557, 84 N. W. 833.

A corporation accepting funds under a contract cannot defend by plea of ultra vires. "It may be punished by the state against whom the offense was committed," said the court, "but is powerless to add to the wrong by invoking the doctrine of ultra vires to perpetuate a fraud upon an innocent member of society." *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41, 45, 85 N. W. 115.

⁷² See *Union Hardware Co. v. Plume & Atwood Mfg. Co.*, 58 Conn. 219, 20 Atl. 455, where recovery apparently allowed on implied contract.

⁷³ *McQuaig v. Gulf Naval Stores Co.*, 56 Fla. 505, 131 Am. St. Rep. 160, 47 So. 2; *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 165, 58 Am. Dec. 448.

⁷⁴ *Lyon Bros. & Co. v. Stern, Kenney & Boze*, 110 La. 473, 34 So. 641; *Atkins v. Shreveport & R. River Val. Ry. Co.*, 106 La. 568, 31 So. 166; *Canal & C. R. Co. v. St. Charles St. R. Co.*, 44 La. Ann. 1069, 11 So. 702. But see *Gair Co. v. Columbia Rice Packing Co.*, 124 La. 193, 50 So. 8.

⁷⁵ *News-Register Co. v. Rockingham Pub. Co.*, 118 Va. 140, 86 S. E. 874.

kota, it applies at least where the contract is not clearly beyond the powers of the corporation as apparent to the other contracting party.⁷⁶

In Massachusetts, the earlier decisions seemed to indirectly approve the federal rule,⁷⁷ but the last expression of the supreme judicial court shows a tendency to break away from the federal rule.⁷⁸

In Mississippi, the federal rule has been followed,⁷⁹ although in a later case the court expressly refused to follow the rule of the federal courts that the action must be on an implied contract rather than on the express contract.⁸⁰

In New Hampshire the decisions are more or less in conflict, some of them inclining towards the federal rule,⁸¹ while in other, and later, cases, a tendency to break away from such rule is evidenced.⁸²

In Texas, the decisions are in conflict. Some of them seem to follow the federal rule,⁸³ but most of them seem to hold according to the majority rule in the state courts.⁸⁴

• 76 *Tourtlot v. Whithed*, 9 N. D. 467, 479, 84 N. W. 8, where contract is ultra vires, because "of the existing circumstances and conditions under which it was made."

77 *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221.

• 78 *New York Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 404, 78 N. E. 463.

79 *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.*, 70 Miss. 669, 676, 35 Am. St. Rep. 681, 13 So. 879.

• 80 *Watts Mercantile Co. v. Buchanan*, 92 Miss. 540, 46 So. 66, where, however, the action was on a contract prohibited by statute, but the court treated the case as involving a merely ultra vires contract, so far as this rule was concerned. See also *National Surety Co. v. Hall-Miller Decorating Co.*, 104 Miss. 626, 46 L. R. A. (N. S.) 325, 61 So. 700.

81 *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Downing v. Mt. Washington R. Co.*, 40 N. H. 230.

It has been held that where a corporation enters into an ultra vires contract to purchase property to be manufactured for it, it may refuse to take

the property after it has been manufactured, and that if it does so, an action cannot be maintained against it for the price. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

82 *Latullipe v. New England Inv. Co.*, 77 N. H. 31, 86 Atl. 361, which, on its face, appears to hold the contrary rule, and *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054, where, however, the contract was apparently prohibited by statute.

83 *Gaston & Ayres v. J. I. Campbell Co.*, 104 Tex. 576, 141 S. W. 515, 140 S. W. 770; *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 184 S. W. 238.

It has been held that where two companies were incorporated in the same state to do the same or a similar business they should have known that a contract clearly beyond their powers was ultra vires and void, so that no rule of estoppel could apply. *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.*, — Tex. Civ. App. —, 184 S. W. 238.

• 84 *Kincheloe Irrigating Co. v. Hahn Bros. & Co.*, 105 Tex. 231, 146 S. W.

§ 1548. — Application of rule to sales or services rendered. According to this doctrine, it has been held that a person who has purchased and received goods or contracted for services from a corporation cannot defeat an action by the corporation for the price agreed upon by setting up that it was ultra vires for it to deal in or sell the goods, or to render the services.⁸⁵ And, on the other hand, it has been held that a corporation cannot set up the defense of ultra vires to defeat an action against it on its promise to pay for goods sold and delivered to it,⁸⁶ or services rendered.⁸⁷ However, it cannot be said that a contract is executed on one side where a corporation purchased cotton on margin through a broker, where the broker made the purchase in his own name and took title thereto for the account of the corporation, without any delivery of any cotton or property of any kind, or transfer of any title to such property to the corporation.⁸⁸

1187; *Bond v. Terrell Cotton & Woolen Mfg. Co.*, 82 Tex. 309, 18 S. W. 691; *San Antonio Hardware Co. v. Sanger*, — Tex. Civ. App.—, 151 S. W. 1104; *Waller v. Gorman Mercantile Co.*, — Tex. Civ. App.—, 141 S. W. 833; *Continental Fire Ass'n v. Masonic Temple Co.*, 26 Tex. Civ. App. 139, 62 S. W. 930.

Rule applies to action for damages for breach of contract. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* — Tex. —, 146 S. W. 1187, aff'g — Tex. Civ. App. —, 132 S. W. 78.

⁸⁵ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504: "A purchaser," said the court in this case, "who acquires by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was ultra vires, or not within its chartered privileges and powers. It would be contrary to the

first principles of equity to allow such a defense to prevail in an action by the corporation." See also *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831.

⁸⁶ *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260; *Dewey v. Toledo, A. A. & N. M. Ry. Co.*, 91 Mich. 351, 51 N. W. 1063; *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701 (where, however, although contract was prohibited by statute, the rule of ultra vires was applied).

⁸⁷ *Schurr v. New York & B. Suburban Inv. Co.*, 18 N. Y. Supp. 454; *Kanneberg v. Evangelical Creed Congregation*, 146 Wis. 610, 39 L. R. A. (N. S.) 138, Ann. Cas. 1912 C 376, 131 N. W. 353.

A corporation will not be permitted to assert that it was without power to employ an attorney where it has received the benefit of his services. *Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 464, 84 Pac. 321.

⁸⁸ Where a corporation entered into an ultra vires contract with a commission merchant and member of the

Where the purchase of its own stock or of the stock of another corporation is ultra vires, and the corporation has had the benefit of the purchase, it is held in the jurisdictions supporting this rule that the corporation cannot set up ultra vires as a defense⁸⁹ either when sued for the price or where an action is brought to enforce the liability of the corporation as a stockholder.

The question whether a corporation whose ownership of stock in another corporation is ultra vires is liable to creditors as for unpaid subscriptions, or can set up the defense of ultra vires, is considered in chapters in later volumes, as is the statutory liability of such corporations as stockholders.⁹⁰ In some states, however, the purchase of stock in another corporation is against public policy so as to make a note given therefor void as between the original parties.⁹¹

A corporation cannot refuse a demand for repurchase of its stock, as per its agreement on selling the stock, on the ground that the contract for repurchase is ultra vires.⁹²

cotton exchange for the purchase and sale of cotton by the latter on its account on speculation, and the latter purchased and sold cotton in his own name, without any delivery or transfer of title to the corporation, it was held that there was no such executed contract as to estop the corporation from setting up the defense of ultra vires in an action against it to recover commissions and for money expended. *Jemison v. Citizens' Sav. Bank of Jefferson*, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. Rep. 482, 25 N. E. 264, where the court said: "The most that can be claimed is that they held the cotton or the contracts therefor subject to the call or order of the defendant."

⁸⁹ *Mulford v. Torrey Exploration Co.*, 45 Colo. 81, 100 Pac. 596; *Goodland v. Bank of Darlington*, 74 Mo. App. 365; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701.

Where a private corporation for benevolent purposes, not possessing authority to become a stockholder in another corporation, nevertheless took stock in a building and loan association and borrowed money from the

association thereon, making contract payments until the amounts paid exceeded the loan with legal interest, the court held the loan to be the only lawful part of the transaction; and that the corporation was not estopped to set up ultra vires as ground for cancellation of the contract as to any further liability. In other words, the federal court followed the majority rule of the state courts, without referring to the rule prevailing in the federal courts. However, the dissenting opinion of Judge Gilbert calls attention to the rule of the Supreme Court of the United States and holds that it should be followed. *United States Savings & Loan Co. v. Convent of St. Rose*, 133 Fed. 354.

⁹⁰ See chapter on Stock and Stockholders, *infra*.

⁹¹ *Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.*, 122 Tenn. 415, 123 S. W. 641.

⁹² *Roush v. Illinois Oil Co.*, 180 Ill. App. 346; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Latulippe v. New England Inv. Co.*, 77 N. H. 31, 86 Atl. 361. Compare *Wilson v. Torchon Lace & Mer-*

· § 1549. — **Application of rule to loans by corporation.** It has also been held that a person who has borrowed money from a corporation, and given his note or other express promise therefor, cannot defeat an action by the corporation on the note or other promise by setting up that it had no power under its charter to make the loan.⁹³ Thus, the fact that a building and loan association is not authorized by statute to make loans to a party not a member cannot be set up as a defense by such party who has borrowed money from the association and received the benefit of the transaction. The question of the ultra vires character of the act may be raised in such case only in a direct action against the corporation by the state.⁹⁴

§ 1550. — **Application of rule to borrowing of money by corporation.** And it has been held that a corporation which has borrowed money without authority, or for use, to the knowledge of the lender,

cantile Co., 167 Mo. App. 305, 149 S. W. 1156, where decision not clear.

⁹³ **United States.** Mutual Life Ins. Co. v. Wilcox, 8 Biss. 203, Fed. Cas. No. 9,980.

Florida. Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448.

Illinois. American Credit Indemnity Co. of New York v. Yamer, 170 Ill. App. 350, 358; Peoria Star Co. v. Cutright, 115 Ill. App. 492.

Indiana. Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Poock v. Lafayette Bldg. Ass'n, 71 Ind. 357.

Iowa. Garrison Canning Co. v. Stanley, 133 Iowa 57, 110 N. W. 171.

Missouri. Summet v. City Realty & Brokerage Co., 208 Mo. 501, 512, 106 S. W. 614.

New York. Steam Nav. Co. v. Weed, 17 Barb. 378.

Texas. Bond v. Terrell Cotton & Woolen Mfg. Co., 82 Tex. 309, 18 S. W. 691.

"Having the proceeds of the note in his pocket, neither the law nor common honesty will permit defendant to avail himself of the plea of ultra vires." Mutual Trust Co. v. Stern,

235 Pa. 202, 205, 83 Atl. 614.

Rule applied to loan by building and loan association. Noah v. German-American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615.

But it was held in an Indiana case that a person entering into the relation of borrowing member of a building and loan association with a corporation not authorized to conduct such business was not estopped to deny that his contract imposed upon him no other obligation than that of returning the sum borrowed, with interest, as the contract was void. Huter v. Union Trust Co. (Ind.), 51 N. E. 1071.

A corporation which acquires negotiable bonds as collateral security for a loan made by it, under circumstances which, if it were an individual, would constitute it a bona fide holder of the bonds, is a bona fide holder, and entitled to recover as such, although its charter may not have authorized it to loan money. St. Paul Gaslight Co. v. Village of Sandstone, 73 Minn. 225, 75 N. W. 1050.

⁹⁴ Bay City Building & Loan Ass'n v. Broad, 136 Cal. 525, 69 Pac. 225.

in an ultra vires business, and has given its note or bonds therefor, or other security, cannot avoid liability on its contract because of the ultra vires character of the transaction.⁹⁵

In an Illinois case, where a banking corporation had created an investment department and executed a deed of trust to secure lenders or depositors, it was held that after receiving, on the faith of the security, loans and deposits which went into its general business, it could not defeat the deed of trust by setting up that the business was ultra vires.⁹⁶ Where a loan is made to a corporation engaged in a lawful business without knowledge of the purpose for which the money is to be used, and the corporation uses it for an ultra vires purpose, it cannot defeat a recovery on that ground.⁹⁷

§ 1551. — Application of rule to leases. It has also been held that the fact that a lease of its property by a corporation is ultra vires cannot be set up by the lessee, where he has occupied the premises under the lease, to defeat an action by the corporation to recover the rent agreed upon for the period of such occupancy;⁹⁸ and that a

95 Illinois. *Ward v. Johnson*, 95 Ill. 215, aff'g 5 Ill. App. 30; *Darst v. Gale*, 83 Ill. 136; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

Indiana. *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412.

New Hampshire. *International Trust Co. v. Davis Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

New Jersey. *Bettle v. Republic Savings & Loan Ass'n*, 71 N. J. Eq. 613, 64 Atl. 176.

Pennsylvania. *Union Trust Co. of Pittsburgh v. Mercantile Library Hall Co.*, 189 Pa. St. 263, 42 Atl. 129; *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428.

Washington. *Blair v. Metropolitan Sav. Bank*, 27 Wash. 192, 67 Pac. 609.

Neither a corporation nor its creditors can attack bonds issued by the corporation as ultra vires, because of the amount, where the corporation has received and retains the proceeds. *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

When a private corporation, without authority, becomes a stockholder in a building and loan association and as such borrows money from it, a suit against the corporation to enforce the security given for the loan cannot be defeated by setting up that its act in becoming a stockholder was ultra vires. *Bowman v. Foster & Logan Hardware Co.*, 94 Fed. 592, which attempts to distinguish the federal rule as applicable only to quasi public corporations.

⁹⁶ *Ward v. Johnson*, 95 Ill. 215, aff'g 5 Ill. App. 30.

⁹⁷ *Luther Lumber Co. v. Sheldahl Sav. Bank*, 22 Wyo. 302, 139 Pac. 433.

⁹⁸ *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390.

In a New York case it was held that the defense of ultra vires could not be interposed to defeat an action brought by a lessor corporation to enforce, to the extent of past-due rent and unpaid taxes, a bond executed to it by a lessee corporation and sureties to secure performance of the terms of

corporation which has taken a lease in excess of its powers, and occupied the premises under it, cannot set up its want of power as a defense in an action against it for the rent due.⁹⁹

§ 1552. — Application of rule to policies of insurance. In accordance with this view it is held that an insurance company, after insuring against a risk which was not within the powers conferred upon it by its charter and receiving the premium on the policy, cannot defeat an action on the policy by setting up that its contract was *ultra vires*.¹ So, although in becoming an insurer of its employees

the lease, where the lease was not *malum in se*, nor expressly prohibited by law, but merely not within the express or implied powers of the corporation, and where the lessee had occupied the premises. *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390.

That the erection of an office building and the renting out of offices therein was an excess of authority on the part of a national bank could not be utilized as a defense by a defendant in an action for rent. *Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co.*, 215 Pa. 115, 114 Am. St. Rep. 949, 64 Atl. 374.

Where a corporation has leased to another a sewing machine, as a defense to action to enforce the terms of the lease the lessee may not deny the authority of the corporation to enter into the contract. *Standard Sewing-Mach. Co. v. Frame*, 2 Pennw. (Del.) 430.

⁹⁹ *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.*, 48 N. J. L. 530, 7 Atl. 523; *Doylestown & D. Turnpike Road Co. v. Philadelphia & E. Elec. Ry. Co.*, 49 Pa. Super. Ct. 381. And see *Brewer & Hoffman Brewing Co. v. Boddie*, 80 Ill. App. 353, *aff'd* 181 Ill. 622, 55 N. E. 49; *Canal & C. R. Co. v. St. Charles St. R. Co.*, 44 La. Ann. 1069, 61 So. 702; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609.

¹ *Minneapolis Fire & Marine Mut.*

Ins. Co. v. Norman, 74 Ark. 190, 109 Am. St. Rep. 74, 4 Ann. Cas. 1045, 85 S. W. 229; *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; *Banker's Mut. Casualty Co. v. First Nat. Bank of Council Bluffs, Iowa*, 131 Iowa 456, 108 N. W. 1046.

All the members of a mutual fire insurance company were required by the charter to be residents of the state, and insurance was authorized by the charter to be written in the state only. These provisions of the charter did not constitute a good defense to the corporation sued upon an executed policy, whereof it had received the benefits, insuring property without the state. The court said: "A corporation chartered to transact a certain business may lawfully do business elsewhere than in the country where it receives its charter, unless the terms of its charter or the laws of such country restrain it. This corporation was authorized for fire insurance, and was engaged in soliciting such insurance outside of the state. Persons taking its policies in a distant country do not, and could not be expected to, know the terms of its charter, nor the laws of the state chartering it. The members of this corporation were presumably cognizant of the fact that the company was insuring outside of the state, and must have known that in so doing it was acting beyond its powers. They

against accident, a corporation performs an ultra vires act, it will be held estopped to set up the limitation on its powers as a defense to an action by an employee who was injured, where he has performed his part of the contract.²

§ 1553. — Application of rule to contracts of common carriers. It has been held that a railroad company which engages in the business of carrying passengers and goods for hire in a way or over routes not authorized by its charter cannot, after contracting to carry and receiving the consideration, set up the ultra vires character of its contract to escape liability for injuries.³

§ 1554. — Rule applied to subscriptions. This rule of estoppel against the corporation where it has received the benefits of an ultra vires contract has been applied to a subscription to secure the location of new industries in the city, where the corporation (in this case a brewing company) had received the benefit in the location of new industries and the increase in population.⁴ So, in another Indiana case, a street railroad company, to increase its business, contracted with the state board of agriculture to pay it a certain sum if it would establish and hold the state fairs at a certain place, and, after the board had performed its part of the contract, claimed exemption from liability on the contract on the ground that it was ultra vires. The court held that the defense could not prevail, even though the action was on the contract itself, as the company had received the benefit of the board's performance of the contract.⁵

could have taken steps to prevent the exercise of such acts by electing officers who would keep its business within its charter, or by taking proceedings to dissolve the corporation for such excesses. Under these circumstances it would be more just and equitable that the loss should fall upon them, rather than the one thus insuring in good faith should lose his insurance." *Continental Fire Ass'n v. Masonic Temple Co.*, 26 Tex. Civ. App. 139, 62 S. W. 930.

After an insurance company has assumed the risks of another company, and has accepted premiums from the insured, it cannot assert as against him that the contract with the other

company was ultra vires. *Milborne v. Royal Benefit Society*, 14 N. Y. App. Div. 406, 43 N. Y. Supp. 1026.

² *Arkadelphia Lumber Co. v. Posey*, 74 Ark. 377, 87 S. W. 1127. To same effect, *Minneapolis Fire & Marine Mut. Ins. Co. v. Norman*, 74 Ark. 190, 109 Am. St. Rep. 74, 4 Ann. Cas. 1045, 85 S. W. 229.

³ *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258. And see *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48, 33 Am. St. Rep. 743, 33 N. E. 472.

⁴ *Huntington Brewing Co. v. McGrew*, — Ind. App. —, 112 N. E. 534.

⁵ *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, 17

§ 1555. — Rule applied to sending of telegram. This rule as to acceptance of benefits has been applied to an action against a railroad company for failing to send a telegram, the objection being that the railroad company had no power to conduct a telegraph business, but it being held that it was liable because it had accepted the benefits of the contract.⁶

§ 1556. — Rule applied to partnership. The doctrine that where an ultra vires contract with a corporation has been executed by one of the parties, the other may be estopped to set up the want of power to enter into the contract, has been applied to contracts of partnership. Thus, it has been held that where corporations have entered into an ultra vires copartnership, and have made a contract as partners, and have received the consideration for their promise, they cannot defeat an action against them as partners on the contract by setting up that the partnership business was ultra vires.⁷

It has also been held that while a contract of partnership between a corporation and an individual is ultra vires as to the corporation, yet if the corporation has received the benefit of the same, it will be required in equity to account to the other party for what is due him under the contract.⁸

§ 1557. — Application of rule to contract of guaranty or suretyship. It has been held that a corporation cannot escape liability on a contract of guaranty or suretyship, after receiving the benefit of the contract, by setting up that it was ultra vires,⁹ and this rule has

Am. Rep. 702. See also *Louisville, N. A. & C. Ry. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370.

⁶ *Arkansas & L. R. Co. v. Stroude*, 77 Ark. 109, 114, 113 Am. St. Rep. 130, 91 S. W. 18; *Hanna v. Chicago, R. I. & P. R. Co.*, 89 Kan. 503, 508, 132 Pac. 154.

⁷ *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258.

⁸ *Boyd v. American Carbon Black Co.*, 182 Pa. St. 206, 37 Atl. 937.

⁹ *Arkansas. Richeson v. National Bank of Mena*, 96 Ark. 556, 132 S. W. 913.

Kansas. Arkansas Valley Town & Land Co. v. Lincoln, 56 Kan. 145, 42 Pac. 706.

Michigan. Timm v. Grand Rapids Brewing Co., 160 Mich. 371, 17 Det. L. N. 122, 27 L. R. A. (N. S.) 186, 125 N. W. 357.

Nebraska. See Thomas v. City Nat. Bank of Hastings, 40 Neb. 501, 24 L. R. A. 263, 58 N. W. 943.

New York. Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co., 16 N. Y. St. Rep. 208.

North Carolina. Hutchins v. Planter's Nat. Bank, 128 N. C. 72, 38 S. E. 252, which did not follow the federal rule although the ultra vires guaranty was that of a national bank.

Oklahoma. Western & Southern Fire Ins. Co. v. Murphey, — Okla. —, 156 Pac. 885. To same effect, *Crowder*

also been stated in the federal courts in a few decisions, in opposition to the rule generally applied in the federal courts.¹⁰

On the other hand, it is held that a corporation which has entered into and performed an ultra vires contract of guaranty may enforce a mortgage given to secure or indemnify it.¹¹

§ 1558. Effect of judgment on ultra vires contract. The Supreme Court of the United States has held that where a judgment has been rendered in a state against a domestic corporation, by default, on a contract which the corporation had no power to make, it will be treated by the federal courts as so far invalid that a stockholder when sued as such on his liability as a stockholder where satisfaction of the judgment against the corporation was impossible, can set up

State Bank v. Aetna Powder Co., 41 Okla. 394, L. R. A. 1917 A 1021, 138 Pac. 392.

Washington. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509.

Where a corporation has gained a pecuniary benefit from the performance of a contract which it has guaranteed, or become surety on, at the expense of the other party to the contract, it cannot set up as a defense that it had no power to make the guarantee or become a surety. Flint & Walling Mfg. Co. v. Kerr-Murray Mfg. Co., 24 Ind. App. 350, 56 N. E. 858.

A manufacturing corporation will not be permitted to utilize ultra vires as a defense where it has guaranteed a debt to a third party for certain materials which it anticipated using in its manufacturing business, the goods not having been obtainable by the corporation had it not made the guarantee. Whitehead v. American Lamp & Brass Co., 70 N. J. Eq. 581, 62 Atl. 554.

Where a lumber company became surety on a bond given by a contractor for building a house to secure the payment of any mechanics' liens for materials, in consideration of the contractor's agreeing to purchase ma-

terial from it, and had the benefit of the contract, it was held that it could not avoid the contract as ultra vires, and file a mechanic's lien for material furnished by it, for the building. Wittmer Lumber Co. v. Rice, 23 Ind. App. 586, 55 N. E. 868.

A corporation will not be permitted to plead ultra vires as a bar to its liability where it has induced a customer to continue handling its product and to continue making advances to it under its promise that it would assume an indebtedness of a predecessor corporation, the customer having relied and acted upon the representations of the corporation. Curtis v. Natalie Anthracite Coal Co., 89 N. Y. App. Div. 61, 70, 85 N. Y. Supp. 413.

A corporation may plead ultra vires as a defense to a contract of suretyship when sued by one who had knowledge of the original relation of the parties. Bradley Engineering & Manufacturing Co. v. Heyburn, 56 Wash. 628, 630, 134 Am. St. Rep. 1127, 106 Pac. 170.

¹⁰ Kellogg-Mackay Co. v. Havre Hotel Co., 199 Fed. 727. See also Roosevelt v. Nashville, C. & St. L. Ry. Co., 128 Fed. 465.

¹¹ Macon & A. R. Co. v. Georgia R. Co., 63 Ga. 103.

the defense that the contract on which the judgment was based was ultra vires. Mr. Chief Justice Fuller, in rendering the opinion, said: "Whether in this case the corporation would have been held estopped if it had made the defense of ultra vires, it did not make it, and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas Constitution. * * * But we did not there hold that it was not open for a stockholder to show that the judgment was not enforceable against him when rendered against the corporation on a contract beyond its power to make."¹²

V. CONTRACTS FULLY EXECUTED ON BOTH SIDES

§ 1559. General rules. In considering the contracts called executed contracts, it is necessary always to keep in mind that executed contracts are those which have been fully performed on both sides,¹³ although the courts sometimes erroneously refer to contracts executed on one side only as executed contracts. When an ultra vires contract with a corporation has been fully performed on both sides, neither party can maintain an action to set aside the transaction or to recover what has been parted with. In other words, neither a court of law nor a court of equity will interfere in such a case to deprive either the corporation or the other party of money or property acquired under the contract.¹⁴

¹² Ward v. Joslin, 186 U. S. 142, 152, 46 L. Ed. 1093, aff'g 105 Fed. 224.

Although a corporation which has received and retained the benefit of an ultra vires transaction may not be permitted to plead its ultra vires character where effort is made to compel it to perform the conditions of the contract by it to be performed, in an action to charge a stockholder with individual liability, a judgment against the corporation is not conclusive against the stockholder in such sense as to bar him from showing the nature of the claim and that the contract upon which the judgment was based was ultra vires in its character, thus constituting a claim, which, while valid as against the corporation, is not one for which he can be held personally liable. Ward v. Joslin, 105 Fed. 224, aff'd in 186 U. S. 142, 46 L. Ed. 1093.

¹³ See Keokuk v. Ft. Wayne Elec. Co., 90 Iowa 67, 71, 57 N. W. 689.

¹⁴ **United States.** First Nat. Bank of Xenia v. Stewart, 107 U. S. 676, 27 L. Ed. 592. See also Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 29 L. Ed. 963.

Alabama. Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706. See also Bigbee & W. R. Packet Co. v. Moore, 121 Ala. 379, 25 So. 602.

Iowa. See Thompson v. Lambert, 44 Iowa 239.

New York. Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; Parish v. Wheeler, 22 N. Y. 494.

Pennsylvania. Leazure v. Hillegas, 7 Serg. & R. 313.

Virginia. Fayette Land Co. v.

"The doctrine of ultra vires, so far as we are aware, has never been invoked successfully when the purpose was to permit a corporation to recover money paid by it for the purchase of goods which it had received and appropriated to its own use."¹⁵ Or, stated differently, if an ultra vires contract is fully executed on both sides, it cannot be attacked or set aside either by the corporation or by the other party to the contract, and the fact that the contract is ultra vires cannot be collaterally urged by a third person not a party to the contract. So in condemnation proceedings, defendant cannot set up that the contract under which plaintiff corporation has acquired the right to condemn, is ultra vires.¹⁶

"It is thoroughly well settled law," said the Alabama court, "that a party to an ultra vires executory contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself. But, where the contract is fully executed—where whatever was contracted to be done on either hand has been done—a different rule prevails. In such case, the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other."¹⁷ However, relief will be granted if "it can be done independently of the contract, or a new, further and independent consideration subsists in support of the transaction sought to be enforced."¹⁸

A further reason for refusing to set aside an executed contract, although ultra vires, is sometimes found in the laches of the com-

Louisville & N. R. Co., 93 Va. 274, 24 S. E. 1016.

West Virginia. See *Wilson v. Carter Oil Co.*, 33 S. E. 249.

England. See *James v. Eve*, L. R. 6 H. L. 335.

Ultra vires will not justify the reopening of a completely executed transaction. *Chase & Baker Co. v. National Trust & Credit Co.*, 215 Fed. 633.

Where the contract has been fully executed on both sides, ultra vires

cannot be urged. *Tourtelot v. Whithed*, 9 N. D. 467, 478, 84 N. W. 8.

¹⁵ *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 377, 68 Pac. 879.

¹⁶ *Terre Haute & P. R. Co. v. Robins*, 247 Ill. 376, 93 N. E. 398.

¹⁷ *McClellan, J.*, in *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706.

¹⁸ *Santa Cruz v. Wykes*, 202 Fed. 357, 371, aff'g 184 Fed. 752.

plaining party where the other party has spent large sums of money in reliance on the contract.¹⁹

§ 1560. Application of rule to executed transfers of property "to" corporation in general. If a corporation enters into an ultra vires contract to purchase property, real or personal, and the contract is fully performed by payment and a conveyance or transfer of the title, the effect of the transaction is to vest the title in the corporation, at least as against all persons but the state, and the corporation may afterwards sell the same.²⁰ The other party cannot, in such a case, maintain a suit to rescind the sale and recover the property,²¹ nor can ultra vires be set up either by the corporation grantee²² or by a third person who is a stranger to the transaction.²³

§ 1561. Application of rule to conveyances of "real" property "to" corporation—In general. At common law, in the absence of any provision in the charter to the contrary, a corporation has the power to acquire and hold real estate in fee.²⁴ However, there are certain restrictions on this power, both at common law and oftentimes by charter provision or other statutes.²⁵ Thus the amount which the corporation may hold is often limited, and it is also the rule that the property can be held only for corporate purposes.²⁶ The question arising as to the effect of an acquisition of real property by a corporation without authority or in excess of its authority is well settled and the courts all agree as to the general rule, differing only as to its application in some particulars. The rule is that if a corporation is authorized in some cases, or for some purposes, or to a certain extent, to take and hold the title to real estate, an ultra vires conveyance passes the title, and no one but the state can object that the conveyance was for an unauthorized purpose, or that it was otherwise in excess of the powers conferred upon the corporation by its charter.²⁷

¹⁹ *Odd Fellows' Hall Ass'n of Portland v. Hegele*, 24 Ore. 16, 32 Pac. 679.

²⁰ *Hough v. Cook County Land Co.*, 73 Ill. 23, 24 Am. Rep. 230; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; *Parish v. Wheeler*, 22 N. Y. 494; *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Fayette Land Co. v. Louisville & N. E. Co.*, 93 Va. 274, 24 S. E. 1016.

²¹ *Long v. Georgia Pac. Ry. Co.*, 91

Ala. 519, 24 Am. St. Rep. 931, 8 So. 706.

²² See § 1561, *infra*.

²³ See § 1569, *infra*.

²⁴ See § 1082, *supra*.

²⁵ See §§ 1099-1105, *supra*.

²⁶ See §§ 1086-1096, *supra*.

²⁷ *United States. Blair v. Chicago*, 201 U. S. 400, 450, 50 L. Ed. 801; *Jones v. Habersham*, 107 U. S. 174, 27 L. Ed. 401; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Run-*

Stated in another way, the state may attack an ultra vires transfer

yan v. Coster's Lessee, 14 Pet. 122, 14 L. Ed. 382; Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299.

Alabama. South & N. A. R. Co. v. Highland Ave. & B. R. Co., 119 Ala. 105, 24 So. 114; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706.

California. Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544.

Georgia. American Mortg. Co. of Scotland v. Tennille, 87 Ga. 28, 12 L. R. A. 529, 13 S. E. 158.

Illinois. Springer v. Chicago Real Estate Loan & Trust Co., 202 Ill. 17, 66 N. E. 850, aff'g 102 Ill. App. 294; Chicago & A. R. Co. v. Keegan, 185 Ill. 70, 77, 56 N. E. 1088; Cooney v. A. Booth Packing Co., 169 Ill. 370, 48 N. E. 406; Hamsher v. Hamsher, 132 Ill. 273, 8 L. R. A. 556, 23 N. E. 1123; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; Alexander v. Tolleston Club of Chicago, 110 Ill. 65; Mapes v. Scott, 94 Ill. 379; Hough v. Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230; Henderson v. Virden Coal Co., 78 Ill. App. 437.

Indiana. Pilliod v. Angola Railway & Power Co., 46 Ind. App. 719, 91 N. E. 829.

Iowa. Brown v. Bradford, 103 Iowa 378, 72 N. W. 648; Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa 101, 4 N. W. 842.

Kentucky. Miller v. Flemingsburg & F. Springs Turnpike Co., 109 Ky. 475, 59 S. W. 512.

Louisiana. Delta Duck Club v. Barrios, 135 La. 357, 65 So. 489.

Maryland. Hagerstown Manufacturing, Mining & Land Improvement Co. of Washington County v. Keedy, 91 Md. 430, 438, 46 Atl. 965; Hanson v. Little Sisters of Poor of Baltimore, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052.

Massachusetts. Nantasket Beach

Steamboat Co. v. Preston, 182 Mass. 147, 65 N. E. 57.

New York. Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 24 L. R. A. 322, 35 N. E. 964.

North Carolina. Cross v. Seaboard Air Line Ry. Co., 90 S. E. 14; Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 594.

Ohio. Walsh v. Barton, 24 Ohio St. 28.

Oklahoma. Local Inv. Co. v. Humes, 151 Pac. 878.

Pennsylvania. Bone v. Delaware & H. Canal Co. (Pa. St.), 5 Atl. 751; Leazure v. Hillegas, 7 Serg. & R. 313.

South Carolina. Chamberlain v. Northeastern R. Co., 41 S. C. 399, 25 L. R. A. 139, 44 Am. St. Rep. 717, 19 S. E. 743.

South Dakota. Gilbert v. Hole, 2 S. D. 164, 49 N. W. 1.

Tennessee. Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & Railroad Co., 106 Tenn. 651, 667, 62 S. W. 162; Barrow v. Nashville & C. Turnpike Co., 9 Humph. 304.

Virginia. Collins v. Doyle's Ex'r, 119 Va. 63, 89 S. E. 88; Fayette Land Co. v. Louisville & N. R. Co., 93 Va. 274, 24 S. E. 1016; Bank of Virginia v. Poitiaux, 3 Rand. 136, 15 Am. Dec. 706.

Washington. Milton v. Crawford, 65 Wash. 145, 118 Pac. 32.

Wisconsin. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 217, 94 N. W. 74.

England. Ayers v. South Australian Banking Co., L. R. 3 P. C. 548.

In the absence of a clear expression of legislative intent to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void but voidable, and the sovereign alone can object. Kerfoot v. Farmers & Merchants Bank, 218 U. S. 281, 54 L. Ed. 1042.

although fully executed on both sides, but neither party to the contract²⁸ nor a third person²⁹ can attack the contract as ultra vires. Likewise, the power of a municipal corporation to purchase or otherwise acquire real property can be questioned only by the state.³⁰

This statement that the power of a corporation to acquire and hold real estate in particular instances can only be inquired into by the state, and cannot be attacked by third persons, is no exception to the general rules applicable to the effect of ultra vires. Instead it is merely a statement, in different words, of the rule that a wholly executed contract will not be interfered with at the suit of one of the parties thereto or of third persons. The rule has little, if any, bearing on the question whether strangers, in general, can attack corporate contracts³¹ and it involves something broader than the question as to who may attack the conveyance. In other words, the situation is this: A corporation, without power to do so, purchases or otherwise acquires real estate. A deed is executed and there is delivery of possession, on the one side and the price is paid on the other side. The contract is then wholly executed. Thereafter, the corporation may seek to get its money back, or the seller may seek to get his real estate back, or the corporate owner may sue third persons or be sued by them so that the title of the property may be involved. In any such case, none of the parties can set up the claim that the purchase was ultra vires. The reason is that the contract is wholly executed on both sides. And when the courts say that the transaction can be attacked only by the state, they merely enunciate one phase of the question which applies equally well to all executed contracts of every kind. In most of the cases arising in the courts, this rule is easy of application and it is sufficient merely to state it in order finally to dispose of the question. However, sometimes, it is not altogether easy to apply the rule. For instance, is a lease an executed or an executory contract? Is a mortgage an executed or an

One who holds possession of land adversely cannot, as against a corporation holding the legal title, set up that the corporation had no power to acquire the land. *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70, 56 N. E. 1088.

A purchase of one railroad company by another, when fully executed by a conveyance, cannot be attacked as ultra vires by a stockholder of a third corporation to which the vendee cor-

poration has leased the same, in an action to set aside the lease. *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299.

²⁸ *Knowles v. Northern Texas Traction Co.* (Tex. Civ. App.), 121 S. W. 232, and see § 1568, *infra*.

²⁹ See § 1569, *infra*.

³⁰ 3 *McQuillin*, Mun. Corp. § 1124.

³¹ See § 1527, *supra*.

executory contract? The courts have largely fought shy of discussing this phase of the question in connection with corporate leases and mortgages but have contented themselves with a decision of the particular case with the result that there is more or less confusion in the reported cases in regard thereto.³²

It is a well-established principle, said the Alabama court, "that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the state, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found."³³ And in a Virginia case it was said by Judge Keith, after a review of the authorities: "No one can be heard to question the right of a corporation to acquire and hold real estate, except the state by which the corporation was created, or that state within whose limits and by whose permission or authority, express or implied, it does business, and it must do so by a direct proceeding instituted for that purpose."³⁴

This rule applies equally well to corporations created by the United States, such as national banks, in which case only the federal government can attack executed conveyances.³⁵ Thus a conveyance of real estate to a national bank in violation of the act of congress limiting the purposes for which national banks may purchase and hold real estate is voidable but not void, and can be attacked only by the federal government.³⁶

³² Leases, see § 1587, *infra*.

³³ Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706.

³⁴ Fayette Land Co. v. Louisville & N. R. Co.; 93 Va. 274, 24 S. E. 1016.

"It would lead to infinite inconvenience and embarrassments," said Judge Field in a California case, "if in suits by corporations to recover possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that neces-

sity." Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544.

³⁵ Brown v. Schleier, 194 U. S. 18, 48 L. Ed. 857, *aff'g* 118 Fed. 981, 112 Fed. 577.

³⁶ Kerfoot v. Farmers & Merchants Bank, 218 U. S. 281, 54 L. Ed. 1042; Baker v. Schofield, 221 Fed. 322; Barron v. McKinnon, 196 Fed. 933, 939; First Nat. Bank of Westhope v. Messner, 25 N. D. 263, 141 N. W. 999; Taylor v. Davison (Tex. Civ. App.), 120 S. W. 1018.

The same rule applies to the purchase by a national bank of a special

The effect of ultra vires or prohibited conveyances to foreign corporations is treated of in a subsequent chapter.³⁷

§ 1562. — Exception to rule where statute authorizes collateral attack. It has been said that "the only exception to the rule which prohibits collateral attack by private persons on such conveyances" is "where such attack is authorized by express legislative permission."³⁸

§ 1563. — Exception to rule where transfer void as against public policy. Where a conveyance by a home corporation to a foreign corporation that has not complied with the laws of the state is void as against public policy, the validity of the conveyance may be drawn in question in a suit against the domestic corporation by a party injured by the neglect of the grantee corporation.³⁹

§ 1564. — Where corporation has no power to hold any land. In some cases an attempt has been made to draw a line between the effect of absolute want of power to hold real estate for any purpose, and the effect of limitations on the capacity to hold real estate where it is conceded that there is power to hold some real estate for some purposes, by merely stating the rule as to the latter without attempting to state the rule which might govern in the former case, or by making some such statement as "whatever the rule may be where a corporation has no power to acquire or hold real property, yet where it has power to hold to some extent and for some purposes," etc.; but there is dictum that even where a corporation has no power whatever to take or hold real estate, a deed made to it is not void but merely voidable, and then only at the suit of the state.⁴⁰ Other decisions, however, seem to take it for granted that if there is no power to hold real estate to any extent or for any purposes (a very exceptional case), or if a statute prohibits the holding of any real property, a convey-

tax bill. *First Nat. Bank of Independence v. Shewalter*, 153 Mo. App. 635, 134 S. W. 42.

The objection that a national bank cannot purchase land at a foreclosure sale can be urged only by the federal government. *Dewitt County Nat. Bank v. Mickelberry*, 244 Ill. 77, 135 Am. St. Rep. 304, 91 N. E. 86.

³⁷ See chapter on Foreign Corporations, *infra*.

³⁸ *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261, 290, 38 Am. St. Rep. 656, 22 S. W. 623.

³⁹ *Plummer v. Chesapeake & O. Ry. Co.*, 143 Ky. 102, 33 L. R. A. (N. S.) 362, 136 S. W. 162.

⁴⁰ *Hagerstown Manufacturing, Mining & Land Improvement Co. of Washington County v. Keedy*, 91 Md. 430, 438, 46 Atl. 965, and cases cited, none of which are more than dicta.

ance is wholly void and no title passes; but no good ground is stated for such contention and it is submitted that it will not be so held if squarely presented.

§ 1565. — **Statutory prohibitions.** The general rule as to the effect of executed contracts applies not only to acquisitions of real property which are merely *ultra vires* as beyond the implied powers of the corporation, but also where a statute expressly forbids the corporation to hold real property except for particular purposes or beyond a prescribed limit or quantity.⁴¹ In stating the law that an *ultra vires* transfer of real property to a corporation, where fully executed, can be objected to only by the state, the courts, except in a few isolated cases, make no attempt to distinguish between transfers which are *ultra vires* as beyond the implied powers of the corporation, and transfers which are absolutely or in effect prohibited by statutes or the charter, such as statutory limitations upon the amount of real property which the corporation may hold, or the like; but instead the courts ordinarily state the rule as embracing both kinds of transfers.⁴² Thus, a constitutional provision or statute that a corporation shall not hold real estate for longer than a certain number of years unless actually occupied in its business can be enforced only at the instance of the public.⁴³ In fact such statutes oftentimes are merely declaratory of the common law,⁴⁴ and where they impose no penalty in terms and do

⁴¹ *Louisville School Board v. King*, 32 Ky. L. Rep. 687, 107 S. W. 247; *Mallett v. Simpson*, 94 N. C. 37, 41, 55 Am. Rep. 595; *Litchfield v. Preston*, 98 Va. 530, 37 S. E. 6.

⁴² *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313.

Only the state can take advantage of statutory limitations upon the amount of property which a corporation may hold. *Brigham v. Peter Bent Brigham Hospital*, 134 Fed. 513, 527.

Restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state. *Mansfield v. Neff*, 43 Utah 258, 134 Pac. 1160.

⁴³ *Pere Marquette R. Co. v. Graham*, 136 Mich. 444, 450, 11 Det. L. N. 69, 99 N. W. 408.

Thus, the rule applies where a constitutional provision or statute forbids a corporation to hold any real estate not necessary for carrying on its business, for more than five years, under penalty of escheat. *Louisville School Board v. King*, 32 Ky. L. Rep. 687, 107 S. W. 247.

The right of a corporation to hold land for a period in excess of the time fixed by the statute can be questioned only by the state. *Summet v. City Realty & Brokerage Co.*, 208 Mo. 501, 513, 106 S. W. 614.

⁴⁴ *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 286, 24 S. E. 1016.

not declare the conveyance to be void, the legal title passes to the corporation and the state is the only one who can complain.⁴⁵

However, in Illinois, it has been held that when a corporation is absolutely prohibited by its charter or by statute from taking land, it is wholly incapacitated to do so, and a conveyance to it in violation of the prohibition is void and passes no title; and this rule has been applied when a corporation has exhausted its capacity by having already acquired land to the full limit of its capacity.⁴⁶ So in Wisconsin it has been suggested that there may be an exception where the "inability results from express statutory prohibition."⁴⁷ This may be true where the statute expressly declares such conveyances "void" or "wholly void,"⁴⁸ but where it merely prohibits conveyances to corporations in excess of certain limits the rule should be exactly the same as where the inability to acquire the property is based on common-law restrictions.

In regard to this matter, Mr. Morawetz, in his valuable treatise on Corporations, says: "The courts will never presume that the legislature intends a prohibited conveyance of property or contract to be wholly null and void, if this would impair the security of titles, or if persons acting in good faith and without notice of the illegality would suffer thereby. Such a result will not be attributed to the legislature, unless it appears clearly to have been contemplated by the legislature. Thus, conveyances of real and personal property have been held to confer title upon the transferee, although made in direct violation of the charters and general laws governing corpora-

⁴⁵ *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 287, 24 S. E. 1016.

⁴⁶ *St. Peter's Roman Catholic Congregation v. Germain*, 104 Ill. 440, where a religious society was forbidden by statute to hold more than ten acres of land.

"It is a well settled rule that where a corporation is forbidden to take or receive lands, such a prohibition goes to its capacity to acquire, and a deed made to it under such circumstances passes no title, such a conveyance being absolutely void. * * * It is claimed, however, this rule only applies where the prohibition is total, and not merely partial, as in this case, —that where there is a capacity to

take to a limited extent, and a conveyance is made for a quantity in excess of that which the law permits, the title will nevertheless pass to the whole, subject to the right of the State to interpose for the excess. We cannot give our adhesion to this doctrine, for it would be conceding that a corporate body might clothe itself with the legal title to an estate in contravention of an express provision of the statute, which is inconsistent with well recognized principles." *St. Peter's Roman Catholic Congregation v. Germain*, 104 Ill. 440, 446.

⁴⁷ *Illinois Steel Co. v. Warras*, 141 Wis. 119, 126, 123 N. W. 656.

⁴⁸ See Chap. 38, *infra*.

tions. Very inconvenient consequences would follow from a contrary doctrine. If such transfers were held to confer no title upon the transferees, subsequent purchasers would likewise acquire no title, and the security of titles having passed through a corporation would be seriously affected. * * * It has been held, in accordance with this view, that a clause in a charter providing that the corporation may lawfully hold lands to a certain amount, and no more, does not affect the title of the company to land held in excess of the authorized amount."⁴⁹

§ 1566. — Remedies of state. Although dicta may be found in the textbooks, and in many of the cases, to the effect that land acquired by a corporation in excess of its powers, or in violation of its charter, is, as in the case of land conveyed to an alien not authorized to take and hold land, subject to escheat or forfeiture by the state, if proper proceedings are instituted to declare a forfeiture, there is no decision in support of any such doctrine. It is no doubt within the power of the legislature to expressly provide for forfeiture to the state of land acquired *ultra vires* by a private corporation, but, in the absence of such a statute, the state cannot confiscate the land of a corporation because it has no power to hold the same. The only remedy of the state is to proceed against the corporation to forfeit its charter, as will be explained in a subsequent chapter.⁵⁰

§ 1567. — As affecting passing of title. The following propositions are too well settled to admit of controversy.

1. The fact that a corporation has exceeded its powers in acquiring real estate does not prevent the passing of title to the corporation, subject to the rights of the state.⁵¹

⁴⁹ 2 Morawetz, *Priv. Corp.* § 678.

⁵⁰ *Com. v. New York, L. E. & W. R. Co.*, 132 Pa. St. 591, 7 L. R. A. 634, 19 Atl. 291. See 8 Harvard L. Rev. 15.

In some states, provision for forfeiture or escheat to the state has been made by statute.

⁵¹ *United States. Barron v. McKinnon*, 196 Fed. 933; *Metropolitan Trust Co. of New York v. McKinnon*, 172 Fed. 846.

Illinois. Barnes v. Suddard, 117 Ill. 237, 243, 7 N. E. 477; *Hough v. Cook County Land Co.*, 73 Ill. 23, 28, 24 Am. Rep. 230.

Kentucky. Louisville School Board v. King, 127 Ky. 824, 837, 15 L. R. A. (N. S.) 379, 107 S. W. 247.

Massachusetts. Nantasket Beach Steamboat Co. v. Shea, 182 Mass. 147, 149, 65 N. E. 57.

Missouri. McIndoe v. St. Louis, 10 Mo. 575.

South Dakota. Gilbert v. Hole, 2 S. D. 164, 49 N. W. 1.

A sale and transfer of land is valid between the parties although the grantee corporation was not authorized to make the purchase. *Miller v. Flemingsburg & F. Springs Turnpike*

2. One who thereafter takes a deed from the vendor of the corporation acquires no title as against the corporation.⁵²

3. A corporation which has acquired title to real estate, although its acquisition of title was ultra vires, may transmit title to another.⁵³

4. The fee does not revert to the grantor of the corporation upon the dissolution of the corporation, although the transfer was ultra vires.⁵⁴

5. A creditor of the vendor cannot rely on ultra vires on the part of the corporate purchaser so as to make the property subject to seizure for the debts of the vendor.⁵⁵

§ 1568. — Right of parties to transfer to attack. A corporation whose acquisition of property is ultra vires cannot, after the contract is fully executed on both sides, bring an action or take steps to rescind, set aside or cancel the transfer merely because ultra vires. Likewise neither the grantor⁵⁶ nor his privies can rescind an exe-

Co., 109 Ky. 475, 22 Ky. L. Rep. 1039, 59 S. W. 512.

Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. *Kerfoot v. Farmers & Merchants Bank*, 218 U. S. 281, 54 L. Ed. 1042.

A creditor who takes a mortgage on personal property of a corporation and thereafter sells the property on default under a power of sale cannot afterwards attack the purchase of the property by the corporation as ultra vires. *Parish v. Wheeler*, 22 N. Y. 494, 509.

An alleged owner of lands cannot sue a corporation to recover them on the ground that the corporation exceeded its authority in acquiring and holding them. *Bowman v. Trainor*, 93 Ark. 435, 124 S. W. 1019.

⁵² *Fritts v. Palmer*, 132 U. S. 282, 286, 33 L. Ed. 317.

⁵³ *Miller v. Flemingsburg & F. Springs Turnpike Co.*, 109 Ky. 475, 59 S. W. 512; *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147, 65 N. E. 57; *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016.

⁵⁴ *Miller v. Flemingsburg & F. Springs Turnpike Co.*, 109 Ky. 475, 59 S. W. 512.

⁵⁵ *Edwards v. Fairbanks & Gilman*, 27 La. Ann. 449.

⁵⁶ *Hayden v. Hayden*, 241 Ill. 183, 89 N. E. 347; *Shelby v. Chicago & E. I. R. Co.*, 143 Ill. 385, 32 N. E. 438, aff'g 42 Ill. App. 339; *Ancell v. Southern Illinois & M. Bridge Co.*, 223 Mo. 209, 122 S. W. 709.

Only the state can interfere. *Hayden v. Hayden*, 241 Ill. 183, 186, 89 N. E. 347.

Thus, the grantor of real estate or of an interest in real estate cannot deny the power of the corporate grantee to take the title or right so conveyed (*Northeastern Telephone & Telegraph Co. v. Hepburn*, 72 N. J. Eq. 7, 65 Atl. 747), nor, having received the proceeds, claim that the purchase was ultra vires (*Ancell v. Southern Illinois & M. Bridge Co.*, 223 Mo. 209, 231, 122 S. W. 709).

Where one corporation has executed a deed and transferred its entire property to another corporation, the grantee corporation assuming all debts of the grantor corporation, the grantor

cuted transfer of realty,⁵⁷ where the land has been transferred and the price paid, by claiming that the corporation vendee had no authority to acquire the property,⁵⁸ nor can he sue to set aside the conveyance in such a case,⁵⁹ nor otherwise, ordinarily, question the title of the grantee corporation. Thus, the grantor of land, or one who claims under him, cannot, after the price is received by the grantor and a deed and possession delivered, maintain ejectment against the corporate grantee on the ground that the corporation had no power to take title to land.⁶⁰

§ 1569. — Remedies of corporation although acquisition of land is ultra vires. A corporation, notwithstanding its acquisition of land was ultra vires, may maintain actions in connection with the land against third persons who cannot set up ultra vires in the acquisition as a defense. This includes actions of ejectment,⁶¹ actions for tres-

corporation will not be permitted to retake the property on the ground that the transfer was ultra vires, where the grantee corporation has already paid part of the debts and has repudiated none of them. *Savings & Trust Co. of Cleveland v. Bear Valley Irrigation Co.*, 112 Fed. 693.

Grantor cannot question power so as to secure reversion of the land after the corporation is dissolved. *Miller v. Flemingsburg & F. Springs Turnpike Co.*, 109 Ky. 475, 59 S. W. 512.

⁵⁷ *American & F. Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888; *Summet v. City Realty & Brokerage Co.*, 208 Mo. 501, 106 S. W. 614; *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418, 46 S. W. 1000.

Where a trustee conveys land to a corporation, the beneficiaries of the trust are estopped to plead that the corporation had no power to own real property. *State Security Bank v. Hoskins*, 130 Iowa 339, 8 L. R. A. (N. S.) 376, 106 N. W. 764.

⁵⁸ *Barrow v. Nashville & C. Turnpike Co.*, 91 Humph. (Tenn.) 304.

⁵⁹ *American & F. Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888.

⁶⁰ *Myers v. Croft*, 13 Wall. (U. S.)

291, 295, 29 L. Ed. 562. To same effect, see *Smith v. Sheeley*, 12 Wall. (U. S.) 358, 20 L. Ed. 430.

⁶¹ *Arizona*. *Tidwell v. Chiricahua Cattle Co.*, 5 Ariz. 352, 360, 53 Pac. 192.

California. *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 544.

Illinois. *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70, 77, 56 N. E. 1088; *Cooney v. A. Booth Packing Co.*, 169 Ill. 370, 48 N. E. 406. *Contra*, *St. Peter's Roman Catholic Congregation v. Germain*, 104 Ill. 440.

Michigan. *Pere Marquette R. Co. v. Graham*, 136 Mich. 444, 450, 99 N. W. 408.

Missouri. *Summet v. City Realty & Brokerage Co.*, 208 Mo. 501, 106 S. W. 614; *Shewalter v. Pirner*, 55 Mo. 218.

Montana. *First Nat. Bank of Helena v. Roberts*, 9 Mont. 323, 23 Pac. 718.

North Carolina. *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 595. But see *Quaker Society v. Dickenson*, 1 Dev. L. 189.

Pennsylvania. *Bone v. Delaware & H. Canal Co.* (Pa. St.), 5 Atl. 751. *Compare Leasure v. Union Mut. Life Ins. Co.*, 91 Pa. St. 491.

passes,⁶² actions for damages for injuries to property in the possession of the corporation,⁶³ actions to enjoin the commission of trespasses⁶⁴ or to enjoin interference with its use of the land,⁶⁵ actions to protect the corporation in the enjoyment of an easement in land by enjoining the disturbance thereof,⁶⁶ actions to remove a cloud and quiet title,⁶⁷ actions for specific performance of a contract to purchase a building, where it was claimed that the holding of the property by the corporate vendor was ultra vires,⁶⁸ actions for the purchase price of the land where afterwards sold by the corporation,⁶⁹ and actions for rent

Wisconsin. *Illinois Steel Co. v. Warras*, 141 Wis. 119, 126, 123 N. W. 656.

⁶² A trespasser cannot defend on the ground that the acquisition of title by the corporation was ultra vires. *Southern Pac. R. Co. v. Orton*, 32 Fed. 457; *Whitman Gold & Silver Min. Co. v. Baker*, 3 Nev. 386.

⁶³ *Farmers' Loan & Trust Co. v. Green Bay & M. R. Co.*, 12 Fed. 773; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, Fed. Cas. No. 2, 989.

A third person not a party to the contract cannot defend a suit against him for injury to real estate by showing that the corporation plaintiff had no title to the property in that its acquisition of it was ultra vires. *Farmers' Loan & Trust Co. v. Green Bay & M. R. Co.*, 12 Fed. 773, 11 Biss. 334.

⁶⁴ *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 544.

⁶⁵ *Alexander v. Tolleston Club*, 110 Ill. 65; *Kansas City & S. E. Ry. Co. v. Kansas City S. W. Ry. Co.*, 129 Mo. 62, 31 S. W. 451 (interference with railroad right of way).

⁶⁶ *Northeastern Telephone & Telegraph Co. v. Hepburn*, 72 N. J. Eq. 7, 65 Atl. 747.

⁶⁷ **United States.** *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

Arkansas. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348;

Bowman v. Trainor, 93 Ark. 435, 124 S. W. 1019.

Kentucky. *National Bank of Commerce v. Licking Valley Land & Mining Co.*, 15 Ky. L. Rep. 211, 22 S. W. 881.

Montana. *Butte Hardware Co. v. Cobban*, 13 Mont. 351, 34 Pac. 24.

Washington. *Puget Sound Nat. Bank of Seattle v. Fisher*, 52 Wash. 246, 17 Ann. Cas. 526, 100 Pac. 724.

The quantity of land which a corporation may hold cannot be called in question by an individual in a suit by the corporation to quiet title. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348; *Bowman v. Trainor Co.*, 93 Ark. 435, 124 S. W. 1019.

⁶⁸ *Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

⁶⁹ *Lauder v. Peoria Agricultural & Trotting Society*, 71 Ill. App. 475; *Watts v. Gantt*, 42 Neb. 869, 61 N. W. 104; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016. To same effect, see *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208.

Nor can he avoid his contract on that ground. *Walsh v. Barton*, 24 Ohio St. 28, 43.

One who contracts to buy land or takes a conveyance from a corporation cannot object that the corporation acted ultra vires in acquiring the land. *Lancaster v. Amsterdam Improvement*

where the corporation has leased the property.⁷⁰ So a corporation may maintain an action upon a contract of guaranty by a third person that the rent reserved should be paid.⁷¹

§ 1570. — Actions by representatives of corporation. If an ultra vires contract is fully executed on both sides, a receiver of the corporation cannot have it set aside merely because ultra vires.⁷²

§ 1571. — Application of rule to mortgages. Generally, where a suit is brought to foreclose, the question of ultra vires is decided according to the prevailing rule as to the effect of ultra vires where the contract is executed on one side only. Thus, where an action is brought to foreclose a mortgage, ultra vires cannot be set up as a defense either by a corporation, where the action is against the corporation, or by an individual, where the action is brought by the corporation, if the defendant has received the benefits of the mortgage.⁷³ However, a mortgage is sometimes considered as a conveyance so as to make an ultra vires mortgage to a corporation within the rule as to executed contracts such as deeds and the like. Thus, it is well settled that the provisions of the federal statutes "forbidding the taking of real-estate security by a national bank for a debt coincidentally contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subject the bank to be called to account by the government for exceeding its powers."⁷⁴

Co., 140 N. Y. 576, 24 L. R. A. 322, 35 N. E. 964.

A bank which has acquired land ultra vires, and has sold and conveyed the same, may recover the price, and it may require the vendee to specifically perform an agreement to give a bond and deed of trust to secure the same. *Bank of Virginia v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

⁷⁰ A lessee cannot question the power of the corporation to hold the leased premises, so as to defeat an action for rent. *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 60 N. E. 528, aff'g 92 Ill. App. 175.

If the purchase of real estate is in excess of the powers of the corporation, and the corporation leases it to

another, the latter cannot, it seems, set up ultra vires in the purchase as a defense to an action for rent. *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147, 65 N. E. 57.

⁷¹ *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147, 65 N. E. 57.

⁷² *Brown v. Schleier*, 112 Fed. 577.

⁷³ *Leon v. Citizens' Building & Loan Ass'n*, 14 Ariz. 294, Ann. Cas. 1914 D 1151, 127 Pac. 721.

⁷⁴ *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 458, 48 L. Ed. 258, following *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. Ed. 107, and *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443, and *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

§ 1572. Application of rule to transfer of "personal" property to corporation—In general. The same doctrine governing real property applies to an ultra vires or prohibited transfer of personal property to a corporation. The transfer vests the title in the corporation as against every person except the state, and even as against the state except in a direct proceeding. Its title to the property, in an action of replevin, trover, or trespass, cannot be attacked or defeated on the ground that the purchase of the property was in violation of a prohibition or limitation in its charter or in a general law, nor on the ground that it was for a purpose not authorized by its charter.⁷⁵ The fact that the purchase of accounts is ultra vires on the part of the purchaser, does not entitle the seller to rescind the executed sale or recover back collateral security delivered by it to secure the obligations of its debtors sold by it.⁷⁶ In any event, a corporation which has made an ultra vires purchase cannot rescind where the seller cannot be put in statu quo.⁷⁷

So the doctrine of ultra vires cannot be invoked in order to permit a corporation to recover money paid by it for the purchase of goods which it had received and appropriated to its own use.⁷⁸ On the same principle, a railroad company, as a defense to an action for loss of property while in its possession for transportation, cannot question the power of the corporate owner to take and hold the property.⁷⁹

It was so held in a state court. *Puget Sound Nat. Bank of Seattle v. Fisher*, 52 Wash. 246, 249, 17 Ann. Cas. 526, 100 Pac. 724.

75 United States. *Barron v. McKinnon*, 196 Fed. 933.

Louisiana. *Edwards v. Fairbanks*, 27 La. Ann. 449.

Massachusetts. *Prescott Nat. Bank of Lowell v. Butler*, 157 Mass. 548, 32 N. E. 909; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235.

New Jersey. *De Camp v. Dobbins*, 29 N. J. Eq. 36.

New York. *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831, 53 Hun 52, 5 N. Y. Supp. 937; *Parish v. Wheeler*, 22 N. Y. 494.

Vermont. *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93.

Wisconsin. *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 37 L. R. A. 138, 65 Am. St. Rep. 22, 71 N. W. 109, 70 N. W. 289.

England. *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548.

That the acquisition of personal property by a corporation was ultra vires can be complained of only by the state. *Prenatt v. Messenger Printing Co.*, 241 Pa. 267, 269, 88 Atl. 439.

⁷⁶ *Chase & Baker Co. v. National Trust & Credit Co.*, 215 Fed. 633.

⁷⁷ *Iowa Drug Co. v. Souers*, 139 Iowa 72, 19 L. R. A. (N. S.) 115, 117 N. W. 300.

⁷⁸ *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 377, 68 Pac. 879.

⁷⁹ *Farmers' & M. Bank v. Detroit & M. R. Co.*, 17 Wis. 372.

This principle applies when a corporation purchases and takes an assignment of a promissory note or other chose in action. It acquires a good title, and its right to maintain an action cannot be questioned on the ground that its taking of the same was for an unauthorized purpose, or was contrary to an express or implied prohibition in its charter.⁸⁰

In a Wisconsin case a trading corporation engaged in buying and selling dry goods brought an action against certain persons to recover damages for conspiracy to defraud it by purchasing goods on credit with the intention of not paying for them, and also to recover on similar claims in favor of others which had been purchased by and assigned to it. The court held that its purchase of these other claims was ultra vires, but that this fact could not be set up by the defendants to defeat the action thereon. "We hold," said the court, "that if a corporation purchases, pays for, and takes an assignment of a cause of action respecting matters outside of the purposes of its creation and not authorized by its charter, in any action to enforce such cause of action want of corporate power to engage in such business cannot be interposed as a defense."⁸¹

§ 1573. — Purchase of stock in another corporation. It has been held that when a corporation makes an ultra vires purchase of stock in another corporation, and the contract is fully executed by both parties, it cannot compel the other corporation to transfer the stock to it on the books, so as to entitle it to vote at the meeting of stockholders, or vote after such a transfer;⁸² but, since the contract is executed, it acquires title to the stock, so as to be able to sell the same and also to receive dividends.⁸⁴ Where a corporation buys shares

⁸⁰ Prescott Nat. Bank of Lowell v. Butler, 157 Mass. 548, 32 N. E. 909; National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235; Baker v. Northwestern Guaranty Loan Co., 36 Minn. 185, 30 N. W. 464.

Contra, First Nat. Bank of Rochester v. Bierson, 24 Minn. 140, 31 Am. Rep. 341; Farmers' & Mechanics' Bank v. Baldwin, 23 Minn. 198, 23 Am. Rep. 683; Straus v. Eagle Ins. Co., 5 Ohio St. 60. See Merchants' Nat. Bank of St. Paul v. Hanson, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849.

Where a corporation purchases a note and the note is transferred to it,

the title passes, and it may maintain an action thereon against the maker and indorsers. National Pemberton Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235.

⁸¹ Per Justice Marshall in John V. Farwell Co. v. Wolf, 96 Wis. 10, 17, 37 L. R. A. 138, 65 Am. St. Rep. 22, 71 N. W. 109, 70 N. W. 289.

⁸² Milbank v. New York, L. E. & W. R. Co., 64 How. Pr. (N. Y.) 20; Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati, 36 Ohio St. 350, 38 Am. Rep. 594.

⁸⁴ Germania Nat. Bank of New Orleans v. Case, 99 U. S. 628, 25 L.

of stock, which is an ultra vires act, and then sells it to a third person, the corporation may nevertheless recover the purchase price from such third person, against the defense that the corporation had no title to the stock, at least where the sale is not repudiated, since the title to property passes to the purchaser under an executed contract of sale although the sale is ultra vires.⁸⁵

Whether a corporation which has made an ultra vires purchase of stock is liable as a stockholder for payment of the debts of the other corporation is the subject of some conflict in the decisions.⁸⁶

§ 1574. Application of rule to ultra vires conveyance or transfer "by" corporation—General rule. In the present connection it is necessary to consider the effect of ultra vires conveyances, viewed simply as transfers of property, apart from any covenants therein. It is well settled that an ultra vires conveyance of real property by a corporation, or an ultra vires transfer of personal property, including notes and other choses in action, like a conveyance or transfer to a corporation in excess of its powers, is not absolutely void, but passes the title,⁸⁷ and the corporation cannot maintain a suit to rescind

Ed. 448; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.*, 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20.

One selling shares of stock to a corporation cannot thereafter question the power of the corporation to buy. *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168.

Where a corporation purchases or subscribes for stock in another corporation, and the contract is fully executed, the defense of ultra vires cannot be set up by the corporation to defeat an action to recover dividends. *Bigbee & W. R. Packet Co. v. Moore*, 121 Ala. 379, 25 So. 602.

⁸⁵ *Barron v. McKinnon*, 196 Fed. 933.

⁸⁶ See chapter on Stock and Stockholders, *infra*.

⁸⁷ *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299; *Ameri-*

can U. Tel. Co. v. Union Pac. Ry. Co., 1 Fed. 745, 1 McCrary 188; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141.

After a corporation has sold property and its vendee has mortgaged the same and the mortgage has been foreclosed, the fact that the sale by the corporation was ultra vires cannot affect the title to the property. *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141.

A stranger may not of course raise question of the power of a corporation to execute a conveyance. *Collins v. Rea*, 127 Mich. 273, 86 N. W. 811.

Where neither stockholders nor creditors object to the disposition of certain corporate property, no third person aside from the state will be heard to complain. *Read v. Citizens' St. R. Co.*, 110 Tenn. 316, 333, 75 S. W. 1056.

Effect of want of power to transfer municipal property, see 3 McQuillin. Mun. Corp. § 1152.

and to recover the property.⁸⁸ And it has been held by the Supreme Court of the United States that where an ultra vires contract for the sale of property by a corporation has been executed by the delivery of possession, and the parties are in *pari delicto*, the corporation cannot maintain a suit in equity to cancel the conveyance and recover possession of the property, but the court will leave the parties in the position in which they have placed themselves.⁸⁹

The effect of covenants in an ultra vires conveyance or lease, and the right to maintain an action thereon, is considered in the next subdivision.⁹⁰

§ 1575. — Ultra vires mortgage by corporation. Some courts seem to have held that an ultra vires or prohibited mortgage of its property by a corporation is void, and that its invalidity may be set up, either at law or in equity, and either by the corporation itself or its receiver, or by persons claiming under a later valid conveyance or mortgage.⁹¹ The better opinion, however, is that when a corporation has had the benefit of money borrowed, and for which it has given a mortgage, it cannot defeat a suit to foreclose the mortgage on the ground that borrowing the money and giving the mortgage was ultra vires.⁹² In other words, an ultra vires corporate mortgage, where fully executed on both sides, will be enforced and the corporation cannot urge ultra vires.⁹³

In the Supreme Court of the United States, where a mortgage by a corporation to secure future advances was attacked as ultra vires, but such mortgages were not expressly prohibited or declared void, Mr. Justice Swayne said, in substance: "If the mortgage here in question be ultra vires, no one can take advantage of the defect of power involved but the state. As to all other parties, it must be held valid, and may be enforced accordingly. * * * Where money has been obtained by a corporation upon its securities which

⁸⁸ *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 124; *Bear Valley Land & Water Co. v. Savings & Trust Co.*, 117 Fed. 941, 112 Fed. 693; *American U. Tel. Co. v. Union Pac. Ry. Co.*, 1 Fed. 745, 1 *McCrory* 188; *Krisch v. Interstate Fisheries Co.*, 39 Wash. 381, 384, 81 Pac. 855.

⁸⁹ *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738.

⁹⁰ See § 1587, *infra*.

⁹¹ *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

⁹² *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Savings & Trust Co. of Cleveland, Ohio v. Bear Valley Irrigation Co.*, 112 Fed. 693, 701; *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110, 18 Atl. 428.

⁹³ *Dillon v. Myers*, 58 Colo. 492, Ann. Cas. 1916 C 1032, 146 Pac. 268.

are irregular and ultra vires, but the money is applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and shareholders are estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company.”⁹⁴

On the other hand, if a mortgage of its property by a corporation is not only ultra vires, but contrary to public policy, it is absolutely void and cannot be enforced. This is true, for example, of a mortgage by a quasi public corporation, as a railroad company, for example, of property which is necessary to enable it to perform the duties which it owes the public, and in consideration of which its franchises have been conferred upon it.⁹⁵

§ 1576. Application of rule to loans and security. Applying the general rule as to executed contracts, it has been held that after a corporation has made a loan and taken a pledge of property as security, and has disposed of the property and applied the proceeds to the payment of the loan, the borrower cannot maintain an action to recover the proceeds of the property on the ground that the taking of the security was ultra vires.⁹⁶

§ 1577. Application of rule to partnerships. A corporation ordinarily has no power to enter into a partnership.⁹⁷ But where it has contributed money or property to the partnership, and the partnership has actually been created, then the contract of partnership is executed, so as to come within the rules applicable to the effect of ultra vires contracts which are executed.⁹⁸

It follows that where a corporation and an individual have assumed

⁹⁴ *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030.

⁹⁵ *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

⁹⁶ *First Nat. Bank of Xenia v. Stewart*, 107 U. S. 676, 27 L. Ed. 592.

⁹⁷ See §§ 841-843, *supra*.

⁹⁸ *Willey v. Crocker-Woolworth Nat. Bank* (Cal.), 72 Pac. 832; *Breinig v. Sparrow*, 39 Ind. App. 455, 80 N. E. 37; *Doubleday, Page & Co. v. Shumaker*, 60 N. Y. Misc. 227, 234, 113 N. Y. Supp. 83. To same effect, see *Harrill v.*

South Carolina & G. R. Co., 135 N. C. 601; 47 S. E. 730. Compare *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295, 50 L. Ed. 1036, where a national bank sued for debts of a partnership, shares of which it had taken as security, was held not liable.

Though a corporation enter into a contract of partnership ultra vires, a court may afford it protection so far as may be necessary to the equitable distribution of the fruits thereof. *Kelly v. Biddle*, 180 Mass. 147, 61 N. E. 821.

to enter into a partnership, and have jointly transacted business, they may recover by reason of their joint interest, on obligations made to them in their joint name, irrespective of any question as to their partnership rights *inter se*, and notwithstanding the fact that it was *ultra vires* for them to enter into the partnership.⁹⁹ Thus, where a corporation sells goods as a partnership, it is no defense to an action for the price that a corporation has no power to enter into a partnership.¹ So the corporation cannot avoid liability for the debt of a firm, in which firm it is a member, on the ground that it had no power to become a partner,² and cannot withdraw goods furnished by it, after insolvency of the partnership, to the prejudice of general creditors.³ Furthermore, an individual cannot escape liability as a partner on the ground that the other partner was incapable of entering into the relation because a corporation.⁴

§ 1578. Application of rule to guaranty or suretyship. Where a corporation becomes a surety or guarantor and is compelled to pay, and then sues the principal, the latter cannot set up that the contract of guaranty or suretyship was *ultra vires*.⁵

§ 1579. Rule applied to surrender of lease. A national bank leased land for ninety-nine years and expended a large sum in erecting a building thereon. Part of the building was afterwards rented

⁹⁹ *Stahr v. Hickman Grain Co.*, 132 Ky. 496, 116 S. W. 784; *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249.

¹ *Huguenot Mills v. George F. Jempson & Co.*, 68 S. C. 363, 102 Am. St. Rep. 673, 47 S. E. 687.

A partnership was formed between a corporation and a natural person. The corporation then entered into contract to sell defendant certain goods which had been purchased by it, in part, in its own name. Upon refusal by the defendant to receive the goods it brought action for breach of the contract both in its own right and in the right of the natural person who had assigned his claim to it. While admitting that the partnership was *ultra vires* of the corporation, the defendant was held estopped from raising this as a defense since he was

charged with notice that a legal partnership could not exist between a corporation and a natural person and must be deemed by the law to have dealt with them as joint owners of the goods in question. *Huguenot Mills v. George F. Jempson & Co.*, 68 S. C. 363, 102 Am. St. Rep. 673, 47 S. E. 687.

² *Cameron v. First Nat. Bank of Decatur* (Tex. Civ. App.), 34 S. W. 178.

³ *Wallerstein v. Ervin*, 112 Fed. 124, aff'g 109 Fed. 135.

⁴ *Moore v. Thorpe*, 133 Minn. 244, 158 N. W. 235.

⁵ *Dunbar v. Cazort & McGehee Co.*, 96 Ark. 308, 131 S. W. 698. To same effect, see *Macon & A. R. Co. v. Georgia R. Co.*, 63 Ga. 103.

The contrary was held in Wisconsin in *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 7 Wis. 53.

and the balance occupied by the bank. Later the bank went into the hands of a receiver and, in consideration of a release of liability for unpaid rent, etc., under the lease, surrendered the leased land with the building to the lessor. The receiver thereafter sued to charge the property with a lien for the money expended in erecting the building, on the ground that the making of the lease and expending the money was *ultra vires*. The court said, in denying the right to relief, that the lease "did not require the bank to build a \$305,000 building"; that "even if the act of the bank in constructing so large a building was *ultra vires*, Mr. Schleier (the lessor) could not have interfered with such construction, and I do not see upon what theory he can be held liable for its cost, or a lien declared upon the land in favor of the plaintiff. * * * The bank building was completed in January, 1891, and the building was used by the bank from that time until November, 1897, when it surrendered the building to Mr. Schleier, and the lease was cancelled. These contracts have all been fully executed, and cannot now be set aside, even though they were *ultra vires*." It was also said that neither the bank nor its receiver, "after it had surrendered the building constructed on the premises leased," could "recover back either the building or its value."⁶

§ 1580. Effect of fraud. Even though an *ultra vires* contract is executed, it may be set aside for fraud or misrepresentation, the same as if it had been a contract within the powers of the corporation.⁷ Thus, it has been said that whatever the limitations upon the powers of a corporation, "they cannot interfere with the just operation of the rule in equity, which forbids a principal from reaping any benefit from the wrongful act of its agent."⁸

§ 1581. Devise or bequest—In general. There are differences between the effect of a conveyance or transfer of property to a corporation, *inter vivos*, and a devise or bequest. A conveyance or transfer *inter vivos* vests the title in the corporation. A bequest, on the other hand, though authorized by the common law, does not *ipso facto* vest the title in the legatee, but requires action or consent by the executor, in whom the title vests, and action by the court, if he refuses to consent. And a devise of real property, though, like a con-

⁶ *Brown v. Schleier*, 112 Fed. 577, 582, *aff'd* 118 Fed. 981, 194 U. S. 18, 48 L. Ed. 857.

⁷ *Edwards v. Michigan Tontine Inv. Co.*, 132 Mich. 1, 92 N. W. 491.

⁸ *Carr v. National Bank & Loan Co. of Watertown*, 167 N. Y. 375, 380, 82 Am. St. Rep. 725, 60 N. E. 649.

veyance, it vests the title directly in the devisee, is valid only when authorized by the statute of wills. For these reasons, among others, the principles which govern ultra vires conveyances and transfers to corporations do not necessarily apply to devises and bequests.⁹

§ 1582. — **Devise of real property.** It is clear that if the statute of wills of a state does not allow a devise of land to a corporation, such a devise is necessarily void and of no effect whatever, since it is only by virtue of the statute that land can be devised at all.¹⁰ This question, however, has nothing to do with the powers of corporations. Suppose, however, that the statute of wills does allow devises to corporations, and a devise is made to a corporation whose charter does not give it the power to take the land. Does the devise, as in the case of a conveyance inter vivos, vest the title in the corporation as against every person except the state,¹¹ or is it void because of the corporation's want of power? To this question the courts have given different answers. Some of the courts have held that the devise in such a case vests the title in the corporation, notwithstanding its want of capacity under its charter, and is valid as against every person but the state.¹² Other courts have held that the principle governing con-

⁹ See *Davidson College v. Chambers Ex'rs*, 3 Jones Eq. (N. C.) 253.

¹⁰ It is so in New York, for example, where by statute no devise to a corporation is valid unless it is expressly authorized by its charter, or by statute, to take by devise. *White v. Howard*, 46 N. Y. 144; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290; *McCartee v. New York Orphan Asylum Society*, 9 Cow. (N. Y.) 437, 18 Am. Dec. 516. See also *Starkweather v. American Bible Society*, 72 Ill. 50, 22 Am. Rep. 133.

¹¹ See § 1561, *supra*.

¹² *United States. Jones v. Habersham*, 107 U. S. 174, 27 L. Ed. 401; *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. 796, *aff'd* 134 Fed. 513.

Illinois. Hamsher v. Hamsher, 132 Ill. 273, 8 L. R. A. 556, 23 N. E. 1123.

Maine. Farrington v. Putnam, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652.

Maryland. In re Stickney's Will, 85 Md. 79, 35 L. R. A. 693, 60 Am. St.

Rep. 308, 36 Atl. 654; *Hanson v. Little Sisters of Poor of Baltimore*, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052.

Massachusetts. Chase v. Dickey, 212 Mass. 555, 99 N. E. 410.

New Jersey. De Camp v. Dobbins, 29 N. J. Eq. 36.

In a Maryland case, where a will devised to a corporation property in excess of what its charter authorized it to hold, the court said: "It cannot be denied that this corporation had power to take any estate and property not exceeding the charter limits, and the devise therefore was not void on its face, and it must be held valid as to all the world until it has been determined, at the instance of the state, that the charter has been violated. If they have violated the law of their being they have committed a wrong not against any particular individual but against the state, and this wrong can only be inquired into at the instance of the state. In other words the corporation

veyances to corporations does not apply, that the devise is void, and that the title to the land vests in the residuary devisees or heirs.¹³

In a Maine case,¹⁴ a will left to a charitable corporation property which, if it should be allowed to take the same, would result in its having more property than was allowed by its charter, which authorized it to take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding one hundred thousand dollars in value, owned at any one time. The next of kin of the testator sued in equity to have the devise and bequest declared inoperative and void. After an exhaustive review of the authorities, the court held that he was not entitled to the relief prayed for, as the devise and bequest were valid as against every person except the state. It was held—to go more into detail, as stated in substance by the court—that the will was valid on its face, there being no statute limiting the testamentary capacity of

can take property to any amount, but can hold it, as against the state, only to the amount provided by its charter.” *Hanson v. Little Sisters of Poor of Baltimore*, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052.

In a late Massachusetts case, it is held, after an exhaustive review of the authorities, that a devise to a corporation of property in excess of its charter authority to take and hold is not so far void that its validity can be questioned by testator’s heirs. *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 9 L. R. A. (N. S.) 689 (with note), 10 Ann. Cas. 1025, 80 N. E. 490.

“Restrictions imposed by the charter upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the State which created it.” *Jones v. Habersham*, 107 U. S. 174, 188, 27 L. Ed. 401.

¹³ *Brown v. Thompkins*, 49 Md. 423; *In re McGraw’s Estate*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233 (leading case); *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 4 L. R. A. 699, 11 S. W. 825; *House of Mercy of New York v. Davidson*, 90 Tex. 529, 39 S. W. 924.

And see *Starkweather v. American Bible Society*, 72 Ill. 50, 22 Am. Rep. 133; *Davidson College v. Chamber’s Ex’rs*, 3 Jones Eq. (N. C.) 253; *Wood v. Hammond*, 16 R. I. 98, 18 Atl. 198, 17 Atl. 324.

In Missouri, the New York rule is approved. *Proctor v. Board Trustees Methodist Episcopal Church, South*, 225 Mo. 51, 69, 123 S. W. 862.

“Approaching the matter from the point of reason and logic, we have this situation: The law directs how property undisposed of according to law shall descend at the death of the owner. The law prohibits the devisee in question from taking and holding the property sought to be devised by the testator. Such conveyance is not voidable but void; therefore the persons whom the law has selected as the proper heirs to this property have a right to object to being deprived thereof, and have the right to assert their statutory claim in opposition to that of the camp which has no legal basis whatever.” *Kennett v. Kidd*, 87 Kan. 652, 44 L. R. A. (N. S.) 544, Ann. Cas. 1914 A 592, 125 Pac. 36.

¹⁴ *Farrington v. Putman*, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652.

the testator; that the limitation in the charter of the corporation of the amount of property it might hold was mainly intended as a regulative and directory provision, and was only impliedly prohibitory, no penalties being attached thereto; that the charter was a contract or compact between the corporation and the state, the limitation being for the benefit of the general public represented by the state, and not for the heirs of the testator or any particular persons; that any transgressions of the compact by the corporation in accepting excessive devises and bequests were voidable only, and not void, and must be treated as valid until declared void; that whether they should be declared void, or be permitted to remain as valid, was a question of policy or expediency which the state must determine for itself,—a governmental, and not a judicial, question; that such question could only be determined in a direct proceeding by the state, and not by any collateral proceeding brought by or for the benefit of any individuals to set the provisions of the will aside.

§ 1583. — Bequest of personal property. If a statute prohibits a bequest to a corporation, such a bequest is void, and the property goes to the next of kin or the residuary legatee.¹⁵ And by the weight of authority, a bequest to a corporation is also void where the corporation is prohibited by its charter or by a general law from taking the property.¹⁶ A decision to this effect in a North Carolina case was based upon the ground that a bequest does not vest the title to the property bequeathed directly in the legatee, like a gift or conveyance inter vivos, but requires, to give him the title, the consent of the executor, and, if he withholds his consent, action by the court, and that a court will not require the executor to pay or deliver money or property to a corporation in pursuance of a bequest to it, where the corporation has no power under its charter to hold the property.¹⁷

§ 1584. — Grant of power after testator's death. If a devise or bequest to a corporation is void at the time of the testator's death because the corporation has no power to take the property, the right

¹⁵ *Cornell University v. Fiske*, 136 U. S. 152, 34 L. Ed. 427; *Cromie's Heirs v. Louisville Orphans' Home Society*, 3 Bush. (Ky.) 365; *Brown v. Thompson*, 49 Md. 423; *State v. Warren*, 28 Md. 338.

¹⁶ *In re McGraw's Estate*, 111 N. Y. 66, 19 N. E. 233; *Davidson College v. Chamber's Ex'rs*, 3 Jones Eq. (N.

C.) 253; *Coggeshall v. Home for Friendless Children*, 18 R. I. 696, 31 Atl. 694; *Wood v. Hammond*, 16 R. I. 98, 18 Atl. 198, 17 Atl. 324.

Contra, *De Camp v. Dobbins*, 29 N. J. Eq. 36.

¹⁷ *Davidson College v. Chamber's Ex'rs*, 3 Jones Eq. (N. C.) 253 (Nash, C. J., dissenting).

of the heirs or next of kin or the residuary devisee or legatee thereto becomes vested, and is not affected by subsequent legislation conferring additional power upon the corporation.¹⁸

VI. CONTRACTS PARTLY EXECUTED ON BOTH SIDES

§ 1585. **General rules.** Contracts partly performed on both sides, so far as the unperformed part is concerned, are generally classified as executory contracts so far as the application of the rules as to the effect of ultra vires is concerned.¹⁹ However, they are distinguishable from contracts purely executory and therefore are separately considered in this connection. The exact status of contracts partly executed on both sides is involved in some doubt. Generally, it is held, at least where the unexecuted part is severable, that the contract, so far as such part is concerned, is precisely the same as if the contract was wholly executory. The question usually arises in case of leases.²⁰

It would seem that a contract is not executed merely because a deed and bill of sale has been executed and delivered, where possession has not been surrendered;²¹ and it is upon this principle that actions for specific performance are included in this subdivision.²² It is not within the scope of this work to consider in detail what are executed and what are executory contracts.²³ Suffice it to state that the fact that an ultra vires contract has been partly performed will not entitle either party to maintain an action against the other to compel performance of the residue, or to recover damages for failure to perform,²⁴ subject to the rule as to contracts fully executed on one side only.²⁵

¹⁸ In *re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387; *Davidson College v. Chamber's Ex'rs*, 3 Jones Eq. (N. C.) 253. But see *Eliot's Appeal*, 74 Conn. 586, 598, 51 Atl. 558.

¹⁹ Executory contracts, effect of ultra vires, see §§ 1530-1535, *supra*.

²⁰ See § 1587, *infra*.

²¹ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 795, 31 L. R. A. 415.

²² See § 1590, *infra*.

²³ See *Hammon, Contracts*.

²⁴ *United States. Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950. See also *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787.

Alabama. See *Memphis & C. R. Co.*

v. Grayson, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

Michigan. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

Mississippi. See *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.*, 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879.

Missouri. *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665.

Tennessee. *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396.

England. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

²⁵ See §§ 1536-1558, *supra*.

For instance, in a Michigan case a corporation created for the purpose of manufacturing and selling carriages entered into a contract for the purchase of a large quantity of excelsior, not for use in its manufacturing business, but for the purpose of selling the same as a speculation. After part of the excelsior had been delivered, the other party refused to deliver more, and sued for the value of what had been delivered. It was held that the plaintiff was entitled to recover, and that the corporation could not recoup damages for breach of the contract in refusing to deliver the residue.²⁶

§ 1586. Action for rescission or cancellation of contracts. When an ultra vires contract has been fully performed, neither party can maintain an action, either at law or in equity, to rescind the same and recover what has been parted with, but the courts will leave the parties where they have placed themselves.²⁷ The rule is otherwise, however, when an ultra vires contract remains wholly executory on both sides²⁸ or has been executed only in part on both sides.²⁹ Thus, in a case in the circuit court of appeals, several manufacturing corporations and partnerships entered into an ultra vires agreement for the combination and consolidation of their several properties and business interests by the organization of a new corporation, the stock in which was to be divided between them, and to which they were to convey their machinery and other property and receive in payment bonds secured by a mortgage. After the new corporation was formed and its stock was divided between the parties to the agreement, and bills of sale and conveyances executed by them to it, but before the new corporation had executed the bonds and mortgage, one of the corporations, being still in possession of its property, repudiated the agreement and brought a suit to cancel the same and the conveyance and bills of sale executed by it and to enjoin the new corporation

²⁶ Day v. Spiral Springs Buggy Co., 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

"The contract has only been performed in part. The defendant has received a portion of the property bargained for, * * * so that the defendant will lose nothing but the anticipated profits on the remainder if the contract is not enforced in its favor. Those profits it had no right at any time to count upon; and, in contemplation of law, there can be no

injustice in depriving it of profits which the law would not permit it to bargain for." Per Chief Justice Cooley in Day v. Spiral Springs Buggy Co., 57 Mich. 146, 151, 58 Am. St. Rep. 352, 23 N. W. 628.

²⁷ See § 1559, *supra*.

²⁸ See Lancaster v. Southern Life Ins. Co., 89 S. C. 179, 71 S. E. 864, and also § 1530, *supra*.

²⁹ See New Castle Northern Ry. Co. v. Simpson, 21 Fed. 533, and see § 1585, *supra*.

and its officers and agents from forcibly taking possession of its property under the same. Under this condition of things it was held that, as the agreement had not been fully executed, the relief prayed for should be granted.³⁰

§ 1587. Rule applied to leases. On first thought, it would seem that a lease, at least when followed by a transfer of possession, would be deemed an executed contract. This would undoubtedly be true if the lessee was put in possession and paid the rent in advance, at least except in so far as agreements in the lease to do acts in the future are concerned.³¹ However, ordinarily, rent is paid in instalments every month or year or the like; and oftentimes the lease contains covenants or agreements to do acts in the future. So far as liability for rent earned but not paid is concerned, the rule governing contracts executed in full on one side only is applicable;³² but so far as unearned rent is concerned, and the rights under the lease so far as rent has not been paid, and the right of the parties in regard to covenants or agreements as to future acts, the lease may well be considered as a contract partly performed on both sides, within the rule as to executory contracts, and this seems to be the tendency of the federal decisions. However, there are decisions, both in the federal and state courts, treating the lease as an executed contract, as hereinafter noticed.³³

In the federal courts, it has been held that even when a lease has been made, if ultra vires, an action will not lie for breach of covenants therein.³⁴ For instance, in a leading case in the Supreme Court of the United States a railroad company made an ultra vires lease of its road for twenty years and covenanted to pay the lessees any damage or loss, to be determined by arbitrators, which they might sustain in case it should terminate the lease before the expiration of

³⁰ *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787. See also *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396.

³¹ See *Atlantic & Pacific Tel. Co. v. Union Pac. R. Co.*, 1 Fed. 745, where consideration for lease was stock in lessee company, and it was held that the lessee could enjoin the lessor from retaking possession of the leased property.

³² See § 1551, *supra*.

³³ See this section, *infra*, and see *Blair v. Chicago*, 201 U. S. 400, 450, 50 L. Ed. 801; *Pennsylvania R. R. Co. v. St. Louis, A. & T. R. R. Co.*, 118 U. S. 290, 30 L. Ed. 83; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 317.

³⁴ *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

such time. The lease was performed by both parties for several years, and then terminated by the company. It was held, notwithstanding such part performance, that the lessee could not maintain an action on the covenant to arbitrate and pay damages. "What is sought in the case before us," said Mr. Justice Miller, "is the enforcement of the unexecuted part of this agreement. So far as it has been executed, * * * the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for. * * * It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its nonperformance. As to this it is not an executed contract."³⁵ So where a lessee corporation under an ultra vires lease abandoned possession and threw up the lease, during the term, it was held by the Supreme Court of the United States that it was not liable for subsequently accruing rent.³⁶ On the other hand, the Supreme Court of the United States has held somewhat different views in a later case, where one railroad company leased its road to another for nine hundred and ninety-nine years. Such lease was held to be beyond the corporate powers and void, although whether as against public policy or as prohibited by statute or merely as ultra vires does not clearly appear. The lessee paid the rent for some seventeen years, and then the lessor sued to have the lease canceled as beyond its corporate powers. The Supreme Court held that the parties were in *pari delicto*, that the invalidity of the lease was apparent upon its face, that the lease had been fully executed by the lessor, and that the lease had been partly executed by the lessee by payment of rent for seventeen years. The court refused to cancel the lease.³⁷ However, in a still later case, the Supreme Court held that where, at the time the lease was repudiated, the leased property had ceased to exist, the lessor

³⁵ *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950. And see *Memphis & C. R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122.

³⁶ *Oregon Ry. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 37, 32 L. Ed. 837, where Mr. Justice Miller said: "To say that a contract which runs for ninety-six years, and which requires of both parties to it continual

and actual operations and performance under it, becomes an executed contract by such performance for less than three years of the term, is carrying the doctrine much further than it has ever been carried, and is decidedly a misnomer."

³⁷ *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 36 L. Ed. 738.

might recover in equity the reasonable value of the property at the time of the repudiation.³⁸

In the state courts, it has been held in Illinois that a corporation organized to carry on the business of a safe deposit or safe storage for personal property, which neglects for a period of several years to enter on such business but on the contrary immediately purchases land and erects a large office building thereon and leases it, cannot enforce a contract of leasing against former tenants for the unexpired portion of a written lease, where the tenants had given up the premises for that part of the unexpired term for which rent was sought to be collected.³⁹ But it has been held in Missouri that where a lease to a corporation for ten years contained an agreement to renew, the lessor could not set up ultra vires as a defense to a suit for specific performance of the agreement to renew, on the theory that the annual payment of rent for the ten years, which was the consideration for the agreement to renew, prevented the contract to renew from being wholly executory.⁴⁰ So it is held in Pennsylvania that a court of equity will not declare a railroad lease void as ultra vires, as between the parties to it, on the application of one of the parties, after the lease has been partly executed and the lessor has enjoyed some of the benefits of it.⁴¹ And the Court of Appeals of New York has held that where the lease of property by a corporation is ultra vires, but it has gone into possession and made improvements on the faith of an option to purchase, and the lessor has recognized the corporation as its tenant and accepted performance of the contract from it, the tenant cannot plead ultra vires in an action by the corporation to compel specific performance of a provision in the lease for the appraisal of the leased premises.⁴²

Where a national bank makes an excessive investment in a lease of real property for the purpose of obtaining an eligible business location, neither the corporation, its receiver, creditors or stockholders can complain, after the lapse of several years, by attempting to hold the lessor of the property liable on the theory that the lease required

³⁸ Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 43 L. Ed. 108.

³⁹ Commercial Co. of Alton v. Sturges, 186 Ill. App. 573.

⁴⁰ Lemp Hunting & Fishing Club v. Hackmann, 172 Mo. App. 549, 156 S. W. 791.

⁴¹ Pittsburgh, J., E. & E. R. Co. v. Altoona & B. C. R. Co., 196 Pa. St. 452, 46 Atl. 431.

⁴² Mutual Life Ins. Co. of New York v. Stephens, 214 N. Y. 488, 108 N. E. 856, at least not without first paying or offering to pay the value of the improvements.

the corporation to erect the building, the erection of which is claimed to be *ultra vires*.⁴³

§ 1588. Rule applied to partnership. In so far as an *ultra vires* contract of partnership between corporations is executory, even though it may have been partly performed, it may be repudiated or rescinded by either party, and either may recover its property from a committee to which it has been delivered under the partnership agreement.⁴⁴ So it has been held that where a contract of partnership is for three years, two of which have expired, it is unexecuted as to the remaining year, in the sense that it may be repudiated as *ultra vires*.⁴⁵

§ 1589. Rule applied to employment of agent or servant. Where a corporation employs an agent or servant in carrying on an *ultra vires* business, either may terminate the contract at any time, and the other cannot maintain an action for damages or specific performance.⁴⁶

§ 1590. Specific performance and compelling conveyance. It would seem to follow as a matter of course that there can be no necessity for a resort to a court of equity for a decree of specific performance in case of a wholly executed contract. Therefore, the remedy of specific performance is treated of in this subdivision. If the contract is wholly executory, then there is no question but that it cannot be specifically enforced in equity where it is *ultra vires*.⁴⁷ So it has been decided by the Supreme Court of the United States that where a lease for ninety-nine years was *ultra vires*, and the lessee was behind in the payment of rent and was otherwise acting to the injury of the lessor, the lessor could not compel specific performance by the lessee of its contracts, and the court said: "We know of no well considered case where a corporation, which is a party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, can be compelled to do so."⁴⁸

In another case in the Supreme Court of the United States, land was donated to a railroad company by persons interested in the con-

⁴³ *Brown v. Schleier*, 118 Fed. 981.

⁴⁴ *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S. W. 396.

⁴⁵ *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 606, 8 S. W. 396.

⁴⁶ *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665.

⁴⁷ See § 1531, *supra*.

⁴⁸ *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.*, 118 U. S. 290, 317, 30 L. Ed. 83.

struction of its road, and was conveyed to its officers, who afterwards refused to convey the same to the company. In a suit in equity against them by a receiver of the company to obtain a decree declaring a trust in favor of the company, and compelling them to convey to it, the relief was denied on the ground that the charter of the company did not authorize it to hold the land for the purposes for which it was donated. In delivering the opinion of the court, Mr. Justice Miller said: "We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to hold such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."⁴⁹

In other words, where "the corporation has not yet acquired the property, a court of equity will not lend its aid and power to cause

⁴⁹ Case v. Kelly, 133 U. S. 21, 33 L. Ed. 513. Compare Scott v. Farmers' & Merchants' Nat. Bank, 97 Tex. 31, 57, 104 Am. St. Rep. 833, 75 S. W. 7, rev'g (Tex. Civ. App.), 66 S. W. 485, which held that while it is the general rule that objection to the acquisition of land in excess of the authorized powers of a corporation may be raised by the state only, it is nevertheless true that a private person may urge this ground as a defense where the corporation is seeking, through the agency of the court, to acquire land, the title to which is in him, in excess of its authorized powers. Where, therefore, a corporation was authorized to hold land only in case it was needed for the promotion of the purposes of its crea-

tion or as security to a claim, and certain land had been deeded to an individual with the intent that it be transferred to the corporation as a bonus for the extension of its street railway lines and the corporation sought to compel the transfer to it of title to the lands, the individual was entitled to urge as a defense that the corporation had no power to take the lands. The court indicated that the question whether the courts would deprive the corporation of the title to the lands after it had been obtained, and whether the courts would aid the corporation to violate the law and secure lands to which it had no right, are very different.

to be conveyed to the corporation that which by its charter law it is not permitted to hold, and such a defense is available to an interested individual.”⁵⁰ The court will not aid the corporation “to acquire land which it had no authority to hold, although it might not interfere to deprive it of such land after its acquisition, except at the instance of the state.”⁵¹

However, in case of contracts partly executed, specific performance is sometimes decreed on the theory of estoppel.⁵² Thus, it has been held that it is no defense to a suit by a corporation for specific performance of a contract to convey land that the property is not necessary for its legitimate business, where the corporation in reliance on the contract has erected permanent improvements on the land.⁵³

Another exception, it seems, is found in the rule that if a contract is fully executed on one side, the party who has so fully executed can compel specific performance by the corporation,⁵⁴ at least in those states where the federal rule is not followed.⁵⁵

VII. CONTRACTS APPARENTLY WITHIN POWERS OF CORPORATION

§ 1591. Introductory. There is a class of cases where, if a party about to enter into a contract with a corporation, should read the statutes in regard to the powers of the corporation and also read the charter, he would be justified in believing that the corporation had power to enter into the contract, when, as a matter of fact, the corporation has no power to enter into the contract for the purpose contemplated by it, at least where such purpose is not known to the other contracting party. Another class of cases, so close to the above as to be incapable oftentimes of clear demarcation, is those where the court attempts to distinguish between entire “want” of power and an “excess” of power, where the contract has been executed on one side, as affecting the right to set up the defense of *ultra vires*.

So far the law as to the effect of *ultra vires* has been ascertained to be as follows: 1. If the contract is executory, *ultra vires* can be set

⁵⁰ *Prairie Slough Fishing & Hunting Club v. Kessler*, 252 Mo. 424, 436, 159 S. W. 1080.

⁵¹ *South & N. A. R. Co. v. Highland Ave. & B. R. Co.*, 119 Ala. 105, 113, 24 So. 114.

⁵² *Lemp Hunting & Fishing Club v. Hackmann*, 172 Mo. App. 549, 156 S. W. 791; *Wooten v. Dermott Town-Site Co.*, — Tex. Civ. App. —, 178 S. W. 598.

⁵³ “The state is the proper party to inquire into this matter, and, if the corporation holds too much land, proceedings in quo warranto will remedy the evil.” *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 131, 92 N. W. 123.

⁵⁴ *Dorsett v. Black Hills Traction Co.*, 30 S. D. 420, Ann. Cas. 1916 A 846, 138 N. W. 808.

⁵⁵ See §§ 1543-1557, *supra*.

up.⁵⁶ 2. If the contract is wholly executed on both sides, ultra vires cannot be set up.⁵⁷ 3. If the contract has been fully executed on one side only, there are two lines of decisions, one holding that ultra vires can be set up and the other that ultra vires cannot be set up. It is now necessary to consider a still further class of cases involving the question as to the difference between want of power and an excess or abuse of power. It may be said, however, that this class of cases apparently relates for the most part to contracts which have been executed on one side only, although in some cases the rule has been stated in connection with executed contracts. In so far as the rule is applied where the contract has been executed on one side only, its effect is to merely add another reason for precluding the setting up of ultra vires by a party to the contract, in an action between the parties, in those states where the rule is that where the contract has been executed on one side only, the other party cannot in any case set up ultra vires as a defense.⁵⁸ On the other hand, where the rule is laid down in jurisdictions where ultra vires contracts are void even though the contract has been fully executed on one side, it may be considered either as an exception to the rule or on the theory that where a contract is merely in excess of or an abuse of corporate powers it is not ultra vires in the strict sense.⁵⁹

§ 1592. Whether included within term ultra vires. It has been said that "strictly speaking, a corporate act is said to be ultra vires when it is not within the scope of the power of the corporation to perform it under any circumstances or for any purpose."⁶⁰ In other words, a contract is not ultra vires, according to that rule, unless it is wholly beyond the power of the corporation to make it. Thus, a loan of money to a corporation to be used to buy an article, the purchase of which is beyond the powers of the corporation, would not be ultra vires if the corporation has general power to borrow money. By the same rule, a purchase of land not necessary for corporate use, where the corporation has the power to purchase land but no power to purchase it except for corporate use, would not be ultra vires in

⁵⁶ See §§ 1530-1535, *supra*.

⁵⁷ See §§ 1559-1584, *supra*.

⁵⁸ See §§ 1539-1542, *supra*.

⁵⁹ The latter theory is illustrated by the decision in *Citizens' State Bank of Noblesville v. Hawkins*, 71 Fed. 369, where a state bank had power, under certain circumstances, and for certain purposes, to acquire stock in

a national bank, but had no power to purchase it solely as an investment.

⁶⁰ *Hillcrest Land Co. v. Foshee*, 189 Ala. 217, 66 So. 478. This same statement is also found in *Citizens' State Bank of Noblesville v. Hawkins*, 71 Fed. 369, and *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300.

the strict sense of the term. However, it is submitted, that this statement is too strict, and that a contract apparently within the powers of a corporation but not actually within its powers, because of the purpose of the corporation in regard thereto, is nevertheless ultra vires, using the term in its strict sense. It is suggested, however, that both classes of contracts are ultra vires, and the only difference is as to the "effect" of the two classes of contracts under some circumstances.

• **§ 1593. Statement of rule.** When want of power on the part of a corporation to enter into a particular contract is apparent, as a matter of law, upon a mere comparison of the contract with the charter of the corporation, the person dealing with the corporation is conclusively presumed to know that the contract is ultra vires, for every person must be presumed to know the law. And in such a case, therefore, the corporation cannot be held liable on the contract merely because the other party acted in good faith, and did not in fact know that the contract was unauthorized. "When powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers."⁶¹ This principle can have no application, however, when the contract is apparently within the powers of the corporation, and the other party is ignorant of the facts rendering it ultra vires. In other words, when the transaction • is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of ultra vires does not apply.⁶² The true rule, which it is believed is acquiesced in by all the courts, is that where an act or contract is within the powers conferred by the charter, but the act of the corporation is in fact in excess of its powers, without the knowledge of the other party to the . . .

⁶¹ *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441, 16 L. Ed. 184; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775.

⁶² *California. Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 578, 99 Am. Dec. 300 (leading case).

Iowa. Lucas v. White Line Transfer Co., 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771; *Humphrey v. Patrons' Mercantile Ass'n*, 50 Iowa 607.

Massachusetts. Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

Mississippi. Littlewort v. Davis, 50 Miss. 403 (where loan was authorized only on promissory notes with good personal securities).

Missouri. See Farmers' & Traders' Bank v. Harrison, 57 Mo. 503, 511, 512.

North Carolina. Luttrell v. Martin, 112 N. C. 593, 606, 17 S. E. 573.

Texas. To same effect, see Planters' Cotton Oil Co. v. Guaranty State Bank of Mertens, — Tex. Civ. App. —, 188 S. W. 38.

contract, ultra vires cannot be set up by the corporation. The reason for this is apparent. The other party to the contract may have actually ascertained the terms of the charter and found that the contract was apparently within the powers therein conferred. He enters into the contract without any knowledge of the ulterior motives of the corporation. It would certainly be unjust to him, if the corporation could set up that while on the face of things the contract was within its powers, yet, because of facts known only to itself, the contract was really in excess of its powers. For instance, suppose a corporation, having power to borrow money, should borrow it for a purpose not authorized by its charter, and the purpose is not known to the lender, it would be absurd to say that the corporation can set up that the money was used for an ultra vires purpose, as a defense to an action to recover the money so loaned.

This theory seems to have been stated for the first time in this country in 1860 by Justice Selden of the New York Court of Appeals⁶³ who laid down the following rules: "There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a bona fide indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if

Wisconsin. *Rock River Bank v. Sherwood*, 10 Wis. 230, 78 Am. Dec. 669.

For a statement of the rule in which there is no reference to the want of notice, see *Citizens' State Bank of*

Noblesville v. Hawkins, 71 Fed. 369; *Commercial Bank v. Nolan*, 7 How. (Miss.) 508; *Haynes v. Covington*, 13 Smedes & M. (Miss.) 408, 411.

⁶³ *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 289, 290.

the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed." In the same case, Justice Comstock said that "an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is also *ultra vires*, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being in *pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals."⁶⁴ In 1869 the Supreme Court of Massachusetts followed this New York rule, the court, by Justice Hoar, stating that "this doctrine seems to us sound and reasonable."⁶⁵ This rule was also adopted in an early case in California in 1869, where the court said that the question is "whether the act in question is one which the corporation is not authorized to perform under any circumstances, or one that may be performed by the corporation for some purposes, but may not for others. In the former case, the defense of *ultra vires* is available to the corporation as against all persons, because they are bound to know from the law of its existence that it has no power to perform the act. But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test, as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers; and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract cannot be enforced; otherwise it can."⁶⁶ The same rule was laid down in Iowa in 1886.⁶⁷

So, on this theory, it is held in Alabama that if a corporation which has power to borrow money for proper purposes, obtains a loan to be used for an improper and unauthorized purpose, which purpose was

⁶⁴ Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 258, 262.

⁶⁵ Monument Nat. Bank v. Globe Works, 101 Mass. 57, 59, 3 Am. Rep. 322.

⁶⁶ Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 586, 99 Am. Dec. 300.

⁶⁷ Lucas v. White Line Transfer Co., 70 Iowa 541, 546, 547, 59 Am. Rep. 449, 30 N. W. 771.

unknown to the lender, the corporation cannot defend an action to recover the loan on the ground that the money was used for an improper and unauthorized purpose.⁶⁸

Even in England, where the defense of ultra vires is rigidly maintained, it is held that a contract which upon its face is valid and within the powers of the corporation is enforceable if the corporation has power to make the contract under certain conditions or for certain purposes, though it in fact makes such a contract without such conditions or for unauthorized purposes, without the knowledge of the other party to the contract.⁶⁹ The rule is well illustrated by Lord Campbell as follows: "For example, if the directors of a railway company were to enter into a contract under the seal of the company for the purchase of a large quantity of iron rails and to pay for them at a fixed price, as the vendor had reasonable ground for supposing that the rails were wanted for the purpose of the railroad, it would be no defense to an action for the price, or for not accepting them, that the rails were illegally purchased on speculation, to be resold by the directors for their own profit. But suppose that the directors of a railway company should purchase a thousand gross of green spectacles, as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors; this excess of authority would necessarily be known to the covenantee; and, he being in *pari delicto*, I conceive that the maxim would apply *potior est conditio possidentis*. This would be an illegal contract to misapply the funds of the company; and the illegality⁷⁰ might be set up as a defense. So, if, without any consideration whatever, the directors of a railway company were to put the company's seal to a deed covenanting to pay a mere stranger £1,000, this would be ultra vires, to the knowledge of the covenantee, and he could not maintain an action to recover the £1,000 from the funds of the company in fraud of the stockholders. When the excess of authority, with the knowledge of both parties, is shewn by the plea, this joint violation of the law, I apprehend, is a bar to the action."⁷¹

A fortiori, if the ultra vires transaction is separate from the contract sued on, ultra vires is no defense. Thus, a lease may be enforced

⁶⁸ Hillerest Land Co. v. Foshee, 189 Ala. 217, 66 So. 478. See also Allen v. West Point Min. & Mfg. Co., 132 Ala. 292, 31 So. 462.

⁶⁹ Norwich v. Norfolk R. Co., 30 Eng. L. & Eq. 120.

⁷⁰ It is evident that the word "illegality" is used here in the sense of "ultra vires."

⁷¹ Norwich v. Norfolk R. Co., 4 E. & B. 397, 443.

against a corporation, where it has power to lease property, although it used the leased premises for an ultra vires purpose.⁷² So a corporation cannot refuse to repay money borrowed, upon the ground that it was borrowed "for the purpose of being used, and was used, for the payment of expenses which were incidental to an act which was ultra vires."⁷³ Nor can a corporation defend an action for engraving bank bills on the theory that it was prohibited from issuing bills as currency.⁷⁴ Likewise, where the corporate payee of a note sued the maker who set up that it was given for money advanced to buy tobacco for the payee and that the tobacco was purchased and received by the payee, the latter cannot recover the money advanced on the ground that its act in buying tobacco was ultra vires.⁷⁵

§ 1594. Application of rule to acquisition of property or borrowing of money. This rule applies where a corporation purchases property which it has apparent authority to purchase, or borrows money which it has apparent authority to borrow, but, without the knowledge of the other party, does so for an unauthorized purpose.⁷⁶ Thus, a bank, in some states, cannot purchase stock in another corporation for investment or speculation but it may take it as collateral security for a present loan, or in compromise of a doubtful or contested claim to prevent a possible loss; and it is held in North Dakota in such cases that "where a contract is ultra vires, not because the corporation may not make it under any circumstances, but by reason of the particular circumstances under which it was made, then it is never void, and the

⁷² *Brewer & Hoffman Brewing Co. v. Boddie*, 181 Ill. 622, 55 N. E. 49, aff'g 80 Ill. App. 353.

⁷³ *Taylor v. North Star Gold Min. Co.*, 79 Cal. 285, 21 Pac. 753.

⁷⁴ *Underwood v. Newport Lyceum*, 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260.

⁷⁵ *Louisville Tobacco Warehouse Co. v. Stewart*, 24 Ky. L. Rep. 934, 70 S. W. 285.

⁷⁶ *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 119, 99 N. W. 290; *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771; *Humphrey v. Patrons' Mercantile Ass'n*, 50 Iowa 607. See also *Colorado Springs Co. v. American Pub. Co.*, 97 Fed.

843; *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799; *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331.

It has been said that "the doctrine of ultra vires has never been carried to the extent of requiring one who honestly lends money to a corporation authorized to borrow it, to see that it is not applied to an improper purpose." *National Home Building & Loan Ass'n v. Home Sav. Bank*, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245, 54 N. E. 619, rev'g 79 Ill. App. 303.

plea of ultra vires cannot be made by either party after the contract has been executed by the other party.”⁷⁷

It has been held that where one contracts to sell to a corporation which has power to buy for one purpose, but has no power to buy for another purpose, that “the criterion of validity in the suit of the vendor is twofold: First, did the vendee buy with a dominant unlawful purpose, and for only incidental use in the rightful way, or with a dominant lawful purpose, intending to devote to the wrongful use only the contingent surplus; and, second, if the vendee’s purpose was dominantly unlawful, was this with the knowledge of the vendor, or did the latter suppose, or have the right to suppose, that the vendee was buying mainly and substantially for the rightful use?”⁷⁸

§ 1595. Application of rule to negotiable instruments—In general. In England, as we have seen, it is held that a corporation other than a trading company has no implied power to make, accept, or indorse a negotiable bill or note, and, if it does so, the instrument is void, and no action can be maintained thereon against it. In this country, however, any corporation, unless restricted by its charter or some other statute, has the implied power to become a party to negotiable instruments, provided it does so for a legitimate corporate purpose.⁷⁹ It cannot do so, however, for an unauthorized purpose. What, then, is the liability of a corporation on a negotiable instrument where its becoming a party thereto was ultra vires? As between the original parties, and as between the corporation and a purchaser of the instrument with notice of the ultra vires character of the transaction, or a purchaser after maturity, or a holder who is not a purchaser for value, the contract is governed by precisely the same rule as applies to any other contract.⁸⁰ It is different, however, when the instrument has passed into the hands of a bona fide purchaser for value and before maturity. In the absence of express statutory pro-

⁷⁷ *Tourtlot v. Whithed*, 9 N. D. 467, 479, 84 N. W. 8.

⁷⁸ *Chesapeake & O. R. Co. v. McKell*, 209 Fed. 514, 518. See also *McKell v. Chesapeake & O. R. Co.*, 186 Fed. 39, 49.

⁷⁹ See § 951, vol. 2, *supra*.

⁸⁰ *National Park Bank v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567; *Balfour v. Ernest*, 5 C. B.

(N. S.) 601. See also *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

One who takes negotiable paper with knowledge that its issue is ultra vires, cannot recover thereon unless the corporation is estopped to set up its want of authority. *Pelton v. Spider Lake Sawmill & Lumber Co.*, 132 Wis. 219, 229, 122 Am. St. Rep. 963, 112 N. W. 29.

vision to the contrary, a corporation cannot avoid liability on a negotiable bill, note, or bond in the hands of a bona fide purchaser by setting up the defense that it is ultra vires because it was issued in violation of a provision limiting the amount of indebtedness which the corporation might incur,⁸¹ or because it was issued for a purpose for which the corporation was not authorized by its charter to issue it.⁸² The reason is that "the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary."⁸³ Where a corporation possesses general power to issue commercial paper, it has also been held that it is no defense to a note in the hands of a bona fide holder for value that it was given in a matter beyond the powers of the corporate maker, and it makes no difference that the note is executed for a debt violating the public policy of the state.⁸⁴

This general rule applies also to bonds the proceeds of which the corporation has used and enjoyed, at least where the bonds are in the hands of bona fide holders for value.⁸⁵

§ 1596. — Accommodation paper. A corporation has no power to issue, accept or indorse a negotiable instrument for the mere accommodation of another;⁸⁶ but it cannot set up its want of power as

⁸¹ *Wood v. Corry Water Works Co.*, 44 Fed. 146, 12 L. R. A. 168; *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799. See also § 1621, *infra*.

⁸² *United States. Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 43 L. Ed. 1081; *Lyon, Potter & Co. v. First Nat. Bank of Sioux City*, 85 Fed. 120.

Connecticut. Credit Co. v. Howe Mach. Co., 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472.

Massachusetts. Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

New Jersey. National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

New York. Mechanics' Banking Ass'n v. New York & S. White Lead Co., 35 N. Y. 505.

Pennsylvania. Wright v. Pipe Line Co., 101 Pa. St. 204.

⁸³ Per Justice Selden in *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 262.

"The general doctrine of the law is that where a corporation has power under any circumstances to issue negotiable paper, a bona fide holder has a right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." *National Bank of Republic v. Young*, 41 N. J. Eq. 531, 7 Atl. 488.

⁸⁴ *Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.*, 122 Tenn. 415, 123 S. W. 641.

⁸⁵ *Orrick v. Fidelity & Deposit Co. of Maryland*, 113 Md. 239, 77 Atl. 599.

⁸⁶ See § 957, vol. 2.

against a bona fide purchaser for value before maturity,⁸⁷ where he takes the note or acceptance in ignorance of the fact that it is merely accommodation paper.⁸⁸ It may do so, however, as against a purchaser with notice of the ultra vires character of the instrument;⁸⁹ and this is the rule under the Negotiable Instruments Law.⁹⁰

87 United States. *H. Scherer & Co. v. Everest*, 168 Fed. 822, 830; *In re Troy & Cohoes Shirt Co.*, 136 Fed. 420.

Connecticut. *Knapp & Co. v. Tide-water Coal Co.*, 85 Conn. 147, 81 Atl. 1063.

Georgia. *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171; *Savannah Ice Co. v. Canal-Louisiana Bank & Trust Co.*, 12 Ga. App. 818, 822, 79 S. E. 45.

Maine. *Johnson v. Johnson Bros.*, 108 Me. 272, Ann. Cas. 1913 A 1303, 80 Atl. 741.

Massachusetts. *J. G. Brill Co. v. Norton & T. St. R. Co.*, 189 Mass. 431, 2 L. R. A. (N. S.) 525, 75 N. E. 1090; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

Missouri. *First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494, 70 L. R. A. 79, 86 S. W. 109.

New York. *National Park Bank v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567; *National Bank of Newport v. H. P. Snyder Mfg. Co.*, 117 App. Div. 370, 102 N. Y. Supp. 478.

Wisconsin. *Pelton v. Spider Lake Sawmill & Lumber Co.*, 117 Wis. 569, 98 Am. St. Rep. 946, 94 N. W. 293.

88 Lyon, Potter & Co. v. First Nat. Bank of Sioux City, 85 Fed. 120; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275.

89 United States. *Evans v. Johnson*, 149 Fed. 978; *In re Prospect Worsted Mills*, 126 Fed. 1011.

Arkansas. *Simmons Nat. Bank v.*

Dilley Foundry Co., 85 Ark. 368, 130 S. W. 162.

Illinois. *Piser v. Serota*, 82 Ill. App. 390 (mem. dec.).

Massachusetts. *J. G. Brill Co. v. Norton & T. St. R. Co.*, 189 Mass. 431, 2 L. R. A. (N. S.) 525, 75 N. E. 1090.

New York. *National Park Bank v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567; *National Bank of Newport v. H. P. Snyder Mfg. Co.*, 107 App. Div. 95, 94 N. Y. Supp. 982.

Rhode Island. *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

A corporation is not liable on an accommodation indorsement in the hands of one who takes with knowledge of that fact. *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 53, 9 L. R. A. (N. S.) 193, 63 Atl. 641.

A note given by a first corporation was indorsed by a second, the indorsement ordinarily implying a consideration although none was in fact given. Where the indorsee knew that no consideration was passed, the indorsing corporation could not be held. *In re Prospect Worsted Mills*, 126 Fed. 1011.

Where a note executed by the president and treasurer of a corporation was accommodation paper only, which the holder well knew, the mere proof that the president and treasurer executed the note did not bind the corporation. *National Bank of Newport v. H. P. Snyder Mfg. Co.*, 107 N. Y. App. Div. 95, 94 N. Y. Supp. 982.

90 Bradley Engineering & Manufacturing Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170.

The reason for the rule is that an accommodation indorsement of negotiable paper is merely an excessive exercise of corporate power to make and indorse commercial paper, so that if the corporation has received and retained the benefits of the indorsement, the contract is not void, on the theory that the act was within the general powers of the corporation and was merely an excessive exercise of one of the powers.⁹¹

In applying these rules, however, it must be remembered that notice may be constructive as well as actual, in determining whether the holder of negotiable paper is a bona fide holder for value, or, as the Negotiable Instruments Law puts it, a "holder in due course." Thus, the fact that the maker of a note procures it to be discounted for his own benefit, if unexplained, is notice to the discounteer that a corporation's indorsement thereon is not in the usual course of business, but is for the accommodation of the maker.⁹² So where a note is taken from the payee, in payment of a debt due from him, indorsed by a third person, the indorsement is prima facie an accommodation indorsement, and the person who takes it is chargeable with notice that the indorsement is an accommodation indorsement.⁹³

The provision of the Negotiable Instruments Law that a person is liable on accommodation paper "to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party" does not apply to corporations who sign negotiable paper for accommodation. *Bradley Engineering & Manufacturing Co. v. Heyburn*, 56 Wash. 628, 630, 134 Am. St. Rep. 1127, 106 Pac. 170.

⁹¹ *Lyon, Potter & Co. v. First Nat. Bank of Sioux City*, 85 Fed. 120; *Gaston & Ayres v. J. I. Campbell Co.*, — Tex. —, 140 S. W. 770.

It is necessary to distinguish cases where it appears "either that the corporation executing the guaranty was without legal authority to execute the contract sued on at all, or that the note sued on by its terms gave notice of its vice and infirmity, that it was obtained without payment of what in law is termed valuable consideration, or that the purchaser when he received

the note thereafter sued on had notice that the indorsement was without consideration." *Gaston & Ayres v. J. I. Campbell Co.*, — Tex. —, 140 S. W. 770, rev'g — Tex. Civ. App. —, 130 S. W. 222.

⁹² *National Park Bank v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567.

If the holder other than the payee takes the paper from the maker, he is chargeable with notice that the corporation indorser is an accommodation indorser. *J. G. Brill Co. v. Norton & T. St. R. Co.*, 189 Mass. 431, 2 L. R. A. (N. S.) 525, 75 N. E. 1090.

⁹³ *J. G. Brill Co. v. Norton & T. St. R. Co.*, 189 Mass. 431, 2 L. R. A. (N. S.) 525, 75 N. E. 1090; *National Bank v. Law*, 127 Mass. 72.

A party who takes a note which bears the indorsement of a corporation, the said indorsement not being in the chain of title and there being no reason to suppose that it had interest

So where the acceptor of a draft presents it for discount, it is notice that the corporation drawer or indorser is an accommodation party.⁹⁴

§ 1597. Application of rule to debts in excess of debt limit. This rule is applied by holding that where a creditor of a corporation has no knowledge that the corporation has exceeded the debt limit, such limit is no defense.⁹⁵

§ 1598. Distinction as basis for exception to rule as to contracts executed on one side only—In general. What has already been stated in this subdivision as to the propriety of precluding the defense of ultra vires when the contract is apparently authorized, or, to state the proposition in other words, where there is an excess of power as distinguished from want of power, is undoubtedly based on good reason and properly states the law. However, in some jurisdictions, the courts, in applying the doctrine of ultra vires, have made a distinction between corporate contracts which are merely in "excess" of the general powers of the corporation and such as are entirely beyond its powers, and have held that no action can be maintained upon a contract falling within the latter class, although it may have fully performed on one side, while, under such circumstances, an action may be maintained upon a contract falling within the latter class. In other words, in those jurisdictions holding that where one side has received the benefits of an ultra vires contract, it cannot set up ultra vires as a defense, the distinction drawn herein, at least as to such contracts, need not be considered since in such a case, as already noted,⁹⁶ ultra vires cannot be urged by the party receiving the benefits. In other jurisdictions, however, as already noticed,⁹⁷ ultra vires can be urged notwithstanding the party setting it up has received the benefit of the contract, at least where the action is based on the express contract as distinguished from an implied contract. In jurisdictions holding the latter rule to be the law, however, an exception is sometimes noted where the act or contract is one within the general

therein or received benefit from the indorsement, will be deemed charged with notice that the corporate indorsement was simply for accommodation. *Pelton v. Spider Lake Sawmill & Lumber Co.*, 117 Wis. 569, 98 Am. St. Rep. 946, 94 N. W. 293.

⁹⁴ *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

⁹⁵ *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295, 325, where it is said that the contracting of debts beyond the debt limits was not the exercise of a power not conferred on the corporation but was the abuse of a general power.

See also next chapter.

⁹⁶ See §§ 1543-1557, *supra*.

⁹⁷ See §§ 1539-1542, *supra*.

powers of the corporation but is in excess of such powers or is unauthorized because for a purpose beyond the powers of the corporation.⁹⁸ Thus, in an early Wisconsin case, a statute gave a corporation power to loan money to be secured by "bond and mortgage," for a term "not exceeding one year." The corporation loaned money for two years, and a note was taken instead of a bond. The corporation sued to foreclose the mortgage securing the note. The law at that time in Wisconsin was that a corporation could not maintain an action upon a contract which it had no legal authority to make. The court distinguished earlier cases on the ground that they were not "cases of mere excess of power, but of entire want of power to make the contracts," and held that inasmuch as there was power to make a loan and take a mortgage, and that since the corporation merely exceeded its authority in making the loan for two years instead of one, and by accepting a note instead of a bond, and the contract was not against public policy and the statute imposed no penalty for making it, therefore the action was maintainable.⁹⁹

⁹⁸ Some courts, drawing a distinction between acts "in excess" of the general powers of the corporation, and those "entirely beyond" its powers, hold that no action can be maintained upon a contract falling within the latter class, although it may have been fully performed on one side, while, under such circumstances, an action may be maintained upon a contract falling within the former class. This rule was applied to a letter of credit where there was nothing in the transaction which was calculated to excite the suspicion that it was a matter of accommodation or was to be used for purposes not connected with the business of the corporation. The court said: "The defendant corporation might properly guarantee a letter of credit under some circumstances, as, for instance, if it were sending some one abroad to purchase goods; and the plaintiffs would have the right to assume, both from previous dealings with the defendant and from lack of notice, that the guaranty was in furtherance of the defendant's legitimate business." *J. P. Morgan & Co. v.*

Hall & Lyon Co., 34 R. I. 273, 83 Atl. 113.

In Massachusetts, the rule has been stated as follows: "There is a clear distinction * * * between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, where such abuse or failure is not known to the other contracting party." Per Chief Justice Grey in *Davis v. Old Colony R. Co.*, 131 Mass. 258, 260, 41 Am. Rep. 221.

⁹⁹ *Germantown Farmers' Mut. Ins. Co. v. Dhein*, 43 Wis. 420, 28 Am. Rep. 549. See also, to same effect, *Rock River Bank v. Sherwood*, 10 Wis. 230, where a bank took a note at twelve per cent. for a debt, when a statute authorized it to receive not exceeding ten per cent.

This distinction is not recognized in the later decisions in Wisconsin.

In a Mississippi case, where a loan was made by a corporation upon a note secured by a mortgage on land, when the corporation was not authorized to make loans except on notes with personal security, it was held that the mortgage was valid, and could be enforced, not merely on the ground that the corporation had furnished the consideration, and that the borrower was estopped to set up the defense of ultra vires, but on the ground that taking the mortgage was merely an excess of the corporation's general power to make the loan. The court said: "There was a loan irregularly made. The power to loan is conferred; the mode is regulated. If a corporation make a contract altogether outside of the purposes of its creation, it is void, because it has not power over the subject in reference to which it acts. But if it contracts with reference to a subject within its powers, but in doing so exceeds them, the person with whom it deals cannot set up such violation of its franchise to avoid the contract."¹

§ 1599. — Illinois rule. The first case in Illinois, it seems, which adopted this rule was decided in 1899.² In that case, suit was brought to foreclose a mortgage on land taken in exchange by a building and loan association. The association had power to purchase only land upon which it held a mortgage or in which it had an interest. It held no mortgage and had no interest in the land in question, but obtained it by exchange and assumed and agreed to pay an existing mortgage on the land. The association had discovered its error and had tendered back the land, and the dispute arose as to whether the association was liable to a deficiency decree in foreclosure under these circumstances. The court held that the association was not liable on the ground that the purchase of the land was wholly foreign to the business of a building and loan association. Chief Justice Cartwright, in delivering the opinion of the court, said: "The purpose of this corporation is the raising of funds to be loaned to its members upon the security of its stock and unencumbered real estate. Manifestly the business of trading in real estate or acquiring the same, except as incidental to their legitimate business, is wholly foreign to the purpose for which the state has created such corporations, and conferred upon them corporate powers." In answering the argument that the association was estopped to raise the question whether the contract was ultra vires, because it had received the benefit of the con-

¹ Littlewort v. Davis, 50 Miss. 403. 35, 64 L. R. A. 399, 72 Am. St. Rep.

² National Home Building & Loan 245, 54 N. E. 619, rev'g 79 Ill. App. Ass'n v. Home Sav. Bank, 181 Ill. 303.

tract by the conveyance of property to it, the court said: "That depends, as we think, upon the sense in which the term *ultra vires* is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. * * * Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act. * * * In the more proper and legitimate use of the term it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because the power to enter into it is absolutely wanting. If there is no power to make the contract, there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power. The powers delegated by the State to the corporation are matters of public law, of which no one can plead ignorance. * * * The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers." The Illinois court holds that when "the contract is within the chartered powers of a corporation, but there has been a failure to comply with some regulation, or the power has been improperly exercised, if the corporation has received the benefit of the contract, it may be estopped to raise that defense."³ This rule has been either expressly or impliedly approved in later cases where the question was directly or incidentally involved,⁴ but has been held not to prevent a recovery

³ Wood v. Supreme Ruling Fraternal Mystic Circle, 212 Ill. 532; 537, 72 N. E. 783, rev'g 114 Ill. App. 431.

⁴ Calumet & C. Canal & Dock Co. v. Conkling, 273 Ill. 318, 326, L. R. A. 1917 B 814, 112 N. E. 982; Converse v. Emerson, Talcott & Co., 242 Ill. 619, 627, 90 N. E. 269, aff'g 148 Ill. App. 604; Free Home Building Loan & Homestead Ass'n v. Edwards, 223 Ill.

126, 135, 79 N. E. 64, aff'g 124 Ill. App. 191; Rector v. Hartford Deposit Co., 190 Ill. 380, 389, 60 N. E. 528, aff'g 92 Ill. App. 175; Fritze v. Equitable Building & Loan Society, 186 Ill. 183, 198, 57 N. E. 873, aff'g 83 Ill. App. 13; Best Brewing Co. v. Klassen, 185 Ill. 37, 50 L. R. A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, rev'g 85 Ill. App. 464, explaining Heims Brewing Co. v.

on an implied contract.⁵ However, it may be stated that there has been no case in Illinois since 1899, it seems, where a plea of ultra vires was rejected on the theory of acceptance of benefits, in a case where there was an abuse of powers or as sometimes stated "the power was improperly exercised."

This rule is well stated by Mr. Hale, the author of a treatise on the Law of Private Corporations in Illinois, as follows: "Every contract which is within either the express or implied powers of a corporation is not ultra vires in any sense. But contracts which are not authorized by any express or implied power may be divided into two different classes: those which the particular corporation is not authorized to make under any circumstances, and those which it may make

Flannery, 137 Ill. 309, 27 N. E. 286, aff'g 38 Ill. App. 95, as a case where the act in question (the leasing of a building in which to conduct a saloon) was within the express power of the corporation.

"If the platting and selling of lots were not within the authority as granted in the charter, such acts were ultra vires and not binding upon the corporation, even though it derived profit from the sale thereof." *Stacy v. Glen Ellyn Hotel & Springs Co.*, 223 Ill. 546, 552, 8 L. R. A. (N. S.) 966, 79 N. E. 133.

A contract by a street railway company with a private party to pave a street, without regard to the action of the city, is ultra vires in the strict sense, and the company is not estopped, by having received the benefits of the contract, to make such defense to a bill for specific performance. *Farson v. Fogg*, 205 Ill. 326, 68 N. E. 755, rev'g 105 Ill. App. 572.

The defense of ultra vires may be interposed in a collateral proceeding where the corporation is alleged to have performed an act which it was not, under any circumstances, authorized to perform, but where the act is one which at most is but a mere abuse or excessive use of a general power, the question of ultra vires can be

raised only by a direct proceeding by the state to oust the corporation of its usurped powers. Thus, in an action for rent of a portion of a building erected by plaintiff, a corporation, and partly occupied by it for corporate purposes, it is no defense that the plaintiff, under the guise of erecting a building for corporate purposes, constructed a much larger building than its business required, containing many rooms intended to be rented to others for offices and business purposes. *Rector v. Hartford Deposit Co.*, 190 Ill. 380, 386, 60 N. E. 528, aff'g 92 Ill. App. 175.

Where an alleged ultra vires contract is one which the corporation was not, under any circumstances, authorized to perform, it is void and may be attacked anywhere, by any one; but where the validity of the contract depends on the question whether the corporation has abused, or unjustifiably used, a power which it had the right to exercise, if exercised in good faith, then only the state can attack it. *Illinois Life Ins. Co. v. Beifeld*, 184 Ill. App. 582, 595; *Western Tel. Mfg. Co. v. Foley*, 150 Ill. App. 343.

⁵ *Brennan v. Gallagher*, 199 Ill. 207, 211, 65 N. E. 227, rev'g 99 Ill. App. 81, and see § 1604, *infra*.

for some purposes but not for others. A manufacturing corporation for example, has no power under any circumstances to write a policy of life insurance; and if it should make such a contract it would be a strictly *ultra vires* act. The same company could, however, properly purchase furniture to furnish its own offices; and if it should purchase furniture to furnish a proposed life insurance office, such contract of purchase would be *ultra vires* only because the purpose was unlawful,—it would constitute an abuse of power. In all such cases of abuse of power, the transaction can be separated into two parts: the purchase of the furniture (in the illustration), and the use to which the furniture is put. From the point of view of the corporation or its stockholders the purchase of the furniture for the above purpose is as much a diversion of corporate funds and hence *ultra vires* as is the writing of the insurance policy; but from the point of view of the person contracting with the corporation the two things are very different. Everyone is charged with the knowledge of the powers of a corporation as shown by its charter; the assured in the life insurance policy would ascertain from the charter that the corporation had no power to make the insurance contract. But the furniture dealer would ascertain from the charter that the company could buy furniture for its own legitimate uses, and he is not chargeable with notice of the unlawful purpose in the minds of the company's officers with whom he deals. The above distinction between contracts which are strictly *ultra vires* and those which amount only to an abuse of power is fundamental in the law of this state.”⁶

§ 1600. — Criticism of rule. It is submitted that there is no doubt as to the correctness of the general rule laid down by the above decisions, as applied to particular facts, but it is also submitted that there is no good ground for the distinction drawn. In other words, if it should not be allowed to interpose *ultra vires* in the one instance it should not be allowed in the other. In fact, it all seems to simmer down to whether one dealing with a corporation must, before entering into a contract, read the articles of incorporation or the charter of the corporation, if there is any question as to the power of the corporation to enter into the contract, while if the right to make the contract is self-evident then the other party need not investigate the purpose of the loan, purchase, or other act forming the subject of the contract.⁷

⁶ Hale, Priv. Corp. § 82.

that corporations have the powers ex-

⁷ We have seen in preceding chapters pressly granted them and also implied

Whether such a distinction as this is sound admits of very reasonable doubt. If a corporation is authorized to make a particular contract, and exceeds its power in this respect, it certainly acts without any power over the subject in so far as the excess is concerned. If it is authorized to make loans on personal security only, and it makes a loan on a real estate mortgage, it certainly acts without power in taking the mortgage. The same is true where a corporation is authorized to borrow money or buy goods for the purposes of its legitimate business, and it borrows money or buys goods to be used in a business which it has no power to carry on. It may well be in such cases that the party—the corporation or the other party, as the case may be—should not be permitted to escape liability on the contract after receiving the benefit of it, as is held by many of the courts; but, it is more reasonable to allow an action in such cases, if at all, on the ground that equitable principles require that the party who has re-

or incidental powers for the purpose of carrying on the business of the corporation; that it is impossible to lay down any precise rule which can be readily applied as to what are implied or incidental powers; and that there is naturally some conflict in the decisions as to whether certain powers are implied in connection with particular corporations. It would seem to follow that when a layman makes a contract with a corporation, he is not presumed to know the scope of the powers of the corporation, so far as the question whether the particular contract is entirely beyond the scope of the purposes for which the company was incorporated is concerned. In fact it is often difficult for the skilled lawyer to determine that question. This theory limits the rule to a very small class of cases. To illustrate: A great proportion of ultra vires acts consists of purchases or sales by the corporation. Now nearly every corporation, at least those formed for pecuniary profit, has power to purchase and sell, to a greater or less extent. Therefore any ultra vires purchase or sale, unless the corporation has no power to purchase or sell under any circum-

stances, is a mere "excess of power," as the term is used in this line of decisions. If the purchase or sale is actually prohibited by a statute or the charter (including the articles of incorporation) then the question is one of "illegality" rather than ultra vires. It follows that the only application of the rule is where a corporation formed for one purpose goes entirely outside the scope of its business in making a contract. But even in such case, if a statute or the charter actually prohibits the contract the question of ultra vires does not arise, while if it does not prohibit the contract in so many words then the question is whether the contract is entirely outside the scope of the business to transact which the company was incorporated—a question which a cursory examination of the decisions will show to be often difficult to answer especially in these days when it is the general practice to incorporate companies so as to authorize them, by a broad statement in the articles of the corporation as to the purposes or powers of the company, to do almost every line of business as incidental to the main business.

ceived and retains the benefits of the contract should be held estopped to say that the contract was *ultra vires*, than to attempt to make a distinction, shadowy, to say the least, between want of power on the part of the corporation and mere excess of power,—an attempt which, even if the distinction is not altogether illogical, must result, and has resulted, in confusion and conflicting decisions. It seems absurd to say that a corporation which takes a mortgage to secure a loan, when its charter expressly declares that it shall have the power to loan money on personal security only, acts, not without power, but merely in excess of power, in taking the mortgage. Making the loan is within the power of the corporation, but taking the mortgage is as entirely beyond its powers as if it were not authorized to make the loan at all.

This idea that persons dealing with corporations are bound to know the extent of their corporate powers, as conferred by the articles of incorporation, charter or other statutes, has little to commend it. It has well been said by Mr. Freeman, in a valuable note in the *American State Reports*, that “the rapid development of the corporation idea, the multiplication in myriad form and variety of corporations, and the extreme complexity of the laws governing them, must make apparent to the most superficial student that a strict adherence to this rule of the law of notice must entail endless injustice, not to say, involve infinite absurdity. This rule lies at the foundation of the doctrine of *ultra vires* as it was originally conceived.”⁸

§ 1601. Effect of knowledge of other party to contract of unauthorized purpose. It will be noticed in the sections immediately preceding that the liability of the company on the contract made in “excess” of its authority but not beyond the scope of its ordinary powers is based on the ignorance of the other party to the contract of the intent to exceed the corporate authority. However, even if the other contracting party actually has notice of the unauthorized purpose at the time of making the contract, there are decisions holding that nevertheless the corporation cannot take refuge behind the plea of *ultra vires* where the other party to the contract has fulfilled his part of the contract, provided he has done nothing to promote such purposes beyond parting with his property.⁹ Thus, in a leading New

⁸ Note in 70 Am. St. Rep. 156, 176.

⁹ *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843, 849; *Illinois Trust & Savings Bank v. Pacific Ry.* Co., 117 Cal. 332, 343, 49 Pac. 197.

It is no defense “to a suit to enforce a contract that has been performed by the promisee to repay money loaned to or paid for another and to foreclose a mortgage securing that re-

York case, Justice Selden laid down the rule as settled that "it is no defense to an action brought to recover the price of goods sold that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design."¹⁰ So in Indiana, it is held that "even if it were conceded that the money was borrowed to be used in a transaction altogether beyond the power of the corporation, and that the lender knew the purpose for which it was to be used, since there is no statutory prohibition involved, and the lender was in no way in complicity with the borrower in carrying out the transaction in which the money was used, there exists no impediment against the enforcement of the contract";¹¹ and the same rule has been stated by the Illinois courts.¹² However, an assignee of a corporate mortgage cannot rescind the assignment upon the ground that the mortgage was the outgrowth of an ultra vires

payment, that the lender or the payor knew that the borrower intended to use, or was using, the money for an illegal purpose, or a purpose beyond its corporate powers, where the lender or payor did not combine or conspire with the borrower to induce such a use and did not share in the benefits thereof." *Jenson v. Toltec Ranch Co.*, 174 Fed. 86, 92, per Judge Sanborn.

¹⁰ "If, in this case, the bank had had no right to purchase state stocks for any purpose, then the contract of sale would have been necessarily illegal, and the vendor would, perhaps, be precluded from all remedy for the purchase money. But here the purchase and sale for a lawful object was a contract which each party had a perfect right to make. Suppose the banking company, although intending at the time of the purchase to use the stocks for trading purposes, had, the next day, abandoned this intention, and deposited them with the comptroller, would this change of purpose reflect back upon the contract of purchase, if it was corrupt, and divest it

of its illegal taint? This could hardly be pretended; and if not, then the consequence of the doctrine contended for here would inevitably be that the vendor of the stocks, without having participated in any illegal act, or even illegal intent, but having simply known of such an intent subsequently abandoned, would be punished with a total loss of the property sold, and that for the benefit of the party alone guilty, if guilt could be predicated of such a transaction." *Tracy v. Talmadge*, 14 N. Y. 162, 176, 177, 67 Am. Dec. 132.

General rule so stated in *Jenson v. Toltec Ranch Co.*, 174 Fed. 86, 92, citing many decisions as so holding.

¹¹ *Wright v. Hughes*, 119 Ind. 324, 331, 12 Am. St. Rep. 412, 21 N. E. 907, approved in *First Nat. Bank of Crawfordsville v. Dovetail Body & Gear Co.*, 143 Ind. 550, 52 Am. St. Rep. 435, 40 N. E. 810, and followed in *Marion Trust Co. v. Crescent Loan & Investment Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257, 61 N. E. 688.

¹² *Bradley v. Ballard*, 55 Ill. 413, 417, 8 Am. Rep. 656.

transaction, where he was aware of the facts upon which such contention is based before he accepted the assignment.¹³

In Maryland, the rule seems to be to the contrary and it is held that while "a lender of money is not concerned with the purpose for which the borrower secures it," yet "when he does know, and is apprised that it is being borrowed for an illegal use, the situation is altered, and he becomes implicated as a participant in the unlawful transaction in furtherance of which the fund is used."¹⁴

VIII. OBLIGATION TO RESTORE BENEFITS RECEIVED UNDER ULTRA VIRES CONTRACT: REMEDIES OF PARTIES TO ULTRA VIRES CONTRACT
OTHER THAN ACTION ON CONTRACT ITSELF

§ 1602. General rules. It is a general principle, recognized both in equity and at law, that, when a corporation repudiates an ultra vires contract into which it has entered, there is an obligation to restore what it has received under the contract. And the same is true with respect to the other party to an ultra vires contract. This doctrine is not at all inconsistent with the doctrine which prevents enforcement of an ultra vires contract. "However the contractual power of a corporation may be limited under its charter," said the New Hampshire court, "there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract; nor, as a corporation, is it exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial."¹⁵ It is well settled that a corporation which has received the benefits of an ultra vires contract cannot repudiate it

¹³ Woodcock v. First Nat. Bank of Niles, 113 Mich. 236, 71 N. W. 477.

¹⁴ Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 631, 63 Atl. 70, applying rule to loan to purchase its own shares of stock.

If there is no power to borrow for a particular purpose, and the purpose of the loan is known to the lender, there can be no recovery from the company to the prejudice of its other creditors. Bear Creek Lumber Co. v. Second Nat. Bank of Cumberland, 120 Md. 566, 87 Atl. 1084.

¹⁵ Manchester & L. R. Co. v. Concord R. Co., 66 N. H. 100, 9 L. R. A.

689, 49 Am. St. Rep. 582, 20 Atl. 383. See also American U. Tel. Co. v. Union Pac. Ry. Co., 1 Fed. 745, 1 McCrary 188; Bradley v. Ballard, 55 Ill. 413, 417, 8 Am. Rep. 656; Morville v. American Tract Society, 123 Mass. 129, 25 Am. Rep. 40; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 731; Wilson's Case, L. R. 12 Eq. 521.

If the corporation sets up the defense of ultra vires it must restore what it has received of the grant made. Atkins v. Shreveport & R. River Val. Ry. Co., 106 La. 568, 577, 31 So. 166.

without being liable in some form for the benefits received.¹⁶ As already noticed, in most jurisdictions a recovery may be had on the contract itself, where it has been executed on one side only,¹⁷ but even in the federal courts and in those courts following the federal rule, which hold that the ultra vires contract is void and that no recovery can be had thereon,¹⁸ it is held that the corporation or other party is liable for benefits received.¹⁹ This principle affects all ultra vires contracts, by preventing a party from setting aside, or evading liability on them, and at the same time retaining the benefits received thereunder.²⁰ Thus, if a corporation seeks to recover property which it has parted with, it must first restore the consideration for the transfer.²¹ So a corporation which has obtained funds as a trustee will not be allowed to withhold them to the detriment of those to whom the fund belongs, on the ground that it had no power to act as trustee.²² To like effect, it is held, in an action by a corporation to recover money disbursed by it, stockholders who have received the benefit of the disbursement cannot defend against their promise on the ground that such disbursement was ultra vires.²³ So it has been held that "the law recognizes in appropriate cases the equities of one who has provided money for the legitimate uses of a corporation, although under an arrangement which the corporation had no authority to make; and that, when the nature of the case is such that remedies at law would be ineffectual, equity will afford such other relief as the case may require."²⁴

Where a corporate agreement as to the selling shares of stock is ultra vires in so far as it imposes the duty to rebuy the stock at the option of the buyer, the corporation cannot repudiate the condition and still retain the price of the stock, but it must either recognize

¹⁶ It is also well settled that where a municipal corporation has received the benefits of a contract which is ultra vires, equity will not cancel or set it aside without compelling the municipality to do equity by restoring the benefits received thereunder. 3 McQuillin, Mun. Corp. § 1277.

¹⁷ See §§ 1543-1557, *supra*.

¹⁸ See §§ 1539-1542, *supra*.

¹⁹ *Marey v. Guanajuato Development Co.*, 228 Fed. 150, 154; *Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co.*, 126 Fed. 712, *rev'g* 119 Fed. 709.

²⁰ *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109, 86 N. Y. Supp. 144.

²¹ *Jenson v. Toltec Ranch Co.*, 174 Fed. 86.

²² *Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co.*, 114 Fed. 263.

²³ *Western Cottage Piano & Organ Co. v. Burrows*, 168 Ill. App. 120, 129.

²⁴ *Roberts v. W. H. Hughes Co.*, 85 Vt. 76, Ann. Cas. 1913 E 1015, 83 Atl. 807.

the condition as valid or else itself rescind the contract and return the consideration received,²⁵ except where the rights of creditors or other stockholders estop the purchaser from enforcing the condition.²⁶

§ 1603. Restoration as condition to rescission. Where a corporation rescinds an ultra vires contract, it must restore the benefits received thereunder.²⁷

The equitable doctrine which imposes upon a corporation which has entered into an ultra vires contract, or upon the other party to such a contract, as the case may be, the obligation to restore what it or he has received under the contract, on repudiating it, applies with peculiar force when affirmative relief by way of rescission and recovery of property is sought in a court of equity. A corporation cannot maintain a suit in equity to rescind or cancel an ultra vires contract, as a lease, for example, and recover what it has parted with, so long as it retains money or property which it has received under the contract. "Many cases hold," said Judge McCrary, "that a corporation

²⁵ *Sweeney v. United Underwriters Co.*, 29 S. D. 576, 137 N. W. 379. To same effect, *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

²⁶ *Melvin v. Lemar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

²⁷ *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109, 86 N. Y. Supp. 144.

Where action is brought by a corporation to set aside a transfer of certain property on the ground that the transfer was unauthorized, it is incumbent upon it to show that it has made a tender to the defendant of the amount it received on the property, or, at the least, a clear and definite offer to restore such amount. An offer by the corporation to allow the amount in question to apply in reduction of a judgment which it might secure against the defendant does not fulfil the requirement. The basis of this holding is that he who seeks equity must do equity; that there must be restoration before suit or at least a

bona fide offer to restore whatever has been received as consideration from the other party for the transfer before there can be a rescission of the contract. In discussing the matter the court said: "This offer was not a sufficient tender. It was not absolute. * * * In any event, it was only a conditional tender, depending entirely upon a judgment being rendered in favor of the corporation for damages. The tender must be without qualifications or conditions." *Alaska & C. Commercial Co. v. Solner*, 123 Fed. 855.

Upon the insolvency of a bank and the acceptance by the officers of an insurance company of bank stock and certificates of deposits in payment of the money on deposit with the bank, the bank was entitled to have the property returned before the insurance company could repudiate the transaction. *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa 591, 103 N. W. 958.

which has made a contract ultra vires, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contracts; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other."²⁸ The same principle applies where a corporation borrows money without authority and secures the payment thereof by delivery of securities. Neither the corporation nor its receiver can repudiate the transaction and recover the securities in equity without repayment of the money received by it.²⁹ So if a corporation, such as a lumber company, makes an ultra vires contract to build a railroad in consideration of an agreement to convey standing timber at a reduced price, and then repudiates the agreement to build the road as ultra vires, the grantor of the timber may recover the difference between the contract price and the actual value of the timber.³⁰

§ 1604. Action on implied contract—In general. The obligation to restore property or money received under an ultra vires contract, on refusing to perform the same, is enforced when possible, even in courts of law, by allowing an action quasi ex contractu to be maintained. Even in those jurisdictions in which the doctrine of ultra vires is strictly applied, and in which it is held that the fact that an ultra vires contract with a corporation has been fully executed on one side by the payment of money, rendering of services, or transfer

²⁸ *American Union Tel. Co. v. Union Pac. Ry. Co.*, 1 Fed. 745, 1 McCrary 188. See also *United Lines Tel. Co. v. Boston Safe Deposit & Trust Co.*, 147 U. S. 431, 37 L. Ed. 231; *New Castle Northern R. Co. v. Simpson*, 23 Fed. 214; *Memphis & L. R. Co. v. Dow*, 19 Fed. 388; *Manville v. Belden Min. Co.*, 17 Fed. 425; *Brown v. Atchison*, 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465; *Buford v. Keokuk Northern Line Packet Co.*, 69 Mo. 611; *Wilson's Case*, L. R. 12 Eq. 521.

²⁹ *Wilson's Case*, L. R. 12 Eq. 521.

If it were true that a national bank were without power to secure title to stock in another corporation pledged to it as collateral, the pledgor, nevertheless, could not retake the stock without payment of the loan. *Fulton v. National Bank of Denison*, 26 Tex. Civ. App. 115, 62 S. W. 84.

³⁰ *Herring v. Wallace Lumber Co.*, 163 N. C. 481, 79 S. E. 876.

of property, will not render the other party liable on the contract, itself, the courts grant relief by allowing an action on implied contract for money had and received, or for the value of the property or services. Such an action is in disaffirmance of the ultra vires contract, and not to enforce the same.³¹ However, the right to recover on an implied contract exists "only when the corporation setting up the ultra vires contract has itself received and enjoyed the property or money, and not when it has been received and enjoyed by a third party, although the defendant corporation may have been incidentally benefited thereby."³²

Where a national bank bought municipal bonds under an agreement that it would upon demand replace them at the same or a less price, and the purchase was ultra vires, it was held by the Supreme Court of the United States that, where the seller demanded compliance with the agreement to replace, after making a proper tender, and the bank refused on the ground that the purchase was ultra vires, the bank was liable on implied contract for the value of the bonds at the time plaintiff demanded compliance with the agreement. In delivering the opinion of the court, Justice Harlan said: "It would seem, upon defendant's theory of its powers, to be too clear to

31 United States. *Citizens Central Nat. Bank v. Appleton*, 216 U. S. 196, 54 L. Ed. 443, aff'g 190 N. Y. 417, 32 L. R. A. (N. S.) 543, with note, 83 N. E. 470, which rev'd 116 App. Div. 404, 101 N. Y. Supp. 1027.

Illinois. *Mercantile Trust Co. of Illinois v. Kastor*, 273 Ill. 332, 112 N. E. 988; *United States Brewing Co. v. Dolese & Shepard Co.*, 259 Ill. 274, 47 L. R. A. (N. S.) 898, 102 N. E. 753, rev'g on other grounds 174 Ill. App. 394.

Indiana. *State Life Ins. Co. v. Nelson*, 46 Ind. App. 137, 92 N. E. 2.

Massachusetts. *Nashua & L. R. Corporation v. Boston & L. R. Corporation*, 164 Mass. 222, 49 Am. St. Rep. 454, 41 N. E. 268; *Slater Woollen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823; *Morville v. American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40.

Michigan. *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

Missouri. See *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 577, 158 S. W. 359.

Oklahoma. *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, L. R. A. 1917 A 1021, 138 Pac. 392.

Tennessee. *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29.

Wisconsin. *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

The fact that a contract by a national bank to receive and collect securities and reinvest the proceeds for the owner was ultra vires does not relieve the bank of the obligation to return the securities or account to the owner for their value. *Emmerling v. First Nat. Bank of Pembina*, 97 Fed. 739.

³² Per Justice Haight in *Marcy v. Guanajuato Development Co.*, 228 Fed. 150, 155.

admit of dispute that the Act of Congress does not give a national bank an absolute right to retain bonds coming into its possession, by purchase, under a contract which it was without authority to make. True, it is not under a duty to surrender possession until reimbursed the full amount due to it; it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power, under the statute, to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract * * * it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor."³³ However, it has been stated by a writer on the law of corporations,³⁴ that this decision cannot readily be sustained on the theory of a quasi contractual obligation, because the measure of damages fixed by the court is based on the terms of the express contract.

In Alabama, however, a recovery on an implied contract has been refused. Thus, in a case where a corporation had no power to loan money, it sued on a common count for money loaned. The court, at an early day, held that "contracts of corporations, which they have no power to make, are void, and courts of justice will not enforce them. So, also, promissory notes, and other instruments, given to secure the performance of the contract are void. No action to enforce the contract, whatever form the pleader's skill may give it, can be maintained. * * * It is true that money loaned may be recovered under a common money count. But then a recovery under a common count, in this case, would be an enforcement of a void contract, as effectually as if it had been under a special count, setting forth the contract."³⁵ So in Ohio it was held, where a corporation made an ultra vires subscription to the stock of a railroad and delivered goods in part payment of the price, it could not, on repudiating the contract as ultra vires, recover the value of the goods

³³ Logan County Nat. Bank v. Townsend, 139 U. S. 67, 74, 35 L. Ed. 107. ³⁵ Grand Lodge v. Waddill, 36 Ala. 313, 319.

³⁴ 2 Machen, Corp. § 1046.

delivered.³⁶ However, neither of these decisions have been followed in later cases and they cannot be sustained either by reason or authority.

On the other hand, it seems that municipal corporations are not liable on an implied contract for benefits received,³⁷ except perhaps for money received.³⁸

§ 1605. — Recovery of value of goods or services. Thus, if a corporation enters into a contract which is merely *ultra vires*, and not immoral nor contrary to any express prohibition, and performs services or delivers goods or conveys land under the contract, the other party cannot set up the *ultra vires* character of the transaction to defeat an action by the corporation to recover the value of the services or of the land or goods, even in those jurisdictions in which no action can be maintained on the contract. As he has had the benefit of the transaction, the law will imply or create a contractual or quasi contractual obligation to pay.³⁹ In like manner, when a corporation is sued quasi *ex contractu* for the value of goods or land purchased and received by it, or for the value of services rendered for it under a contract, it cannot defeat a recovery by setting up that the contract was *ultra vires*.⁴⁰

³⁶ *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486.

³⁷ 3 McQuillin, *Mun. Corp.* pp. 2585, 2587.

³⁸ As to the rights of bondholders whose bonds are *ultra vires* to recover amount paid therefor, see 5 McQuillin, *Mun. Corp.* § 2349.

³⁹ *Slater Woollen Co. v. Lamb*, 143 Mass. 420, 9 N. E. 823. And see *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128. *Contra*, *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486.

That the purchase of goods by a corporation is *ultra vires* does not bar suit by the vendor for the recovery of the proceeds of the goods where, being unable to recover on an express con-

tract, he disaffirms same. A suit where a contract must be so disaffirmed is upon *quantum meruit* or upon a *quantum valebat*. That the corporation has become insolvent does not prevent the disaffirmance of the contract and suit for the proceeds of the goods. Where the petition in such case sets out that the goods were sold by the corporation and proceeds of the sale received by it, although the suit was for the agreed price of the goods, the prayer may be in the alternative, judgment for the contract price or for the proceeds of the sale should the contract be without binding force. *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29.

⁴⁰ *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; *Moore v. Swanton Tannery Co.*, 60 Vt. 459, 15 Atl. 114.

§ 1606. — Action for use and occupation. If a corporation uses another's property under an ultra vires lease to it, or if another uses the property of a corporation under an ultra vires lease by it, an action may be maintained to recover, on implied contract, the value of the use and occupation, even in those jurisdictions in which an action cannot be maintained for rent due under the lease.⁴¹

§ 1607. — Recovery of money paid or lent. On the same principle, if a corporation pays money under a contract which is merely ultra vires, and not immoral or otherwise illegal, and the other party refuses to perform, it may recover the money in an action for money had and received. This is true, for example, where a corporation pays money in advance under an ultra vires contract for the purchase of goods, and the other party, while retaining the money, refuses to deliver the goods.⁴² So where a corporation has no power to loan money, it may nevertheless sue on an implied contract for money had and received, if the loan is not *malum in se* or *malum prohibitum*.⁴³ The same is true where a corporation loans or advances money upon securities upon which its charter does not authorize it to make loans or advances. It may recover the money in an action on implied contract for money had and received, or money lent.⁴⁴

In like manner, where an act is ultra vires, the other party to the contract has a right of action for money had and received for the

⁴¹ See *Brunswick Gas Light Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525; *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 9 L. R. A. 689, 49 Am. St. Rep. 582, 20 Atl. 383.

⁴² *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781. *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486, holds the contrary, but the decision is not sustained either by reason or authority.

⁴³ *Leigh v. American Brake-Beam Co.*, 205 Ill. 147, 68 N. E. 713, aff'g 107 Ill. App. 444.

It does not follow that where a corporation has loaned its funds in excess of its power that by reason of its

ultra vires act it shall be without remedy. In such case a contract to return the money received will be implied. Where a corporation has received money under an ultra vires contract, it may be required to return the same. So, conversely, where it has loaned money, ultra vires, an action for its recovery will not be deemed an affirmation but rather a disaffirmance of the contract. *Lehigh v. American Brake-Beam Co.*, 205 Ill. 147, 68 N. E. 713, aff'g 107 Ill. App. 444.

⁴⁴ *Philadelphia Loan Co. v. Towner*, 13 Conn. 248, 249; *Allen v. Freedman's Savings & Trust Co.*, 14 Fla. 418.

Grand Lodge v. Waddill, 36 Ala. 313, to the contrary, cannot be sustained.

amounts paid to the corporation in connection therewith, where it refuses to carry out the contract.⁴⁵ It was so held in a Massachusetts case, where a corporation received a sum of money under an ultra vires contract, and promised to return the same if an additional sum should not be raised within a certain time.⁴⁶ Some courts hold that if money is borrowed by a corporation without authority, it is not liable on its contract to pay the same, but is liable, both at law and in equity, to the extent to which the money has been applied to legitimate corporate purposes.⁴⁷

If a corporation issues and sells bonds which are void for want of power to issue them, the purchaser may maintain an action against it to recover the consideration paid.⁴⁸

In England it has been held in several cases that if a corporation borrows money when it has no power to do so, either because its nature is such that it cannot borrow at all, or because the amount which it is authorized to borrow is limited by its charter, and the money so borrowed is applied to the payment of valid debts of the corporation, whether contracted before or after the loan, the lender, or the holder of bonds issued for the loan, may recover from the corporation to the extent to which the money has been so applied. To this extent he is merely subrogated in equity to the rights of the creditors who have been paid, and there is no increase in the indebtedness of the corporation.⁴⁹ This rule only applies in so far as the money has been applied to the payment of valid debts of the corporation.⁵⁰

§ 1608. Accounting in equity. A corporation cannot receive money or property equitably belonging to another and not account

⁴⁵ *Jacobs v. Monaton Realty Investing Corporation*, 160 N. Y. App. Div. 449, 465, 145 N. Y. Supp. 611, rev'd on other grounds in 212 N. Y. 48, 105 N. E. 968.

⁴⁶ *Morville v. American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40.

⁴⁷ *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Union Gold Min. Co. of Colorado v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. Ed. 648; *Allis v. Jones*, 45 Fed. 148; *Allen v. Intendant & Councilmen of LaFayette*, 89 Ala. 650, 8 So. 30; *Parsons v. Inhabitants of Monmouth*, 70 Me. 262; *Troup's Case*, 29

Beav. 353; *In re National Permanent Ben. Bldg. Society*, 5 Ch. App. 309; *In re Cork & Y. Ry. Co.*, 4 Ch. App. 748; *In re German Min. Co.*, 4 De G. M. & G. 19; *Wenlock v. River Dee Co.*, 19 Q. B. Div. 155.

⁴⁸ *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Dec. 598.

⁴⁹ *In re National Permanent Ben. Bldg. Society*, 5 Ch. App. 309.

⁵⁰ *In re National Permanent Ben. Bldg. Society*, 5 Ch. App. 309; *In re Cork & Y. Ry. Co.*, 4 Ch. App. 748; *Blackburn Building Society v. Cunliffe*, 22 Ch. Div. 61; *Wenlock v. River Dee Co.*, 19 Q. B. Div. 155.

for it, even though it was received in connection with an ultra vires contract or act of the corporation.⁵¹ When, under an ultra vires contract with a corporation, one of the parties has received money or property to which the other is equitably entitled, a court of equity, if it has jurisdiction in the particular case, will compel an accounting. Thus, where railroad companies entered into a pooling contract, and the contract was carried out, and the profits therefrom collected and held by the receiver of one of the companies, a court of equity compelled him to account to the other company for its share.⁵² Where a railroad company uses the roadbed, rolling stock, and equipments of another company under an ultra vires lease or other contract, it cannot defeat a suit in equity for an accounting and a return of the property on the ground that the contract was ultra vires.⁵³

The same rule applies where a corporation enters into an ultra vires partnership agreement with an individual or another corporation. Either party may be compelled to account to the other for his or its share of the profits.⁵⁴ The rule has also been applied for the purpose of compelling a corporation to account for the value of land received by it under an ultra vires contract.⁵⁵

Where a lease of all the property of a transportation company to a sleeping car company was held ultra vires on the part of the lessor, in an action for rent, the lease having many more years to run, and a suit for an accounting was brought, and the parties could not be put in statu quo by a return of the leased property because it had substantially disappeared, it was held that the lessee should account for the value of the leased property as of the time when the lease took effect with interest; that the value of such property was not to be ascertained from the market value of the shares of stock of the lessor at that time but by the value of the property transferred; that

⁵¹ Equitable Trust Co. of New York v. National Bank of Commerce in St. Louis, 211 Fed. 688; New Castle Northern R. Co. v. Simpson, 23 Fed. 214; Pauly v. Pauly, 107 Cal. 8, 18, 48 Am. St. Rep. 98, 40 Pac. 29; German Nat. Bank v. Meadowcroft, 95 Ill. 124, 133, 35 Am. Rep. 137, aff'g 4 Ill. App. 630; Emigh v. Earling, 134 Wis. 565, 27 L. R. A. (N. S.) 243, 115 N. W. 128.

A bank having lawfully received a deposit or other property must account for it or its proceeds notwithstanding

some ultra vires agreement connected with the transaction. First Nat. Bank of Decatur v. Henry, 159 Ala. 367, 49 So. 97.

⁵² Central Trust Co. of New York v. Ohio Cent. R. Co., 23 Fed. 306.

⁵³ Manchester & L. R. Co. v. Concord R. Co., 66 N. H. 100, 9 L. R. A. 689, 49 Am. St. Rep. 582, 20 Atl. 383.

⁵⁴ Boyd v. American Carbon Black Co., 182 Pa. St. 206, 37 Atl. 937.

⁵⁵ Moore v. Swanton Tanning Co., 60 Vt. 459, 15 Atl. 114.

the value of contracts with railroad companies and patents transferred by the lessor could not be recovered, where the contracts and patents expired before the lessee ceased to pay rent; and that nothing could be recovered for the breaking up of the business of the lessor by reason of the lease being adjudged *ultra vires*.⁵⁶

§ 1609. Right to recover property in case of *ultra vires* lease or sale. A lease is generally not regarded as an executed contract, at least by the federal courts, although possession has been delivered and a lease executed and part of the rent paid, at least in so far as the time for which rent is not yet paid or so far as unexecuted provisions in the lease relating to future acts are concerned.⁵⁷ Notwithstanding all this, the Supreme Court of the United States has held, where a railroad company leased all its property to another for nine hundred and ninety-nine years, and the lease was *ultra vires*, that equity will not set aside the lease, at the suit of the lessor, after the lessee has been in possession for several years and complied with all the terms of the lease and he objects to its rescission.⁵⁸ That this decision is out of line with other decisions of that court is altogether clear, unless the lease be considered as an executed contract.

In a case in Minnesota, plaintiff shipped cigars to a tobacco works company which had no authority to purchase cigars. Before they were paid for, the purchaser made an assignment for benefit of creditors, whereupon the seller brought replevin for the cigars against the assignee and sought to recover on the ground that the company had no power to purchase cigars. The court said: "This plea of illegality is a shield, not a sword; a defense, not a ground for affirmative relief. If the transaction was illegal, the law simply leaves the parties where it finds them."⁵⁹

⁵⁶ Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 43 L. Ed. 108.

⁵⁷ See § 1587, *supra*.

⁵⁸ St. Louis, V. & T. H. R. Co. v.

Terre Haute & I. R. Co., 145 U. S. 393, 36 L. Ed. 738.

⁵⁹ Erb v. Yoerg, 64 Minn. 463, 67 N. W. 355.

CHAPTER 38

ILLEGAL OR PROHIBITED CONTRACTS

- § 1610. General considerations.
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- § 1612. Kinds of illegal contracts—In general.
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- § 1614. — Contracts contrary to public policy.
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- § 1620. — Loans to officers.
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- § 1626. — Contracts fully executed.
- § 1627. — Parties not in *pari delicto*.
- § 1628. — *Locus poenitentiae*.
- § 1629. What law governs.

§ 1610. **General considerations.** It is not within the scope of this work to go into details in regard to the legality of contracts in general, where in violation of a statute, or *malum in se* because immoral or against public policy, but reference should be made to standard textbooks on the law of contracts.¹ As has been stated, "there is nothing peculiar to corporation law about acts in contravention of public policy; that is to say acts contrary to an express provision of law or contrary to the policy of express law, though not expressly prohibited or (otherwise) contrary to good morals. Such acts, when done by corporations, are unlawful and void, not because they are outside of the powers reserved by or granted to the particular corporation, but because they are unlawful by whomsoever done, whether by corporations or individuals."² So, while an attempt is made in this connec-

¹ See Hammon, Contracts, § 206 et seq.

² Article by Jesse W. Lilienthal in 11 Harv. L. Rev. 387, 390.

tion to collect cases relating to corporate contracts as bearing on the law as to the "effect" of "illegal" contracts, yet it is to be kept in mind that most of the decisions relating to the effect of illegality are rendered in cases where a corporation is not a party to the contract, or where, if it is a party, no reference is made to that fact, since the basic rules as to the effect of illegality are identical without regard to whether the contract is wholly between individuals, or between corporations, or between individuals and corporations.³

§ 1611. Distinguished from ultra vires contracts. It is well settled at this time, despite some early cases to the contrary, that a contract is not necessarily "illegal," as against public policy or otherwise, merely because it is ultra vires, i. e., beyond the powers of the corporation, where not expressly prohibited by a statute or the charter.⁴

In the preceding chapter, there has been considered the effect of contracts with a corporation which are merely ultra vires, and not otherwise illegal; that is, contracts which are merely beyond the powers conferred upon the corporation by its charter, and which would be perfectly lawful if entered into between natural persons. We come now to deal with contracts which are not only ultra vires, but illegal in the sense in which contracts between natural persons are said to be illegal; and any contract which would be illegal if entered into between natural persons is illegal when entered into between corporations, or between a corporation and a natural person, unless the charter of the corporation renders the law inapplicable to it.⁵

However, the courts sometimes fail to note the difference between ultra vires and illegal contracts, and often apply the rules relating to the effect of ultra vires contracts to contracts either expressly pro-

The effect of usury as a defense seems to be the same without regard to whether the lender is a corporation or an individual. *Farmers' & Traders' Bank v. Harrison*, 57 Mo. 503, 514.

³ For general rules as to effect of illegality, see *Hammon, Contracts*, § 255 et seq.

⁴ *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166, 180; *Bissel v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, 270, 277, opinion of

Justice Comstock. Compare *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43, 28 Am. Rep. 9, decided in 1877, which seems to be the only case adhering to the old rule.

⁵ *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390, and cases hereafter cited. See also § 1512, *supra*, distinguishing ultra vires contracts from illegal contracts.

hibited or against public policy, without in any way noticing the distinction.

§ 1612. Kinds of illegal contracts—In general. The matters considered in this chapter are confined to illegal contracts, i. e., contracts in terms prohibited either by a general statute or the charter, and contracts illegal at common law. The latter class of contracts is divisible into (1) agreements contrary to positive morality, recognized as such by law, and (2) agreements contrary to the common weal—that is, against public policy.⁶

§ 1613. — Contracts malum in se. Contracts to do an immoral thing, or for any immoral purpose, are generally referred to as malum in se, and sometimes are merely referred to as contracts against public policy.⁷ Such contracts are absolutely void, and can give no right of action. This rule, however, is not peculiar to contracts by corporations. "It has its root in the universal principle that persons shall not stipulate for iniquity."⁸

§ 1614. — Contracts contrary to public policy. As already noted in preceding chapters relating to the particular powers of corporations, certain corporate contracts are held to be against public policy.⁹ Contracts against public policy where entered into between individuals are also against public policy where a corporation is a party. Common illustrations are contracts in unreasonable restraint of trade,¹⁰ contracts to procure a monopoly,¹¹ etc. Such contracts are not merely ultra vires, but are also illegal and void, and no action can be maintained upon them. The rule is the same as in the case of contracts between natural persons.¹² Furthermore, no recov-

⁶ Pollock, Contracts, 233, 234.

⁷ See Hammon, Contracts, § 224 et seq.

⁸ Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390; Gause v. Commonwealth Trust Co., 44 N. Y. Misc. 46, 89 N. Y. Supp. 723.

⁹ For instance, see §§ 906, 1131, supra.

A promise by a land company to pay a portion of the expense of a public improvement is not against public policy. Charlotte Tp. v. Piedmont Realty Co., 134 N. C. 41, 46 S. E. 723.

¹⁰ See Hammon, Contracts, §§ 244a-246.

¹¹ See chapter on Monopolies, infra.

¹² **United States.** Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868; Marshall v. Baltimore & O. R. Co., 16 How. 314, 14 L. Ed. 153.

California. Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

Connecticut. State v. Hartford & N. H. R. Co., 29 Conn. 538.

Illinois. McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593.

ery can be had on a contract void as against public policy, even though the party setting up the illegality has received and still retains the benefit of the contract.¹³

It has been held that a railroad company or other quasi public corporation cannot maintain an action on the covenants in a lease of its property, by which it rendered itself unable to perform its duties to the public, since the lease is not merely *ultra vires*, but contrary to public policy and illegal.¹⁴ In fact, any agreement which involves the abandonment, in whole or in part, by a quasi public corporation, of the duties devolving upon it as such, is contrary to the public welfare and cannot be sustained;¹⁵ and the same is true of an agreement which merely tends to obstruct such a corporation in the performance of its duties.¹⁶

Where a railroad corporation made a lease of its property offensive to public policy, the court, in holding that rental could not be recovered under the lease, said, "I can understand how, if two individuals who have the legal capacity to enter into the relation of landlord and tenant have executed a lease which is void by reason of the manner or time of execution, the law from the facts showing the possession and use of the property would imply a lease; that is, would make a lease for the parties, and by means of evidence of value would fix the rental. But in this case, as already stated, the two railroads

Indiana. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592.

Missouri. *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

New York. *Bliss v. Matteson*, 52 Barb. 335.

Ohio. *Emery v. Ohio Candle Co.*, 47 Ohio St. 320, 21 Am. St. Rep. 819, 24 N. E. 660.

An option by a public service corporation in consideration of being granted a street franchise, to sell all its property to the municipality, is against public policy, so that the corporation is not estopped to set up *ultra vires* in regard to the option. *Quinby v. Consumers' Gas Trust Co.*, 140 Fed. 362, 365.

¹³ *State v. Bankers' Trust Co.*, 157 Mo. App. 557, 138 S. W. 669; *Jefferson Bank of St. Louis v. Chapman-White-*

Lyons Co., 122 Tenn. 415, 123 S. W. 641.

¹⁴ *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Visalia Gas & Electric Light Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042.

See also Chaps. 32 and 33, *supra*.

¹⁵ *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55; *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950; *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169, *rev'g* 20 Ill. App. 473; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.*, 68 Ill. 489; *Gulf, C. & S. F. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156.

¹⁶ *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 32 L. Ed. 819; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *Jackson v. Bowman*, 39 Miss. 671.

were forbidden by public policy to enter into the relation of landlord and tenant. It seems to me that if the courts, from the fact that the two railroads had nevertheless undertaken to enter into that relation, should imply that that relation was in fact created, it would not only subvert that public policy, but point out to the parties, or others in like situation and with like intention, how to evade the law."¹⁷ So a contract by a railroad company giving to one person the exclusive right to place advertisements on its box cars has been held contrary to the public policy of Virginia as declared by its statutes and will not be enforced by its courts.¹⁸ It is to be noted, however, that many of the decisions of the courts of this country, in regard to sales, mortgages or leases by quasi public corporations, which disable them to some extent to perform their public duties, proceed entirely on the theory that the contract is *ultra vires*, without in any way referring to the difference between *ultra vires* and illegal contracts.

§ 1615. Effect in general of illegal contracts. As a general rule, an illegal contract between natural persons is void, and no action can be maintained upon it. *Ex dolo malo non oritur actio*. The same is true of an illegal contract between corporations, or between a corporation and a natural person.¹⁹

§ 1616. Effect of contracts in violation of charter or statutory prohibition—General rules. It is a general rule that a contract which is in violation of a statutory prohibition is illegal and void, and that no action can be based upon it, unless it appears that the legislature did not intend that the prohibition should have this effect. And this is true of a contract by a corporation which is expressly or impliedly prohibited by its charter or by any other statute. Such a contract is not only *ultra vires*, but is illegal, and no action can be maintained upon it, unless it appears from the other provisions of the charter or statute, and the purpose of the prohibition, that the legislature did not intend to make the contract void.²⁰ It can make no

¹⁷ *Cox v. Terre Haute & I. R. Co.*, 123 Fed. 439, 451.

¹⁸ *National Car Advertising Co. v. Louisville & N. R. Co.*, 110 Va. 413, 24 L. R. A. (N. S.) 1185, 66 S. E. 88.

¹⁹ *Providence Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Wilson v. Torchon Lace & Mercantile Co.*, 167 Mo. App. 305, 149 S.

W. 1156; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

As to the effect of partial illegality on contracts in general, see *Hammon, Contracts*, § 251.

²⁰ *United States. De La Vergne Refrigerating Mach. Co. v. German Sav. Institution*, 175 U. S. 40, 58, 44 L. Ed. 65; *In re Jaycox*, 12 Blatchf. 209, Fed. Cas. No. 7,237.

difference that the contract, but for such prohibition, would be lawful, for "no one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed."²¹ Moreover, there can be no estoppel to set up the illegality,²² nor can there be any ratification of the contract which will make it effective;²³ and the fact that the party setting up the illegality has received the benefits of the contract and retains them does not preclude the defense.²⁴ Moreover, a contract by which a party lends money to a

Illinois. *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626.

Indiana. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592.

Iowa. *State v. Corning State Sav. Bank*, 136 Iowa 79, 113 N. W. 500; *Mutual Guaranty Fire Ins. Co. v. Barker*, 107 Iowa 143, 70 Am. St. Rep. 149, 77 N. W. 868.

Massachusetts. *White v. Franklin Bank*, 22 Pick. 181.

Missouri. *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

New York. *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *New York State Loan & Trust Co. v. Helmer*, 77 N. Y. 64; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31.

Pennsylvania. *Southern Loan Co. v. Morris*, 2 Pa. St. 175, 44 Am. Dec. 188.

In *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592, this principle was applied where a manufacturing company had issued a warehouse receipt, not only ultra vires, but also contrary to the statute law of the state.

Where a mutual insurance company issued a policy which it was expressly prohibited by law from issuing, it was held that the policy was illegal and void on that ground and not merely

ultra vires, and that the holder, although he had paid the premiums, could not maintain an action thereon. *Mutual Guaranty Fire Ins. Co. v. Barker*, 107 Iowa 143, 70 Am. St. Rep. 149, 77 N. W. 868.

A contract under which it is agreed that a corporation shall issue stock as fully paid up, when in fact the payment is intentionally fictitious, contrary to an express constitutional or statutory provision or to the general policy of the law, is illegal, as well as ultra vires, and is not enforceable. *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

²¹ See *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390.

²² In *re Waterloo Organ Co.*, 134 Fed. 341, rev'g on other grounds 128 Fed. 517.

²³ *Converse v. Emerson, Talcott & Co.*, 242 Ill. 619, 627, 90 N. E. 269; *Imperial Bldg. Co. v. Chicago Open Board of Trade*, 238 Ill. 100, 112, 87 N. E. 167.

²⁴ *Mutual Guaranty Fire Ins. Co. v. Barker*, 107 Iowa 143, 148, 70 Am. St. Rep. 149, 77 N. W. 868; *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 81 Atl. 828, aff'g 77 N. J. Eq. 328, 76 Atl. 1048.

"The doctrine, however, that a corporation cannot avail itself of the defense of ultra vires when a contract has been in good faith performed by the other party and the corporation

corporation to be used, with the knowledge and assistance of the lender, to buy its own shares of stock, which is beyond the power of corporations in that state and in violation of a statute, is illegal, and the money so loaned cannot be recovered;²⁵ and it is held in Maryland that this is also true on the ground that the contract for the purchase of stock is against public policy.²⁶

Where a statute in Massachusetts expressly provided that no bank should "make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day, with interest," and a bank, in violation of the statute, received a deposit and issued a written promise to pay the same in six months after date, it was held that the promise was illegal and void because of the statute, and that it would not support an action.²⁷ A like construction has been placed upon statutes prohibiting corporations, not expressly authorized by their char-

has had the full benefit of its performance, was never held to have any application where such contract is immoral or illegal or prohibited by statute or where its enforcement would be against public policy." *Fritze v. Equitable Building & Loan Society*, 186 Ill. 183, 199, 57 N. E. 873, aff'g 83 Ill. App. 18.

A second railway seeking to hold the first railway liable for having acquired a right of way for crossing the tracks of the second railway and having crossed the tracks, contended that although the contract was ultra vires, the first railroad must be required to pay for what it had acquired upon the ground that a corporation cannot be permitted to retain the benefits of its ultra vires contract and at the same time utilize the doctrine of ultra vires as a defense when sued thereon. The court stated that the weakness in the position of the railroad announcing the doctrine was that the contract was illegal and therefore absolutely void, rather than simply ultra vires, and said: "The appellant is seeking to enforce a contract illegal

in itself. The law will refuse to lend its aid to that end. Executory, it will interfere at the suit of neither party; executed in whole or in part, it leaves the parties where they have placed themselves." *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* (Ind. App.), 70 N. E. 843. See also *Gause v. Commonwealth Trust Co.*, 44 N. Y. Misc. 46, 89 N. Y. Supp. 723.

²⁵ "It was a contract which in its performance caused a reduction of the capital stock of the Maryland Trust Company in an illegal way, and destroyed pro tanto the double liability imposed upon the company's shareholders by the law of the company's being. In these latter particulars the contract was an illegal one." *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 616, 63 Atl. 70.

²⁶ *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 633, 63 Atl. 70.

²⁷ *White v. Franklin Bank*, 22 Pick. (Mass.) 181. And see *Southern Loan Co. v. Morris*, 2 Pa. St. 175, 44 Am. Dec. 188.

ters, from engaging in the business of banking, and notes discounted by a corporation in violation of the prohibition have been held void.²⁸

§ 1617. — Prohibition merely declaratory of common-law doctrine of ultra vires. A provision in a general corporation law that no corporation created thereunder shall employ its assets for any other purpose than to accomplish the legitimate objects of its creation is merely declaratory of the common-law rule by which corporations are confined in their powers to the purposes for which they are created, and does not amount to such an express statutory prohibition of ultra vires loans and other transactions as to render them illegal instead of merely ultra vires.²⁹ However, there is some authority to the contrary.³⁰

§ 1618. — As dependent on intention of legislature. The fact that the legislature has prohibited a corporation from entering into certain contracts does not render a contract in violation of the prohibition void, if it appears that the legislature did not intend the prohibition to have this effect, but contemplated some other penalty, for "in declaring the effect of statutes prohibitory in form, courts have but one object in view—the real purpose of the statute; the real intention of the legislature in its enactment."³¹ In other words, where there is an express prohibition, the question of validity of the contract depends somewhat upon the purpose of the statute, and if it was intended for the benefit of those who might be prejudiced if violations thereof were permitted, the persons thus to be prejudiced

²⁸ *In re Jaycox*, 12 Blatchf. 209, Fed. Cas. No. 7,237; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100.

²⁹ *Farmers' Nat. Bank of Valparaiso v. Sutton Mfg. Co.*, 52 Fed. 191, 17 L. R. A. 595; *Harris v. Independence Gas Co.*, 76 Kan. 750, 762, 13 L. R. A. (N. S.) 1171, 92 Pac. 1123; *Butterworth & Lowe v. Kritzer Milling Co.*, 115 Mich. 1, 72 N. W. 990; *Bond v. Terrell Cotton & Woolen Mfg. Co.*, 82 Tex. 309, 18 S. W. 691. See also 2 Morawetz, Corp. (2nd. Ed.) §§ 658-660.

³⁰ *Norris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542, 562.

³¹ *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544. See also

Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 25 L. Ed. 188; *Hammon, Contracts*, § 209.

It has been held that where a statute prohibits certain acts by a corporation, without imposing any penalty or forfeiture for its violation, the validity of such acts can be questioned only by the state and not by private parties. *Meholin v. Carlson*, 17 Idaho 742, 760, 134 Am. St. Rep. 286, 107 Pac. 755, where the statute prohibited banks from accepting their own capital stock as collateral except to prevent a loss upon a debt previously contracted. See also *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 250, 36 L. Ed. 956.

may plead the invalidity of and defeat the contract.³² This view is clearly settled, but in the construction of particular statutes the courts have differed. Take, for example, the statutes in the different states which require foreign corporations to comply with certain conditions before doing business in the state, but which do not in express terms declare the effect of violating the prohibition. Some courts have held that the prohibition renders contracts by foreign corporations before complying with the conditions precedent to doing business absolutely void, so that no action can be maintained thereon, while others have thought that the legislature did not intend the prohibition to have this effect, and have held such contracts to be valid.³³

§ 1619. — Lending money, discounting and taking securities.

There is also a direct conflict in the decisions as to the effect of a charter or statutory prohibition against discounting or lending money on certain securities. If the statute expressly declares that securities taken in violation of the prohibition shall be void, such securities cannot be enforced.³⁴ Some courts have gone further and have held that the mere fact of prohibition renders them void and unenforceable;³⁵ but this construction is not supported by the weight of authority. The better opinion is that where the charter of a corporation or some other statute prohibits it from lending money on certain kinds of security, but does not declare that prohibited securities taken by it shall be void, they are not void, and may be enforced by it. The taking of such security is a misuser of the powers conferred upon the corporation by its charter, for which the state may enforce a forfeiture, but the misuser cannot be set up by the borrower to prevent the corporation from enforcing the security.³⁶

³² *State v. Corning State Sav. Bank*, 136 Iowa 79, 113 N. W. 500, holding that where statute prohibited savings banks from contracting any debt except for deposits and expenses, it was for the benefit of creditors so that when the bank becomes insolvent those creditors whose loans were prohibited should not be allowed to share with the lawful creditors.

³³ *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544. See chapter on Foreign Corporations, *infra*.

³⁴ *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

³⁵ *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. (N. Y.) 31; *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) 482.

³⁶ *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Mott v. United States Trust Co.*, 19 Barb. (N. Y.) 568; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370.

The leading case on this subject was decided by the Supreme Court of the United States in 1878.³⁷ In that case a national bank, on the security of a note secured by a trust deed which was in effect a mortgage, loaned money to the payee who thereupon assigned the note and trust deed to the bank. The bank attempted to enforce the trust deed by sale, on default, but the debtor set up as a defense the federal statute in effect prohibiting a loan on real estate. The court, by Mr. Justice Swayne, said: "The statute does not declare such a security void. It is silent upon the subject. If congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision.

* * * We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."³⁸ This case has been followed in many decisions in the state courts.³⁹

The same is true of the provision in the National Bank Act prohibiting a national bank from lending a person a greater amount than ten per cent. of its capital stock. A borrower cannot set up violation of the statute to defeat an action by the bank to recover the money loaned or to defeat securities given therefor.⁴⁰ So a state statute pro-

³⁷ Union Nat. Bank of St. Louis v. Bank of Mena, 96 Ark. 594, 132 S. W. Matthews, 98 U. S. 621, 25 L. Ed. 188. 913.

³⁸ Union Nat. Bank of St. Louis v. Matthews, 98 U. S. 621, 25 L. Ed. 188.

³⁹ First Nat. Bank of Sutton v. Grosshans, 61 Neb. 575, 581, 85 N. W. 542.

⁴⁰ United States. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. Ed. 648; Wyman v. Citizens' Nat. Bank of Faribault, 29 Fed. 734; Shoemaker v. National Mechanics' Bank, 2 Abb. 416, Fed. Cas. No. 12,801.

Arkansas. Richeson v. National

Iowa. Mills County Nat. Bank v. Perry, 72 Iowa 15, 2 Am. St. Rep. 228, 33 N. W. 341.

Ohio. Vining v. Bricker, 14 Ohio St. 331.

Pennsylvania. O'Hara v. Second Nat. Bank of Titusville, 77 Pa. St. 96.

"We do not think it required public policy, or that congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the

viding that no person shall become indebted to the company in an amount in excess of one-tenth of its capital actually paid in does not render uncollectible an indebtedness of a party in excess of the prescribed limit. The purpose of a law of this character is to protect the interests of stockholders, or, in the case of banks, the depositors, and to consider such statute as barring the corporation from collecting such indebtedness because it had permitted it to accrue in violation of the statute, would be to defeat the very purpose for which the statute was enacted.⁴¹ A like construction has been placed upon a state statute prohibiting savings banks from lending their funds on the security of names alone, and it has been held that a savings bank may enforce payment of a promissory note taken for money loaned in violation of the statute.⁴²

§ 1620. — Loans to officers. A statute prohibiting a corporation from making loans to its officers does not render void the promise of an officer who has borrowed from the corporation in violation of the statute.⁴³ Such a statute, said the Massachusetts court, "is designed to forbid officers, who are charged with the duty of investing the funds of the corporation, borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy holders from the dishonesty

money actually received by him. This would be to injure the interests of creditors, stockholders and all who have an interest in the safety and prosperity of the bank." *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 642, 24 L. Ed. 648.

No one but the government can take advantage of a violation of the federal statutes prohibiting national banks from loaning to any person or corporation more than ten per cent. of the bank's capital. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 613, 63 Atl. 70.

⁴¹ *Murry Nelson & Co. v. Leiter*, 190 Ill. 414, 83 Am. St. Rep. 142, 60 N. E. 851, aff'g 93 Ill. App. 176.

⁴² *Farmington Sav. Bank v. Fall*, 71 Me. 49.

And so it was held of a statute pro-

hibiting a bank from discounting paper without at least two names on it. *Roberts v. Lane*, 64 Me. 108, 18 Am. Rep. 242.

⁴³ *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 291, 71 Am. St. Rep. 58, 57 Pac. 84.

"We do not think this contention can be sustained. The obvious purpose of the section of the code invoked and relied upon was to protect savings banks and their depositors. To hold, therefore, that, if the deposits or funds of such a bank should be borrowed by any of its officers, directly or indirectly, no action could be maintained by the bank, to recover back the money, would often work out great injustice and wrong." *Savings Bank of San Diego County v. Burns*, 104 Cal. 473, 38 Pac. 102.

or self-interest of the officers. It is intended as a shield to the corporation. To construe it as making the promises of the officers who borrow money in violation of its provisions void would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the corporation for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction.”⁴⁴

§ 1621. — Limitation of indebtedness. In a preceding chapter, the general question of debt limits of private corporations has been noticed.⁴⁵ Where a contract, either by itself or added to the other corporate debts, is in excess of the debt limit fixed by the charter or other statute, it is “illegal” as distinguished from *ultra vires*.⁴⁶ The general rule is that the corporation, after receiving the benefit of the contract, cannot set up its violation of the prohibition to defeat an action thereon,⁴⁷ unless the statute declares indebtedness in excess

⁴⁴ *Bowditch v. New England Mut. Life Ins. Co.*, 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798. And see *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211.

⁴⁵ See Chap. 25, *supra*.

⁴⁶ In Kentucky, however, such contracts have been treated merely as *ultra vires*. *American Southern Nat. Bank v. Smith*, 170 Ky. 512, 186 S. W. 482; *Croninger v. Bethel Grove Camp Ground Ass’n*, 156 Ky. 356, 161 S. W. 230. So in Minnesota. *Kraniger v. People’s Bldg. Society*, 60 Minn. 94, 99, 61 N. W. 904.

⁴⁷ *United States. Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124; *Weber v. Spokane Nat. Bank*, 64 Fed. 208, *rev’d* 50 Fed. 735; *Allis v. Jones*, 45 Fed. 148; *Poole v. West Point Butter & Cheese Ass’n Co.*, 30 Fed. 513.

Iowa. Traer v. Lucas Prospecting Co., 124 Iowa 107, 119, 99 N. W. 290; *Marshall Field Co. v. Oren Ruffcorn Co.*, 117 Iowa 157, 162, 90 N. W. 618; *Garrett v. Burlington Plow Co.*, 70 Iowa 697, 59 Am. Rep. 461, 29 N. W. 395; *Humphrey v. Patrons’ Mercantile*

Ass’n, 50 Iowa 607. See also *Beach v. Wakefield*, 107 Iowa 567, 78 N. W. 197, 76 N. W. 688; *Warfield Co. v. Marshall County Canning Co.*, 72 Iowa 666, 2 Am. St. Rep. 263, 34 N. W. 467.

Kansas. Sherman Center Town Co. v. Russell, 46 Kan. 382, 26 Pac. 715; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

Minnesota. Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799.

New Hampshire. Connecticut River Sav. Bank v. Fiske, 60 N. H. 363; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295.

Virginia. See Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748.

A corporation which has received the benefit of its bonds cannot set up the defense that the bonds were in excess of the amount authorized by the charter. *International Trust Co. v. Davis & Farnum Mfg. Co.*, 70 N. H. 118, 46 Atl. 1054.

This rule does not apply where the other party to the contract who is seek-

of the limit to be void,⁴⁸ at least where the debt sued on does not, alone and by itself, exceed the debt limit;⁴⁹ but it seems that the corporation is not liable for the excess where it did not receive the benefits of the loan.⁵⁰

In any event, it is held that a debt incurred by a corporation is enforceable as to the amount not in excess of the debt limit, even though it might be unenforceable as to the amount in excess thereof, unless there is an express provision to the contrary in the statute or charter;⁵¹ and where, at the time a contract was made, the corporation had no debts and had sufficient money on hand to pay for the

ing to enforce it is an officer of the corporation who knew when he made the contract that it was in excess of the debt limit. *Croninger v. Bethel Grove Camp Ground Ass'n*, 156 Ky. 356, 161 S. W. 230.

In the case of municipal corporations, however, there can be no recovery where the debt is in excess of the debt limit. 3 *McQuillin, Mun. Corp.* §1171.

As to the debt limit as a defense to actions on municipal bonds, see 5 *McQuillin, Mun. Corp.* § 2352.

⁴⁸ *H. Scherer & Co. v. Everest*, 168 Fed. 822, 828.

It is no defense to a note that it increased the debt limit of the corporation beyond the limit fixed by the charter or by statute, where the charter or statute does not prescribe that indebtedness beyond the limit shall be void. *H. Scherer & Co. v. Everest*, 168 Fed. 822, 828.

⁴⁹ "A private corporation incurs indebtedness daily, and that, too, which is not to be offset by prospective current income, but which helps swell the indebtedness to which the limitation applies. It incurs the indebtedness in the transaction of its ordinary business, and through its various agents. No specific formal action of its directors in advance would ordinarily be practicable. Its records, therefore, so far as they may be presumed to be accessible to creditors, would not ordi-

narily show, even if well kept, more than an approximation at a given time to the corporate indebtedness; nor has it any officer charged by law with the duty of keeping a record of the indebtedness, or of any action through which the indebtedness was contracted. Unless, therefore, the corporation is estopped from setting up the limit where the consideration has been received, it would properly be without credit, the very thing for which private corporations largely are organized." *Humphrey v. Patron's Mercantile Ass'n*, 50 Iowa 607, 611.

A creditor whose own debt against the corporation does not exceed the debt limit, and who has no reason to know that the limit has been exceeded, is not affected by the fact that there are other debts of which he has no notice which, when added to his own, make an aggregate indebtedness greater than the corporation can legally incur. *Citizens' Bank v. Bank of Waddy*, 126 Ky. 169, 11 L. R. A. (N. S.) 598, 128 Am. St. Rep. 282, 103 S. W. 249.

⁵⁰ *Kraniger v. People's Bldg. Society*, 60 Minn. 94, 97, 61 N. W. 904, where the secretary borrowed a sum in excess of the debt limit and then absconded.

⁵¹ *Oswald v. Minneapolis Times Co.* 65 Minn. 249, 252, 68 N. W. 15; *Kraniger v. People's Bldg. Society*, 60 Minn. 94, 61 N. W. 904.

property purchased, it cannot defend an action on a note given for such property by setting up a charter limitation of indebtedness.⁵² So where the statute makes it unlawful to contract in excess of a certain amount, and makes the directors individually liable for debts contracted in excess of the maximum amount, contracts in excess of the debt limit are enforceable against the corporation.⁵³

A different rule is sometimes applied where the debt incurred, standing by itself, exceeds the debt limit of the corporation, in which case it has been held in Kentucky⁵⁴ and Minnesota⁵⁵ that the exceeding the debt limit is a defense, at least as to the excess; but in many of the decisions no reference is made to this phase of the question and a recovery is allowed.⁵⁶

Where the question arises between other creditors and the creditor whose own debt is in excess of the limitation, the federal courts hold that where the corporation cannot take advantage of the debt limit as a defense, subsequent creditors cannot urge the invalidity of the debt in excess of the debt limit;⁵⁷ and this rule has been adopted in Pennsylvania.⁵⁸ In Kentucky, however, the courts hold the contrary;⁵⁹ and it is also held in that state that where a corporation

⁵² *Perry & Bee Co. v. Holbrook Opera House Co.*, 91 Neb. 19, 135 N. W. 219.

⁵³ *Underhill v. Santa Barbara Land, Building & Improvement Co.*, 93 Cal. 300, 28 Pac. 1049; *Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295.

⁵⁴ *American Southern Nat. Bank v. Smith*, 170 Ky. 512, 186 S. W. 482; *First Nat. Bank of Covington v. D. Kiefer Milling Co.*, 95 Ky. 97, 23 S. W. 675.

⁵⁵ *Kraniger v. People's Bldg. Society*, 60 Minn. 94, 97, 61 N. W. 904.

"Dieta may be found in a few cases to the effect that limitations like this upon the amount of indebtedness which the corporation may contract are merely directory. But there can be no distinction in principle between a case where the charter or articles of association prohibit a thing altogether and where it is prohibited beyond a certain limit. In the one case there is a total absence of authority to do the thing at

all, and in the other a total absence of authority to do it beyond a certain limit; and, after that limit is reached, there is as much an absence of authority in the latter case as there was in the former." Per Justice Mitchell in *Kraniger v. People's Bldg. Society*, 60 Minn. 94, 98, 61 N. W. 904.

⁵⁶ See *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124, 133, aff'd in 173 U. S. 100, 43 L. Ed. 629.

⁵⁷ *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 82 Fed. 124, 135, aff'd in 173 U. S. 100, 43 L. Ed. 629; *Allis v. Jones*, 45 Fed. 148.

⁵⁸ *Fidelity Insurance, Trust & Safe-Deposit Co. v. West Penn & S. C. R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911, 21 Atl. 21.

⁵⁹ In Kentucky it is held that a debt created by a corporation in excess of the limit prescribed by its articles is void for the excess as against subsequent creditors without notice; and

borrowed money in excess of its debt limit and executed a note therefor secured by a pledge of collateral, and afterwards it became insolvent, the person having charge of the affairs of the insolvent, whether a receiver or a banking commissioner or other person, may recover from the lender not only money on deposit in the lender's bank but also the collaterals, in excess of the debt limit, without returning the money borrowed: and in so holding it is further held in connection therewith (1) that every person dealing with the corporation is chargeable with notice of its debt limit as fixed by the charter; (2) that the duty of a corporation to return the consideration received is different where the corporation is insolvent and the rights of creditors are involved; (3) that it is immaterial that the creditors of the corporation have not been deprived of anything because the corporation at the time of the borrowing obtained value received and consequently its assets were not depleted or impaired, especially where the creditors are all the time changing; and (4) that there is no difference in the application of the rule upholding the liability as to how the offending creditor gets into court, whether by process or voluntarily for the purpose of enforcing his debt.⁶⁰

§ 1622. — Penalty pointed out by the statute. A prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the legislature intended to define such consequences, and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced.⁶¹ In such a case, if an action can be main-

that, while all persons who deal with a corporation are chargeable with notice of the limit of indebtedness prescribed by its articles, the record of a mortgage executed by a corporation to secure a debt in excess of the limit is not constructive notice to subsequent creditors that the limit has been exceeded. *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 106 Ky. 7, 50 S. W. 2, modifying 48 S. W. 440. But where the debts of a company exceeded its charter limit, and thereafter the charter was amended so as to raise the limit enough to more than cover its principal item of indebtedness as well as its other debts, and the

corporation then recognized the principal debt by executing its note therefor, it was held that the principal creditor was entitled to participate equally with other general creditors in bankruptcy proceedings instituted after the giving of the note. *In re Benedict Tea & Coffee Co.*, 192 Fed. 1011 (under Kentucky law).

⁶⁰ *American Southern Nat. Bank v. Smith*, 170 Ky. 512, 186 S. W. 482. To the same effect, see *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 106 Ky. 7, 20 Ky. L. Rep. 1684, 51 S. W. 180, 50 S. W. 2, 1092.

⁶¹ *Harris v. Runnels*, 12 How. (U. S.) 80, 13 L. Ed. 38; *Hanover Nat.*

tained on the transaction of which the prohibited act was a part, without sanctioning the illegality of the transaction, such an action will be entertained. This principle was applied in a New York case where a corporation had loaned money by discounting commercial paper in violation of a statute prohibiting loans on such securities, and declaring that such securities, if taken, should be void. It was held that securities for a loan taken in violation of the statute were void, but that an action could be maintained by the corporation to recover the money loaned.⁶² So if a statute forbidding loans to officers of a corporation merely provides a forfeiture to the state for a violation thereof with no other penalty, the violation of the statute is no defense to an action to recover the amount loaned.⁶³ And where a statute provides that any corporation purchasing the stock of any other competing corporation shall forfeit its charter, only the state can complain of such a purchase.⁶⁴ In Mississippi, even where a statute expressly forbids the purchase of the capital stock of another competing corporation under penalty of forfeiture of its charter, it is held that a corporation purchasing from an individual shares of stock in a competing corporation cannot defend an action for the price by setting up *ultra vires* where it retains the stock.⁶⁵

§ 1623. Relief of party from illegal contract—In general. Assuming that a contract by a corporation is illegal, so that no action will lie to enforce the same, the question arises whether a court will grant either or both of the parties relief from the consequences of such a contract. As a general rule, subject to the exceptions hereafter stated and explained, when an illegal contract has been executed by one or both of the parties, in whole or in part, by the payment of money or transfer of property, no action will lie to recover the money or property. The maxim is, *ex dolo malo non oritur actio*. "No court," said Lord Mansfield, "will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law, * * *

Bank v. First Nat. Bank, 109 Fed. 421; Faneuil Hall Bank v. Bank of Brighton, 16 Gray (Mass.) 534; Connecticut River Sav. Bank v. Fiske, 60 N. H. 363; Ossipee Hosiery & Woolen Mfg. Co. v. Canney, 54 N. H. 295.

⁶² Pratt v. Short, 79 N. Y. 437, 35 Am. Rep. 531.

⁶³ People's Trust Co. v. Pabst, 113

N. Y. App. Div. 375, 98 N. Y. Supp. 1045.

⁶⁴ People's Bank v. Lamar County Bank, 107 Miss. 852, 67 So. 961, rev'g 66 So. 219, and following Watts Mercantile Co. v. Buchanan, 92 Miss. 540, 543, 46 So. 66.

⁶⁵ Watts Mercantile Co. v. Buchanan, 92 Miss. 540, 46 So. 66.

the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." ⁶⁶ And it was said by Lord Kenyon: "There is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being particeps criminis, an action has been maintained to recover it back." ⁶⁷

This principle, except as hereafter stated, applies to illegal contracts of corporations. Thus, where a contract for a loan of money by a corporation was "illegal" and executory, the corporation is not entitled to recover money collected by the bankrupt to whom the loan was to be made, on collateral assigned. ⁶⁸ So it is held that where a statute forbids a bank to enter into a partnership, it cannot sue for a division of the net profits of the firm. ⁶⁹

§ 1624. — Contracts malum in se. When a contract is contrary to public morals, or founded upon an immoral consideration, it is malum in se, and in such a case the law will not undertake to relieve the parties from the position in which they have placed themselves, or to adjust the equities between them. This, of course, is as applicable to contracts of a corporation as it is to contracts between natural persons. ⁷⁰ It is held, however, where a corporation uses money in speculating in futures, which is immoral and against public policy, the commission company receiving the money cannot set up the illegality as a defense to an action to recover the sums deposited with the defendant, notwithstanding it subsequently paid out a large part thereof to others. ⁷¹

§ 1625. — Contracts merely mala prohibita. The same consequence, however, does not necessarily follow from a contract by a corporation which is merely malum prohibitum. In such a case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and, if equity and justice require a

⁶⁶ Holman v. Johnson, 1 Cowp. 341.

⁶⁷ Howson v. Hancock, 8 T. R. 575.
See, generally, Hammon, Contracts, §§ 255a-259.

⁶⁸ In re Grand Union Co., 219 Fed. 353.

⁶⁹ Interstate Trust & Banking Co. v. Reynolds, 127 La. 193, 53 So. 520.

⁷⁰ See Hammon, Contracts, § 257.

⁷¹ Medlin Milling Co. v. Moffatt Commission Co., 218 Fed. 686, 691.

restoration of money or property received by either party thereunder, it will in many cases grant relief. If a contract by a corporation is merely forbidden by statute, and is not immoral or otherwise illegal aside from the prohibition, and the corporation has received under it money which in equity it ought to repay or property or services for which in equity it ought to pay, the law will imply a promise to pay, and an action quasi ex contractu may be maintained.⁷² Thus, where a bank or other corporation lends money on securities on which it is prohibited by its charter or by statute to make a loan, the fact that taking such securities is illegal and the securities void and unenforceable, does not prevent it from maintaining an action to recover the money loaned.⁷³ And where a bank receives a deposit of money, and issues a written contract to repay it in a form forbidden by statute, it is liable in an action on implied contract for the money received by it.⁷⁴ So where policies of insurance are void because of a class prohibited by statute, the holders are entitled to a return of the unearned portion of the premiums paid.⁷⁵

§ 1626. — Contracts fully executed. If an illegal contract with a corporation has been fully executed on both sides, neither party can maintain an action to rescind and to recover what he has parted with. As the parties are equally guilty of violating the law, the court will leave them where they have placed themselves.⁷⁶ Thus, under the National Bank Act, which prohibits national banks from making loans on the security of shares of their own stock, it has been held that the courts will not interfere at the suit of a borrower from a bank, who has pledged shares of stock in a bank as collateral, after the bank has sold the shares, and applied the proceeds to payment of the loan.⁷⁷

§ 1627. — Parties not in pari delicto. The rule that no action will lie to recover money paid under an illegal contract does not apply

⁷² See *White v. Franklin Bank*, 22 Pick. (Mass.) 181.

⁷³ *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531.

⁷⁴ *White v. Franklin Bank*, 22 Pick. (Mass.) 181.

⁷⁵ "This is a proceeding in equity, and certainly the rules which should apply in the equitable action of assumpsit for money had and received should apply here." In *re Citizens'*

Mut. Fire Ins. Co. of Holly (Mich.), 17 Det. L. N. 756, 127 N. W. 769, rev'g on rehearing 125 N. W. 375.

See, generally, standard textbooks on Insurance.

⁷⁶ *First Nat. Bank of Xenia v. Stewart*, 107 U. S. 676, 27 L. Ed. 592; *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168.

⁷⁷ *First Nat. Bank of Xenia v. Stewart*, 107 U. S. 676, 27 L. Ed. 592.

where the party seeking relief is not in *pari delicto* with the other, and the parties are not regarded as being in *pari delicto* where the contract is merely *malum prohibitum*, and the prohibition was intended for the protection of the party asking relief. In such a case relief may be granted. This principle has been applied under statutes prohibiting banks or other corporations from issuing certain securities, but imposing no penalty upon persons receiving them, and it has been held that, as the prohibition is intended for the protection of the public against such securities, persons who purchase or lend money upon such securities are not in *pari delicto* with the corporation issuing them, and that they may therefore recover the money paid or loaned.⁷⁸ So where money has been paid to a corporation under an agreement not wholly illegal, under the supposition that it was legal and acting in good faith, but the corporation knew that the business to be transacted under the contract was a cheat and a fraud, the parties are not in *pari delicto*, and equity has jurisdiction to compel an accounting.⁷⁹

§ 1628. — *Locus poenitentiae*. It is also a general principle that, so long as an illegal contract which is merely *malum prohibitum* is still executory, there is a *locus poenitentiae*, and that, while this is the case, it may be rescinded or disaffirmed and money paid under it recovered back.⁸⁰

This principle was applied in a Massachusetts case where a person who had deposited money in a bank, and received from the bank a written contract to repay which the bank was prohibited by statute from issuing, disaffirmed the contract, and brought an action to recover the money.⁸¹ And it was applied in a Wisconsin case where a corporation which had paid money under an *ultra vires* contract to purchase goods sued to recover the money before the contract was carried out.⁸² So, in regard to a contract forbidden by public policy,

⁷⁸ *Thomas v. Richmond*, 12 Wall. (U. S.) 349, 20 L. Ed. 453; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490. See also *Hammon, Contracts*, § 259.

⁷⁹ *Edwards v. Michigan Tontine Inv. Co.*, 132 Mich. 1, 92 N. W. 491.

⁸⁰ *In re Grand Union Co.*, 219 Fed. 353.

"Upon this principle, money placed in the hands of a person as stakeholder to abide the event of a wager is re-

coverable from the stakeholder either before or after the determination of the wager, and even after the money has been paid to the winner, if the authority to pay was withdrawn by the plaintiff before payment." *Hammon, Contracts*, § 258.

⁸¹ *White v. Franklin Bank*, 22 Pick. (Mass.) 181.

⁸² *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

the Supreme Court of the United States has said that, "Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was, nevertheless, a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts."⁸³ However, the New York courts have repudiated the doctrine in relation to the existence of a *locus poenitentiae*.⁸⁴

§ 1629. What law governs. In determining the effect of an act or contract prohibited by a state statute, federal courts will follow the construction placed upon the statute by the court of last resort of the state.⁸⁵ Likewise, of course, where the effect of a contract or conveyance depends upon the construction of a federal statute, the decisions of the federal courts construing such statutes are binding on the state courts.⁸⁶

⁸³ Per Justice Miller in *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 86, 25 L. Ed. 950.

⁸⁴ *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518. But see *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

⁸⁵ *Sioux City Terminal Railroad &*

Warehouse Co. v. Trust Co. of North America, 173 U. S. 99, 43 L. Ed. 628, *aff'd* 69 Fed. 441, applying rule to statutes fixing debt limits of corporations.

⁸⁶ *Mapes v. Scott*, 94 Ill. 379, 385. See also *Merchant's Nat. Bank v. Hanson*, 33 Minn. 40, 42, 53 Am. Rcp. 5, 21 N. W. 849.

CHAPTER 39

CORPORATE MEETINGS AND ELECTIONS

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I. NECESSITY FOR AND CALLING OF MEETINGS

§ 1630. Necessity for and duty to hold meetings. The corporate powers, when vested in the stockholders or members, are vested in them collectively, as a body, and not as individuals. They have no power to act as or for the corporation except at a corporate meeting called and conducted according to law. Action by the stockholders or members individually, and not at a corporate meeting, even though a majority may concur, and even though their consent be expressed in a writing signed by them, is not the action of the corporation, and is void.¹

In accordance with this rule, a majority of the stockholders of a corporation cannot appoint an agent for the corporation, or authorize the execution of a corporate contract, deed or mortgage, where they express their assent, not in a meeting of stockholders, but separately and at different times.² The same is true of acceptance by the stock-

1 United States. *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. Ed. 65; *In re Wm. S. Butler Co.*, 207 Fed. 705; *Sayles v. Brown*, 40 Fed. 8.

Louisiana. *Peirce v. New Orleans Building Co.*, 9 La. 397, 29 Am. Dec. 448.

Massachusetts. *Torrey v. Baker*, 1 Allen 120.

Michigan. *Finley Shoe & Leather Co. v. Kurtz*, 34 Mich. 89.

Nebraska. *Clarke v. Omaha & S. W. R. Co.*, 5 Neb. 314.

New Jersey. *Demarest v. Spiral Riveted Tube Co.*, 71 N. J. L. 14, 58 Atl. 161.

New York. *Reiff v. Western U. Tel. Co.*, 49 N. Y. Super. Ct. 441.

North Carolina. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017.

Pennsylvania. *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450; *Langolf v. Seiberlitch*, 2 Pars. Eq. Cas. 64.

Rhode Island. *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

Texas. *Nicholstone City Co. v. Smalley*, 21 Tex. Civ. App. 210, 51 S. W. 527.

England. *In re George Newman & Co.*, [1895] 1 Ch. 674.

Of course the rule stated in the text does not apply where the statute authorizes individual action, as where it provides for a written ratification of the purchase, sale or mortgaging of corporate property by the stockholders. See Chaps. 29 and 32.

As to the requirements with regard to the first meeting to organize, see Chap. 9.

For a discussion of the distinction between a corporation as a legal entity and its stockholders or members, see Chap. 1.

That the stockholders are not the agents of the corporation, see §§ 24, 49, *supra*.

That the directors of a corporation have no authority to act for the corporation save when assembled as a board, see Chap. 42, *infra*.

² *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 44 L. Ed. 65; *Peirce v. New Orleans Bldg. Co.*, 9 La. 397, 29 Am.

holders of a corporation of an act amending its charter,³ of an agreement or resolution declaring a dividend,⁴ and of any other act by which the stockholders undertake to bind the corporation.

Individual assents given by stockholders separately and elsewhere than at a corporate meeting may preclude those who so assent from complaining of what they have sanctioned.⁵ And the unanimous consent of all the stockholders may be binding although not given at a corporate meeting.⁶

Where the statute provides for annual meetings for the election of directors, it is the duty of the corporation to hold them at the time and place prescribed,⁷ and the duty of those present at that time and place to proceed with the election,⁸ provided they constitute a quorum.⁹

§ 1631. Calling of meetings. As a rule a valid call is essential to the validity of the proceedings had at a corporate meeting.¹⁰ And when the charter or by-laws of a corporation require corporate meetings to be called by a particular authority, or in a particular mode, and

Dec. 448; *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017; *Nicholstone City Co. v. Smalley*, 21 Tex. Civ. App. 210, 51 S. W. 527, and other cases cited in the note preceding.

Stockholders can confer authority on an agent of the corporation to dispose of all the corporate property only by the vote of the majority in a corporate meeting duly warned, or by unanimous agreement. *In re Wm. S. Butler Co.*, 207 Fed. 705.

³ *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450; *Langolf v. Seiberlitch*, 2 Pars. Eq. Cas. (Pa.) 64.

⁴ *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

⁵ *In re George Newman & Co.*, [1895] 1 Ch. 674.

⁶ See *Strickland v. Jolly*, 136 Ga. 885, 72 S. E. 348.

If all the stockholders give their consent to a corporate act elsewhere than at a corporate meeting, the act may be binding as against subsequent creditors. *Coe v. East & West R. Co. of Alabama*, 52 Fed. 531.

Stockholders can confer authority on an agent of the corporation to dispose of all the corporate property only by the vote of a majority in a corporate meeting duly warned, or by unanimous agreement. *In re Wm. S. Butler Co.*, 207 Fed. 705.

⁷ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

As to the time of holding meetings see § 1633, *infra*.

As to the place of holding meetings, see § 1634, *infra*.

⁸ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806; *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

⁹ See § 1643, *infra*.

¹⁰ *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

As to calling of first meeting for organization, see Chap. 9.

"The majority can act for the corporation * * * only at a meeting which has been regularly called." *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

the provisions are mandatory, the requirements must be complied with to render the meeting legal.¹¹ So a meeting cannot be called orally when by by-law or charter provision it is required that it be called in writing.¹² Nor can it properly be called by the president, secretary or other officer when the charter or by-laws require it to be called by the trustees or directors,¹³ or provide that it may be called by stockholders holding a certain amount of stock.¹⁴

And where it is provided that a meeting must or may be called by a certain number of members or stockholders or by stockholders holding a certain amount of stock, a call by less than the required number is invalid.¹⁵

11 United States. *Matthews v. Columbia Nat. Bank*, 79 Fed. 558.

Connecticut. *Congregational Soc. of Bethany v. Sperry*, 10 Conn. 200.

Indiana. *Southern Plank Road Co. v. Hixon*, 5 Ind. 165.

Maine. *Evans v. Osgood*, 18 Me. 213.

Maryland. *Smith v. Erb*, 4 Gill 437.

Nevada. *State v. Pettineli*, 10 Nev. 141.

Vermont. *Stevens v. Eden Meeting House Society*, 12 Vt. 688.

West Virginia. *Reilly v. Oglebay*, 25 W. Va. 36.

Meetings must be called by the proper authority, in order that the business transacted may be legal. *Whipple v. Christie*, 122 Minn. 73, Ann. Cas. 1914 D 856, 141 N. W. 1107.

"It is in general essential to the validity of acts done at a special or called meeting of a corporation that the call shall be made by the person or persons appointed by the governing statute to call such meetings * * *." *Riggs v. Polk County*, 51 Ore. 509, 95 Pac. 5.

See, as to the call of a meeting by a justice of the peace under a New Hampshire statute, *Ashuelot R. Co. v. Elliot*, 57 N. H. 397; *Goulding v. Clark*, 34 N. H. 148.

Even though it is made the duty of certain officers of the corporation to call an election, this does not re-

lieve the corporation from the liability of causing the duty to be performed. *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126.

12 Westcott v. Minnesota Min. Co., 23 Mich. 145; *Stevens v. Eden Meeting-House Society*, 12 Vt. 688.

13 Matthews v. Columbia Nat. Bank, 79 Fed. 558; *State v. Pettineli*, 10 Nev. 141; *Reilly v. Oglebay*, 25 W. Va. 36.

An application for mandamus to compel the president and secretary to call a meeting will be denied where the power to call meetings is vested exclusively in the board of directors. *Dusenbury v. Looker*, 110 Mich. 58, 67 N. W. 986.

14 Under such circumstances a valid meeting cannot be called by the secretary upon authorization by such stockholders. *Reilly v. Oglebay*, 25 W. Va. 36.

15 Where the statute authorizes a meeting to be called by stockholders "holding at least one-half of the votes," a call by less than that number is invalid. *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488.

Where it was provided that a meeting should be called by a petition signed by twelve of the proprietors at least, it was held that a less number than twelve could not legally call a meeting. *Evans v. Osgood*, 18 Me. 213.

A corporation has the power to adopt by-laws regulating the mode of calling meetings of the stockholders or members, and, if the by-law is reasonable, and not repugnant to the charter, nor to any law of the state, a meeting called in conformity thereto is a legal meeting.¹⁶

In the absence of express provision in the charter or by-laws, meetings may be called by the directors whenever they deem it necessary to do so,¹⁷ or by an officer or general agent who is intrusted with the management of the corporation.¹⁸ But a meeting cannot be legally called by a subordinate officer or agent, as by the president or secretary, not intrusted with the general management of the corporation.¹⁹

In calling or directing a call of a meeting, the directors must act as a board,²⁰ and this must appear in the call or notice.²¹

But where vacancies in the board prevent it from acting, the remaining directors may call a meeting.²² Furthermore, a demand to call a meeting may be made upon the directors individually.²³

If the by-laws fix the time for holding annual meetings and impose upon the directors or a corporate officer the duty of calling them, it is their duty to call such a meeting at the time fixed,²⁴ without any de-

A provision of the by-laws requiring a meeting to be called by a quorum of seven members must be complied with, or the meeting will not be a meeting of the corporation. *Stein v. Marks*, 44 N. Y. Misc. 140, 89 N. Y. Supp. 921.

¹⁶ *Cogswell v. Bullock*, 13 Allen (Mass.) 90; *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33. See § 516, *supra*.

¹⁷ *Cassell v. Lexington, H. & P. T. R. Co.*, 10 Ky. L. Rep. 486; *Com. v. Smith*, 45 Pa. St. 59.

¹⁸ *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

¹⁹ *Cassell v. Lexington, H. & P. T. R. Co.*, 10 Ky. L. Rep. 486; *Attorney General v. Looker*, 111 Mich. 498, 56 L. R. A. 947, 69 N. W. 929.

A meeting cannot be called by the president, where power to call it is vested by the by-laws in the trustees. *State v. Pettineli*, 10 Nev. 141.

²⁰ *State v. Pettineli*, 10 Nev. 141; *Johnston v. Jones*, 23 N. J. Eq. 216.

That the directors can act for the

corporation only when assembled as a board, see Chap. 42.

²¹ *Johnston v. Jones*, 23 N. J. Eq. 216.

²² *Toronto Brewing & Malting Co. v. Blake*, 2 Ont. 175.

²³ The demand need not be made upon the board of trustees or directors while in session. *State v. Wright*, 10 Nev. 167.

²⁴ Where the by-laws provide that the annual meeting "may" be held on a certain day, and that it "shall" be called by a notice given by the directors, the word "may" will be construed to mean "must" or "shall," and it is the duty of the directors to call the meeting on the day so specified. They have no discretion in the matter. *Stabler v. El Dorá Oil Co.*, 27 Cal. App. 516, 150 Pac. 643.

Where the by-laws provide that the annual meeting may be held in the first week of a certain month in each year, and that it "shall be called as the directors may direct, or by a notice

mand having been made by the stockholders that the meeting be called.²⁵

A call made by a de facto board of directors is valid.²⁶

Irregularities in calling a meeting, or a failure to comply with provisions of the charter or by-laws on the subject may be waived by the stockholders.²⁷ And they will not render a meeting illegal, if all the persons who are entitled to vote are present and participate,²⁸ or if they subsequently ratify the action taken.²⁹ Nor can a stockholder who was present and voted at a meeting without objection subsequently contend that it was irregularly called.³⁰

in writing by the president," etc., both the alternative methods provided are equally mandatory, and if the directors for any reason fail to call the meeting, it is the duty of the president to call it. *Pennington v. George W. Pennington Sons*, 170 Cal. 114, 148 Pac. 790.

²⁵ *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 Pac. 643. In this case it was held that if a demand was necessary, as required in the case of special meetings, a demand made by a large number of stockholders, more than two weeks before the date fixed for the meeting, was sufficient.

²⁶ *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191; *Smith v. Erb*, 4 Gill (Md.) 437; *Com. v. Smith*, 45 Pa. St. 59.

But see *O'Hara v. Williamstown Cemetery Co.*, 133 Ky. 828, 119 S. W. 234, where it is intimated that de facto trustees cannot be required by mandamus to call and hold a stockholder's meeting for the election of trustees.

As to de facto directors generally, see Chap. 42.

²⁷ *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892; *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

Stockholders waive the objection that a special meeting was not regularly called, where, though present at such meeting, they do not then object

to its regularity, but protest against the action proposed to be taken on other grounds and procure a restraining order to prevent it as against a regularly called meeting. *Weinburgh v. Union St. Ry. Advertising Co.*, 55 N. J. Eq. 640, 37 Atl. 1026.

Where all the stockholders assemble pursuant to a call by one having no authority to call meetings, they may proceed to an election by the mutual agreement and consent of all. But the consent of all is essential, and if all do not consent, an attempted election by only a portion of the stockholders is invalid. *State v. Pettineli*, 10 Nev. 141.

That provisions as to notice may be waived, see § 1641, *infra*.

²⁸ *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892; *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737; *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

That a failure to give the required notice will not invalidate the meeting under such circumstances, see § 1641, *infra*.

²⁹ *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

³⁰ *Hiles v. C. A. Hiles & Co.*, 120 Ill. App. 617.

That he cannot object that the re-

Unreasonable delay in objecting will be equivalent to ratification, and ground for the court's refusal to interfere and set the action at the meeting aside.³¹

A meeting is not illegal because of a failure to comply with provisions which are merely directory or permissive.³² And in any case a substantial compliance is all that is required.³³

In the absence of proof to the contrary, it will be presumed that a meeting was regularly called.³⁴

§ 1632. Remedies on refusal to call meetings. When the charter, by-laws or general law makes it the duty of officers to call a stockholders' meeting to elect directors, or transact other corporate business, and they wrongfully refuse to do so, mandamus will lie at the

quired notice was not given, see § 1641, *infra*.

³¹ *Weinburgh v. Union St. Ry. Advertising Co.*, 55 N. J. Eq. 640, 37 Atl. 1026; *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *Southern Counties Deposit Bank v. Rider*, 73 L. T. (N. S.) 374. See also *Vargo v. Vajo*, 76 N. J. Eq. 161, 73 Atl. 644.

³² See *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420; *Newcomb v. Reed*, 12 Allen (Mass.) 362; *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

A by-law of an insurance company authorizing a special meeting to be called by the president or secretary upon written application by a certain number of members does not preclude the directors from calling special meetings without any such application. *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217.

³³ See *Walworth v. Brackett*, 98 Mass. 98; *Whipple v. Christie*, 122 Minn. 73, Ann. Cas. 1914D 556, 141 N. W. 1107; *Hardenburgh v. Farmers' & Mechanics' Bank*, 3 N. J. Eq. 68.

In *Bernstein v. Kaplan*, 150 Ala. 222, 43 So. 581, a resolution of the directors merely providing for a meet-

ing to be held for the purpose of amending the charter was held to be a substantial compliance with a statute providing that when changes are to be made in the charter the directors shall pass a resolution declaring that such change is desirable and calling a meeting, in view of the fact that all of the directors and stockholders were present at the meeting, that a majority of the directors there voted in favor of the resolution, and that the action of the directors in calling the meeting indicated their approval.

³⁴ *Georgia*. *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925.

Illinois. *Forest Glen Brick & Tile Co. v. Gade*, 55 Ill. App. 181, appeal dismissed 158 Ill. 39, 42 N. E. 65, *aff'd* 165 Ill. 367, 46 N. E. 286.

Louisiana. *Dunn v. New Orleans Bldg. Co.*, 8 La. 483.

Massachusetts. *Wallace v. Inhabitants of First Parish in Townsend*, 109 Mass. 263.

North Carolina. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

As to the presumption that the required notice was given, see § 1640, *infra*.

instance of a stockholder.³⁵ And the fact that stockholders purposely absent themselves from an annual meeting in order to prevent an election of directors at that time will not estop them from applying for mandamus to procure the calling of another meeting for that purpose, where those present at the time originally fixed, though constituting a minority, could legally have proceeded with the election.³⁶

Ordinarily the writ must be directed to the directors or other officers authorized to call the meeting.³⁷

³⁵ *California*. *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 Pac. 643; *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126.

Connecticut. *Bassett v. Atwater*, 65 Conn. 355, 28 L. R. A. 304, 32 Atl. 937.

Georgia. *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

Illinois. *People v. Town of Fairbury*, 51 Ill. 149.

Kentucky. *O'Hara v. Williamstown Cemetery Co.*, 133 Ky. 828, 119 S. W. 234. See also *Orr v. Bracken County*, 81 Ky. 593, 5 Ky. L. Rep. 632.

Minnesota. *State v. De Groat*, 109 Minn. 168, 134 Am. St. Rep. 764, 123 N. W. 417.

Nevada. *State v. Wright*, 10 Nev. 167.

New Jersey. *McNeely v. Woodruff*, 13 N. J. L. 352.

New York. *People v. Cummings*, 72 N. Y. 433; *People v. Board of Governors Albany Hospital*, 61 Barb. 397; *People v. Hart*, 11 N. Y. Supp. 670.

North Carolina. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

England. *Reg. v. Aldham & United Parishes Ins. Society*, 15 Jur. 1035. Compare *MacDougall v. Gardiner*, 10 Ch. App. 606.

See also the chapter on Mandamus, *infra*.

But mandamus will not issue upon the relation of a foreign holding corporation to compel the secretary of another foreign holding corporation

to call a meeting of its stockholders for the purpose of taking action necessary to change the articles of incorporation of two other foreign corporations. *State v. De Groat*, 109 Minn. 168, 134 Am. St. Rep. 764, 123 N. W. 417.

In *O'Hara v. Williamstown Cemetery Co.*, 133 Ky. 828, 119 S. W. 234, which was an action to compel an accounting by the acting trustees of a corporation and to obtain a writ of mandamus to require them to call and hold a meeting of the stockholders for the election of trustees, it is said: "If, on the trial of the case, the circuit court should conclude that appellees are merely de facto trustees, and by reason thereof cannot be required by mandamus to call or hold a meeting of the stockholders of the corporation for the election of trustees, it can at least require of them an accounting, remove them as de facto trustees, and declare a vacancy in the offices they have been assuming to hold, and in addition render such a judgment as will require the corporation or its stockholders to legally elect a board of trustees in conformity to the provisions of its charter."

³⁶ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

³⁷ An application for mandamus directed to the president and secretary will be denied where the power to call meetings is vested exclusively in the board of directors. *Dusenbury v. Looker*, 110 Mich. 58, 67 N. W. 986.

But it has been held that where the directors reside outside of the state and hence are beyond the jurisdiction of the court, the court acquires jurisdiction by service on the corporation and may order it to call an election, even though the directors are not served, and that if the corporation then fails and refuses to require its officers to call such election, the court may appoint a commission to call it.³⁸

A stockholder may maintain a bill in equity where the directors fraudulently or wrongfully refuse to call a meeting for the election of officers.³⁹

A court of equity in which a suit to foreclose a mortgage executed by a corporation is pending, and a receiver has been appointed, cannot call or postpone a meeting of stockholders to elect officers.⁴⁰

Statutes sometimes provide that if the election for directors is not held at the time prescribed, and the directors fail or refuse to call one on request of a certain number of stockholders, a designated court or judge may order an election, upon the application of any stockholder and on notice to the directors.⁴¹

II. TIME AND PLACE OF HOLDING MEETINGS

§ 1633. Time of holding meetings. In the absence of express provision to the contrary, corporate meetings may be held at any reason-

³⁸ *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126.

³⁹ *Lehigh Coal & Navigation Co. v. Central R. Co.*, 35 N. J. Eq. 349.

The chancellor has power to order an election upon the presentation of a proper case. *Orr v. Braeken County*, 81 Ky. 593, 5 Ky. L. Rep. 632.

A mandatory injunction lies to compel election of officers. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

In *Bartlett v. Gates*, 118 Fed. 66, the court modified a preliminary injunction against the holding of a meeting for the election of directors so as to permit and direct the holding of a meeting at a time fixed by the court, and ordered the directors to call such meeting and the secretary to give notice of it.

⁴⁰ *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. 381.

⁴¹ In Delaware if the election for directors is not held on the day designated in the by-laws, the chancellor may summarily order an election to be held upon the application of any stockholder, and may punish the directors for contempt for failure to obey the order. In *re Jackson*, 9 Del. 279, 81 Atl. 992.

In North Carolina the judge of the district in which the principal office of the corporation is located may order an election under such circumstances, or may make such other order as justice may require. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

To obtain such an order, an application to the directors to call a meeting, and their failure or refusal to do so after thirty days' notice must be shown. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

The failure to join the corporation

able time.⁴² But the time fixed must be reasonable, and mandatory provisions of the charter, statute, or by-laws as to the time must be complied with.⁴³

As a rule, however, a provision in the charter or by-laws of a corporation, authorizing corporate meetings at a certain time, is not intended to and does not prevent meetings at other times on proper notice.⁴⁴

as a party is waived if not taken advantage of by demurrer. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

⁴² *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

As to the time of holding the meeting to organize, see Chap. 9.

Where the statute provides for annual meetings, but fixes no time when they shall be held, it is competent for the stockholders to fix the time, and, when fixed, it becomes the duty of the corporation to hold the meeting at the time so appointed. *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

Where the time of holding the annual meeting of an incorporated church is not fixed by its charter or by-laws, evidence as to the time of holding the annual meetings of one faction, after the division of the congregation into two factions, is inadmissible to show a custom as to the time of holding annual meetings before the division, on an issue as to whether a particular meeting was an annual one. *Firestone v. First Slavish Roman Catholic Greek Rite Church*, 215 Pa. 8, 63 Atl. 1038.

A corporate meeting of a religious corporation is not invalidated because a class meeting of the members is called for the same time and place, where the notice of the corporate meeting is in strict accordance with the statute and makes no reference to such joint meeting, and it does not appear that the rights of any person entitled to appear and participate in the corporate meeting were affected. *People v. African Wesleyan M. E.*

Church, 156 N. Y. App. Div. 386, 141 N. Y. Supp. 394.

⁴³ *Pond v. Vermont Valley R. Co.*, Fed. Cas. No. 11,264; *Miller v. English*, 21 N. J. L. 317; *State v. Conklin*, 34 Wis. 21.

As to the construction of particular provisions, see *McNeely v. Woodruff*, 13 N. J. L. 352; *In re David Jones Co.*, 67 Hun (N. Y.) 360, 22 N. Y. Supp. 318; *Vandenburgh v. Broadway Underground Connecting Ry. Co.*, 29 Hun (N. Y.) 348; *Walker v. Devereaux*, 4 Paige (N. Y.) 229.

An election of directors at the first corporate meeting is not invalid because it is held before the adoption of by-laws, instead of afterwards, the charter providing that the directors shall be chosen by the members of the corporation at their annual meeting, and that the annual meeting for the election of directors shall be held at such time and place as may be provided by the by-laws. *Hughes v. Parker*, 19 N. H. 181.

But when a charter directs that all elections of directors after the first shall be held annually at such time as the by-laws shall direct, no second election can be held until by-laws fixing the time have been adopted. *Johnston v. Jones*, 23 N. J. Eq. 216. Compare *Vandenburgh v. Broadway Underground Connecting Ry. Co.*, 29 Hun (N. Y.) 348.

⁴⁴ *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137; *People v. Town of Fairbury*, 51 Ill. 149; *Hughes v. Parker*, 20 N. H. 58; *Beardsley v. Johnson*, 121 N.

As against absent stockholders or members, a meeting is not legal if held before the day or hour specified in the notice of the meeting.⁴⁵

When an hour for a meeting is fixed by the notice, the meeting should be opened at that hour, or within a reasonable time thereafter.⁴⁶

Stockholders or members who take part in a meeting cannot complain that it was held at a different time from that fixed by the charter or by-laws, or specified in the notice.⁴⁷

Where the charter requires annual meetings for the election of directors, the directors cannot, by a by-law or otherwise, so change the time of the annual election as to continue themselves in office more than a year, against the wishes of the owners of a majority of the stock.⁴⁸ But where the statute gives the stockholders the right to fix by by-laws the time when directors shall be annually chosen and the right to alter or repeal by-laws previously adopted, they may change the date of the annual meeting by properly altering the by-laws.⁴⁹

The necessity of organization before the stockholders can take any action on behalf of the corporation has been discussed in an earlier chapter.⁵⁰

In the absence of a showing to the contrary, it will be presumed that a meeting was held at the proper time.⁵¹

§ 1634. Place of holding meetings—In general. Mandatory provisions in the statute, charter or by-laws as to the place of holding corporate meetings must be followed.⁵²

In the absence of any express provision on the subject, they may be

Y. 224, 24 N. E. 380, 49 Hun (N. Y.) 607, 1 N. Y. Supp. 608; *People v. Cummings*, 72 N. Y. 433.

A statute or by-law providing for the election of directors on a specified date will ordinarily be deemed directory only. If the directors are elected on a later date, without other irregularity than that of time of election, they will be deemed directors de jure. *In re Hammond*, 139 Fed. 898.

⁴⁵ *People v. Albany & S. R. Co.*, 55 Barb. (N. Y.) 344, 38 How. Pr. 228, aff'd 5 Lans. (N. Y.) 25, 57 N. Y. 161.

⁴⁶ *State v. Bonnell*, 35 Ohio St. 10. And see *South School Dist. v. Blakeslee*, 13 Conn. 227.

⁴⁷ *Hussey v. Gallagher*, 61 Ga. 86.

⁴⁸ *Nathan v. Tompkins*, 82 Ala. 437,

2 So. 747; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 467.

⁴⁹ *Gold Bluff Mining & Lumber Corporation v. Whitlock*, 75 Conn. 669, 55 Atl. 175.

⁵⁰ See § 252. See also *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 45 Pac. 252, 41 Pac. 1017.

⁵¹ *Jones v. Hilldale Cemetery Society*, 23 Ky. L. Rep. 1486, 65 S. W. 838; *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

⁵² *American Primitive Soc. of Patterson v. Pilling*, 24 N. J. L. 653; *Miller v. English*, 21 N. J. L. 317; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. See also § 516.

As to the holding of the meeting to organize, see Chap. 9.

held at any place within the state, provided it is a reasonably convenient place.⁵³

As against stockholders who are not present, and who do not consent, a meeting held at a different place from that specified in the notice of the meeting is a nullity.⁵⁴ But stockholders who are present and participate in the meeting cannot complain that it was held at a place other than that prescribed;⁵⁵ and this has been held to be true even where they participate under protest, if they do not show that they were injured by the thing protested against.⁵⁶

Neither the corporation nor those standing in its shoes can complain where it has ratified or acquiesced in the action taken.⁵⁷ Nor can one who accepts the office of director and performs the duties of that office escape its liabilities on the ground that the meeting at which he was elected was not held at the place prescribed.⁵⁸

In the absence of evidence to the contrary, it will be presumed that the place at which a meeting was held was the place prescribed by the charter or by-laws.⁵⁹

⁵³ In such circumstances the board of managers are the proper persons to fix it. *Com. v. Smith*, 45 Pa. St. 59.

If the place is fixed by a de facto board of managers, the meeting is valid though they are not managers de jure. *Com. v. Smith*, 45 Pa. St. 59.

As to the validity of acts of de facto directors generally, see Chap. 42.

⁵⁴ *American Primitive Soc. of Pater-son v. Pilling*, 24 N. J. L. 653; *Brown v. Company*, 22 Pittsb. Leg. J. N. S. (Pa.) 343.

⁵⁵ *Bartlett v. Fourton*, 115 La. 26, 38 So. 882. See also *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

⁵⁶ In *Bartlett v. Fourton*, 115 La. 26, 38 So. 882, it is said in reference to an objection that a meeting was held at a place other than the office of the company, and certain other objections: "The three objections first mentioned are met by the fact that it is nowhere alleged that the company had any office, or that any stockholder was deprived of his vote or of any other right by reason of the matters objected

to, taken in connection with the additional fact that the plaintiffs participated in the election. It is true that it is alleged that their participation was under protest, and, if the allegation of protest were accompanied by an allegation of injury, resulting from the thing protested against, we should probably hold that the plaintiffs should not be estopped by such participation."

⁵⁷ Where the corporation accepts the benefits of a trusteeship, neither the corporation, nor minority stockholders suing in its behalf, can attack its validity on the ground that the meeting of the stockholders at which it was authorized was held at a place other than that prescribed by the by-laws. *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, aff'd 148 Fed. 1019.

⁵⁸ *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

⁵⁹ *Jones v. Hilldale Cemetery Society*, 23 Ky. L. Rep. 1486, 65 S. W. 838; *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

§ 1635. — Meetings held without the state. It is perfectly clear that a corporation, while it may act through agents in another state, can have no existence beyond the limits of the state by which it was created, for the laws of a state cannot operate beyond its limits.⁶⁰ It necessarily follows that a corporation cannot act itself—that is, can do no act which must be the direct act of the corporation, as distinguished from action by agents—beyond the limits of the state by which it was created.⁶¹ It is well settled, therefore, that the incorporators cannot meet and organize the corporation in another state.⁶²

Most of the courts have gone further than this, and have held that any acts of the stockholders or members of a corporation at a corporate meeting,⁶³ such as the election of directors or other corporate

Where the by-laws required meetings to be held at the counting room of the corporation, and it appeared from the records that a meeting was held at the dwelling house of the general agent and clerk, it was held that, in the absence of evidence to the contrary, it would be presumed that the counting room was for the time being at that place. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

An election is not invalid because held in a city other than that where the principal office of the company was located by the certificate of incorporation, where the statute merely requires the meeting to be held at the place fixed by the by-laws, and it does not appear that the place where the meeting was held was not the one fixed by the by-laws, and does appear that the company had an office and held all of its meetings there. *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

⁶⁰ See § 387, *supra*.

⁶¹ See § 387, *supra*.

⁶² See § 256, *supra*.

⁶³ *Colorado*. *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700.

Florida. *Duke v. Taylor*, 37 Fla. 64, 31 L. R. A. 484, 53 Am. St. Rep. 232, 19 So. 172.

Illinois. *Harding v. American Glucose Co.*, 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349; *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090, rev'g 68 Ill. App. 378.

Indiana. *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329.

Iowa. *Bellows v. Todd*, 39 Iowa 209.

Maryland. *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 54 Am. Rep. 760, 20 Atl. 1032.

Massachusetts. *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116.

Minnesota. *Hodgson v. Duluth, H. & D. R. Co.*, 46 Minn. 454, 49 N. W. 197.

Missouri. *Missouri Lead Mining & Smelting Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488; *Camp v. Byrne*, 41 Mo. 525; *Webb & Co. v. Midway Lumber Co.*, 68 Mo. App. 546.

New Jersey. *Hilles v. Parrish*, 14 N. J. Eq. 680.

New York. *Mitchell v. Vermont Copper Min. Co.*, 8 Jones & S. 406, aff'd 67 N. Y. 280.

Pennsylvania. *Derry Council No. 40, O. U. A. M. v. State Council of Pennsylvania*, 197 Pa. 413, 80 Am. St. Rep. 838, 47 Atl. 208.

Texas. *Sovereign Camp Woodmen*

officers,⁶⁴ authorizing a sale or transfer of property,⁶⁵ votes to increase or diminish capital stock,⁶⁶ or amending or changing the articles of association,⁶⁷ or the by-laws,⁶⁸ are the direct acts of the corporation, and not acts of agents, and are void, or at least voidable, in the absence of elements of estoppel, if done at a meeting held without the state. And it has been held that directors elected at such a meeting are not even de facto officers.⁶⁹

of *World v. Fraley*, 94 Tex. 200, 51 L. R. A. 898, 59 S. W. 879, aff'g (Tex. Civ. App.), 59 S. W. 905.

See also §§ 387, 393, *supra*.

"A private corporation, whose charter has been granted by one state, cannot hold meetings or pass votes, or have any legal existence in another state. It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

The proceedings of meetings held outside of the state are absolutely void and of no effect. *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

"Neither stockholders nor directors can do a corporate act, out of the jurisdiction creating the corporation, which shall have any force to bind those who do not participate in it." *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623.

See also *Southern Elec. Securities Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785, where it is said that stock in a Mississippi corporation owned by a foreign corporation can only be voted at a corporate meeting held in Mississippi.

⁶⁴ *Colorado*. *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700.

Florida. *Duke v. Taylor*, 37 Fla. 64, 31 L. R. A. 484, 53 Am. St. Rep. 232, 19 So. 172.

Illinois. *People v. Hoyne*, 182 Ill. App. 42.

Maine. *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619.

Maryland. *Smith v. Silver Valley*

Min. Co., 64 Md. 85, 84 Am. Rep. 760, 20 Atl. 1032.

Massachusetts. *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116.

Missouri. *Missouri Lead Mining & Smelting Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488.

Texas. *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

Such an election is irregular, if not void. *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 9 L. R. A. 650, 8 So. 150.

Directors chosen at such a meeting are not directors de jure, and are not entitled, as against those previously constituting the directory, to control the affairs of the corporation. *Hodgson v. Duluth, H. & D. R. Co.*, 46 Minn. 454, 49 N. W. 197.

⁶⁵ *Harding v. American Glucose Co.*, 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 577, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349.

So held of an assignment for the benefit of creditors. *Webb & Co. v. Midway Lumber Co.*, 68 Mo. App. 546.

⁶⁶ *Missouri Lead Mining & Smelting Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488.

⁶⁷ *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090, rev'g 68 Ill. App. 378.

⁶⁸ *Mitchell v. Vermont Copper Min. Co.*, 8 Jones & S. (N. Y.) 406, aff'd 67 N. Y. 280; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623.

⁶⁹ *Miller v. Ewer*, 27 Me. 509, 46

This doctrine was applied in a leading Maine case, where the members of a corporation created by the laws of that state met and organized in New York and elected directors and other officers there, and the directors afterwards met in New York and authorized the president and secretary to execute a mortgage on the property of the corporation. It was held that the election of the directors and other officers in New York was a nullity, and that the mortgage was therefore void. It was said in this case: "As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty which confers it, and they cannot possess or exercise it there, (they) can have no more power there to make the artificial being act, than other persons not named or associated as corporators. Any attempt to exercise such a faculty there, is merely an usurpation of authority by persons destitute of it and acting without any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void. * * * If the artificial being * * * may be considered as having existence and active life in this state, by proof of its acts within her limits, it will be still true that it cannot have existence without her limits, and of course cannot make choice of any officers or agents there. It may maintain a suit without those limits, but that does not imply its existence or presence there. It may also contract without those limits. Being within them, it may, acting per se, by vote transmitted elsewhere, propose a contract or accept one previously offered. And it may, by an agent or agents duly constituted, act and contract beyond those limits. But it can neither exist, nor act per se without them, except by the assistance of its officers or agents duly elected or appointed within them." ⁷⁰

The rule "is based upon public policy, which seeks to protect the stockholders from meetings which might be held at places remote from their homes, or of which they had not been notified." ⁷¹

In principle, this doctrine is sound, but it has not been followed to

Am. Dec. 619; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

⁷⁰ *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619. Followed in *Freeman v. Machias Water Power & Mill Co.*, 38 Me. 343. Quoted in part with approval in *Sovereign Camp Woodmen of World v. Fraley* (Tex. Civ. App.), 59 S. W. 905.

⁷¹ *Sovereign Camp Woodmen of World v. Fraley*, 94 Tex. 200, 51 L. R. A. 898, 59 S. W. 879, aff'g judgment in (Tex. Civ. App.), 59 S. W. 905. And see, to the same effect, *Derry Council No. 40, O. U. A. M. v. State Council of Pennsylvania*, 197 Pa. 413, 80 Am. St. Rep. 838, 47 Atl. 208.

the full extent in all jurisdictions. On the contrary, some courts have held that where a corporation has been organized within the state, so as to acquire a valid corporate existence, and the stockholders or members of the corporation afterwards meet in another state and elect officers, their proceedings are not absolutely void, but the officers, if they act as such, are at least officers *de facto*, and their authority to act on behalf of the corporation cannot be collaterally attacked.⁷²

It has also been held that, in the absence of an express charter or statutory provision to the contrary, if all the stockholders of a corporation are present and take part, in person or by proxy, at a meeting held without the limits of the state, they and the corporation will be estopped to deny the validity of their proceedings, and that, if all are not present, those who are present and take part will be estopped,⁷³ as will those who take the benefit of the action taken at such a meet-

⁷² *Humphreys v. Mooney*, 5 Colo. 282; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Wright v. Lee*, 2 S. D. 596. See also *Heath v. Silverthorn Lead Mining & Smelting Co.*, 39 Wis. 146.

⁷³ The action taken at such meetings is binding upon those who participate in them. *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, *rev'g* on other grounds 41 Fed. 531.

"Members or stockholders may be estopped by their consent to, participation in or ratification of the act done." *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090, *rev'g* 68 Ill. App. 378.

Where there is no prohibitory statute, and all of the shareholders consent, the acts of the stockholders at a meeting held in a foreign jurisdiction are valid. *Missouri Lead Mining & Smelting Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488.

In *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623, it is said that the stockholders cannot do a corporate act out of the jurisdiction creating the corporation which will have any force to bind those who do not participate in it.

In *Handley v. Stutz*, 139 U. S. 417,

423, 35 L. Ed. 227, it is said: "It is true there are cases holding that stockholders' meetings cannot be legally held outside of the home state of the corporation, but the question has generally arisen where a majority present at such meeting had attempted by their action to bind a dissenting minority, or had taken action prejudicial to the rights of third persons. * * * Indeed, so far as we know, the authorities are uniform to the effect that the action taken at such meetings is binding upon those who participate in or take the benefit of them."

See also *Hodgson v. Duluth, H. & D. R. Co.*, 46 Minn. 454, 49 N. W. 197; *Webb & Co. v. Midway Lumber Co.*, 68 Mo. App. 546. And see *Miller v. Ewer*, 27 Me. 509, 521, 46 Am. Dec. 619, where it is said that the decision in *Copp v. Lamb*, 12 Me. 312, was apparently based on the ground that it was not competent for a person claiming under one of the proprietors of land, who had acted as an officer of a meeting held outside of the state, to deny the validity of the meeting after forty years and where the action there taken had been subsequently confirmed at a meeting not shown to have been held outside of the state.

ing.⁷⁴ But there can be no estoppel against those who do not take part or acquiesce in the proceedings.⁷⁵ And there is authority to the effect that participation in such a meeting will not work an estoppel, for the reason that it is absolutely void and liable to be treated as a mere nullity in any proceeding in which it is called in question.⁷⁶

If the general law or the charter or by-laws of a corporation expressly provide that corporate meetings shall be held within the state, a meeting held in another state is a nullity as against stockholders who do not participate or consent.⁷⁷

It has been held by a number of courts that the general rule invalidating corporate meetings held outside of the state does not apply to incorporated fraternal benefit associations having power to organize subordinate bodies or lodges outside of the state.⁷⁸

Reasons given for such view are that the reason underlying the general rule is not applicable to this class of corporations, since they have no stockholders in the sense in which that term is ordinarily used, and are composed of members living in a number of states, and a majority of whom generally live outside of the state under whose laws the incorporation takes place;⁷⁹ and also that the power to organize

⁷⁴ *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, rev'g on other grounds 41 Fed. 531.

⁷⁵ *Hilles v. Parrish*, 14 N. J. Eq. 380; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623.

⁷⁶ *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339; *Sovereign Camp Woodmen of World v. Fraley* (Tex. Civ. App.), 59 S. W. 905.

⁷⁷ *Hodgson v. Duluth, H. & D. R. Co.*, 46 Minn. 454, 49 N. W. 197; *Hilles v. Parrish*, 14 N. J. Eq. 680.

An attempted organization outside of the state is void where its laws require the organization to be effected within the state. *Welch v. Old Dominion Min. & Ry. Co.*, 56 Hun (N. Y.) 650, 10 N. Y. Supp. 174.

Under such circumstances the treasurer of the corporation is not relieved from liability by turning over the corporate funds to a treasurer elected in another state as his successor. *Kent v. Honsinger*, 167 Fed. 619.

⁷⁸ *Head Camp Pacific Jurisdiction*

Woodmen of World v. Woods, 34 Colo. 1; 81 Pac. 261; *Derry Council No. 40, O. U. A. M. v. State Council of Pennsylvania*, 197 Pa. 413, 80 Am. St. Rep. 838, 47 Atl. 208; *Sovereign Camp Woodmen of World v. Fraley*, 94 Tex. 200, 51 L. R. A. 898, 59 S. W. 879, aff'g judgment in (Tex. Civ. App.), 59 S. W. 905.

⁷⁹ *Derry Council No. 40, O. U. A. M. v. State Council of Pennsylvania*, 197 Pa. 413, 80 Am. St. Rep. 838, 47 Atl. 208; *Sovereign Camp Woodmen of World v. Fraley*, 94 Tex. 200, 51 L. R. A. 898, 59 S. W. 879, aff'g judgment in (Tex. Civ. App.), 59 S. W. 905.

"Such associations are composed of members living in various states, usually the greater number outside of the state in which the corporation was created. Their interests demand that the meetings of the supreme legislative department be held as near to the membership as possible, and to accomplish this purpose the place of meeting is usually changed at each

subordinate bodies in other states necessarily contemplates that a large part of the corporate business will be transacted there and impliedly authorizes the holding of the meetings at such place as may be best adapted to the purpose for which the corporation is created.⁸⁰ This doctrine has been repudiated in at least one jurisdiction, however.⁸¹

The legislature may no doubt expressly authorize the holding of corporate meetings beyond the limits of the state.⁸² But general authority to hold meetings at such places as may be deemed proper,⁸³ or to transact business outside of the state,⁸⁴ or to own and manage property in another state,⁸⁵ or to elect directors at such places as the by-laws may provide,⁸⁶ does not have that effect. The contrary has been

convocation of the body. Sound public policy sustains such a proceeding, as consistent with the rights of persons interested in the management of the corporation." *Sovereign Camp Woodmen of World v. Fraley*, 94 Tex. 200, 51 L. R. A. 898, 59 S. W. 879, aff'g judgment in (Tex. Civ. App.), 59 S. W. 905. See also § 507, p. 1068, supra.

⁸⁰ *Sovereign Camp Woodmen of World v. Fraley*, 94 Tex. 200, 51 L. R. A. 898, 59 S. W. 879, aff'g judgment in (Tex. Civ. App.), 59 S. W. 905.

⁸¹ In *People v. Hoyne*, 182 Ill. App. 42, the court says that the reasoning in *Derry Council v. State Council*, 197 Pa. 413, 47 Atl. 208, "is unsound in principle and unsupported by authority," and holds that the general rule is applicable to corporations not for pecuniary profit, such as a medical association.

But the statutes of Illinois expressly provide that fraternal benefit societies may provide for the meeting of their legislative or governing bodies in any other state, territory or province where they may have subordinate bodies. *J. & A. Ill. St. Ann.* ¶ 6657; *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090, rev'g 68 Ill. App. 378.

⁸² *Graham v. Boston, H. & R. R. Co.*,

118 U. S. 161, 30 L. Ed. 196, aff'g 14 Fed. 753.

⁸³ A general clause in a charter authorizing the corporators to call the first meeting of the company at such place as they think proper will not authorize such meeting to be held outside of the state. *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619. See also § 256, supra.

⁸⁴ *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

It will be presumed "that the words 'transact business' were used in the ordinary sense in which they are employed in reference to corporations, i. e., perform such acts as are done through directors and other agents, and that they were not applied to strictly corporate acts, which can be done by the stockholder alone." *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

⁸⁵ Such authority does not give it authority to change its domicile to the latter state or to perform corporate acts there. *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329.

⁸⁶ Such a provision will not sustain a by-law providing that such elections may be held outside of the state. The words "at such places as may be provided by the by-laws" in such a statute must be construed to refer to

held to be true, however, of a provision that a corporation may transact any business outside of the state that it could do within the state.⁸⁷

The legislature may also validate proceedings taken at a meeting held outside of the state.⁸⁸

§ 1636. — Corporations existing under laws of several states.

When corporations existing under the laws of different states are consolidated, or a corporation of one state is also created a corporation under the laws of other states, it has a legal domicile and existence in each state, and corporate meetings may be held and business transacted by the stockholders in either state, so as to bind the corporation and its property everywhere, without a repetition of the meeting and proceedings in the other states.⁸⁹

It has been held, however, that authority given to a corporation chartered in one state, by the legislature of another state to act in the latter state does not give it a right to migrate to the latter state or to hold corporate meetings or perform corporate acts there, in the absence of authority from the first state.⁹⁰

III. NOTICE OF MEETINGS

§ 1637. In general. Where the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, or they

places within the state. *People v. Hoyne*, 182 Ill. App. 42.

⁸⁷ *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090, rev'g 68 Ill. App. 378.

⁸⁸ *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090, rev'g 68 Ill. App. 378.

Acts of the legislatures of four states, in which a single corporation was chartered, expressly ratifying the proceedings whereby the corporation mortgaged its property, cure any irregularity in holding the meeting at which the mortgage was authorized in one only of such states. *Graham v. Boston & R. R. Co.*, 118 U. S. 161, 30 L. Ed. 196, aff'g 14 Fed. 753.

⁸⁹ *Graham v. Boston & R. R. Co.*, 118 U. S. 161, 30 L. Ed. 196, aff'g 14 Fed. 753; *Ohio & M. R. Co. v. People*, 123 Ill. 467, 14 N. E. 874; *Covington & C. Bridge Co. v. Mayer*, 31 Ohio St. 317. See § 393, *supra*.

“The several consolidated corporations remain intact, and each is subject to the laws of its creation; but the consolidated company may hold its meetings for the transaction of business, election of directors, etc., in any one of the states, even if the laws of a particular state require the meetings of the corporation to be held within the state, and its acts are legal and binding upon all. The consent of the state to the consolidation necessarily implies a consent to the doing of such acts as are essential to the life, existence, and carrying on of business by the consolidated company.” *Pollitz v. Wabash R. Co.*, 167 Fed. 145, rev'd on other grounds 176 Fed. 333.

⁹⁰ *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329. See §§ 387, 393, *supra*.

are fixed by usage, this is itself sufficient notice to stockholders or members, and no further notice is necessary.⁹¹ But if the time and place is not so fixed, as where a special meeting is called, notice must be given to every stockholder or member who is entitled to vote.⁹² And it has been held that notice is not rendered unnecessary by the fact that the charter or by-laws fix the day,⁹³ or the place and day of the meet-

91 Alabama. Medical & Surgical Society v. Weatherly, 75 Ala. 248.

Kentucky. Jones v. Hilldale Cemetery Society, 23 Ky. L. Rep. 1486, 65 S. W. 838.

Minnesota. Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547.

New Hampshire. Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252.

New York. People v. Batchelor, 22 N. Y. 128; New York Electrical Workers' Union v. Sullivan, 122 App. Div. 764, 107 N. Y. Supp. 886.

North Carolina. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

Ohio. State v. Bonnell, 35 Ohio St. 10.

Vermont. Warner v. Mower, 11 Vt. 385.

As to the requirements in regard to the notice of the meeting to organize, see Chap. 9.

In *People v. Matthiessen*, 193 Ill. App. 328, *aff'd* 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, it was held that the evidence did not show a long established custom to hold the annual meetings at a particular time and place without notice, so as to dispense with the necessity for giving notice.

92 United States. In re St. Helen Mill Co., 3 Sawy. 88, Fed. Cas. No. 12,222.

California. San Buenaventura Commercial Min. & Mfg. Co. v. Vassault, 50 Cal. 534; *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

Connecticut. Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Kentucky. Cassell v. Lexington, H. & P. Turnpike Road Co., 10 Ky. L. Rep. 486, 9 S. W. 701.

Massachusetts. Wiggin v. First Freewill Bapt. Church, 8 Mete. 301.

Mississippi. Mulvihill v. Vicksburg Railroad, Power & Manufacturing Co., 88 Miss. 689, 40 So. 647.

New York. People v. Batchelor, 22 N. Y. 128; Stein v. Marks, 44 Misc. 140, 89 N. Y. Supp. 921.

North Carolina. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

Pennsylvania. Com. v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450.

Stockholders are not bound to take notice of a special meeting called by a vote at a regular meeting at which they were not present. *People v. Batchelor*, 22 N. Y. 128.

Where a person's membership in a corporation is declared forfeited at a meeting of which he has no notice, and which is not the regular meeting fixed by the corporate constitution for the consideration of such matters nor an adjournment of such meeting, he will be reinstated. *Medical & Surgical Society v. Weatherly*, 75 Ala. 248.

Where a meeting for the election of directors is ordered by the court, notice should be mailed to all stockholders whose addresses are known. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

93 Charter Gas Engine Co. v. Charter, 47 Ill. App. 36.

A by-law prescribing the time of

ing,⁹⁴ since the stockholders or members are entitled to notice of the place, day and hour.

Notice is necessary, of course, when required by statute or the charter or by-laws of the corporation.⁹⁵ And by-laws providing that the annual meeting shall be held on a specified day of each year will not take the place of a notice prescribed by the statute, or dispense with the necessity for giving it, even though they prescribe the place and hour at which the meeting is to be held.⁹⁶

No notice of an adjourned meeting need be given unless required by the charter or by-laws, provided notice of the original meeting was given, if required.⁹⁷

Notice need be given to those persons only who are entitled to vote.⁹⁸

the annual meetings, but not the place where they are to be held, does not dispense with the necessity for giving notice. *United States v. McKelden*, 1 MacArthur & M. (D. C.) 162.

⁹⁴ *San Buenaventura Commercial Min. & Mfg. Co. v. Vassault*, 50 Cal. 534.

⁹⁵ *United States. Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 24 L. R. A. 776, rev'g 55 Fed. 7; *Cleveland City Forge Iron Co. v. Taylor Bros. Iron Works Co.*, 54 Fed. 82, 85.

California. Dolbear v. Wilkinson, 172 Cal. 366, 156 Pac. 488.

Colorado. Jones v. Pearl Min. Co., 20 Colo. 417, 38 Pac. 700.

District of Columbia. United States v. McKelden, 1 MacArthur & M. 162.

Illinois. People v. Matthiessen, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, aff'g 193 Ill. App. 328; *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

Louisiana. Davies v. Monroe Waterworks & Light Co., 107 La. 145, 31 So. 694.

Maine. Smith v. Schoodoc Pond Packing Co., 109 Me. 555, 84 Atl. 268.

Michigan. Tuttle v. Michigan Air Line R. Co., 35 Mich. 247.

New York. Stein v. Marks, 44 Misc. 140, 89 N. Y. Supp. 921.

North Carolina. Benbow v. Cook, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

"The failure to give the notice required by the by-laws is a substantial omission, which should not be disregarded unless upon clear waiver by the stockholder." *In re Keller*, 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133.

That there may be a *de facto* consolidated corporation notwithstanding a failure to give the required notice of the meeting of the constituent companies called to consider the question of consolidation, see § 302.

⁹⁶ *People v. Matthiessen*, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, aff'g 193 Ill. App. 328.

⁹⁷ See § 1653, *infra*.

⁹⁸ *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. See also *Mulverhill v. Vicksburg Railroad, Power & Manufacturing Co.*, 88 Miss. 689, 40 So. 647.

Notice need not be given to one who is not a stockholder of record, where only stockholders of record are entitled to vote. *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159.

So one to whom stock has been assigned as collateral security is not en-

And it has been held that one receiving stock as administrator is under obligation, in order to protect his rights, to secure a transfer of the stock, or to give notice that notices of meetings should be sent to a specified place, in order that he may receive notice. Otherwise the corporation is not liable for continuing to send notices to the address of the deceased.⁹⁹

It has also been held that a meeting is legal although one of the members of the corporation is incapable, from mental imbecility, of receiving a notice thereof.¹

An election will be set aside for failure to give the required notice although a new election will not change the result.² But there is authority to the effect that a stockholder cannot complain that the required notice was not given unless he shows that he was injured thereby.³

titled to notice where the stock has never been transferred to him on the books of the company. *Osborn v. Detroit Kraut Co.*, — Mich. —, 160 N. W. 442; *Cleveland City Ry. Co. v. First Nat. Bank*, 68 Ohio St. 582, 67 N. E. 1075.

In Ohio the statute relative to the consolidation of corporations requires notice of the meeting to consider the question of consolidation to be given "to each of the persons in whose names the capital stock of the company stands on the books thereof." Hence notice need not be given to a person who has a concealed equity in stock. *Cleveland City Ry. Co. v. First Nat. Bank*, 68 Ohio St. 582, 67 N. E. 1075.

Failure to give notice to the undisclosed owner of stock is immaterial, where notice is given to the person in whose name it stands and who manages it, and the latter is represented and votes by proxy at the meeting. *Wright v. Tacoma Gas & Electric Light Co.*, 53 Wash. 262, 101 Pac. 865.

The meeting is not invalidated because notice was given to the holders of the equitable title to stock and not to the holder of the legal title, where the latter holds it as a mere naked

trustee for the former, and hence would have been obliged to vote in accordance with their wishes. *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795.

Where the constitution of a religious corporation provides that, in case of a division, the majority shall be considered the proper congregation and shall keep the corporate property, and such a division takes place, members of the minority are not entitled to notice of corporate meetings, since they are no longer entitled to a voice in the management of the corporate business. *Lutheran Trifoldighed Congregation of Neenah v. St. Paul's English Evangelical Lutheran Congregation of Neenah*, 159 Wis. 56, 150 N. W. 190.

As to what persons are entitled to vote, see § 1657 et seq., *infra*.

⁹⁹ *Dana v. American Tobacco Co.*, 72 N. J. Eq. 44, 65 Atl. 730, *aff'd* on other grounds 72 N. J. Eq. 736, 69 Atl. 223.

¹ *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

² *In re Keller*, 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133.

³ *Bartlett v. Fourton*, 115 La. 26, 38 So. 882.

The objection that no notice was given, or that the notice given was defective, cannot be raised by third persons who have not been injured.⁴ And this is true though the statute provides that no meeting shall be legal or valid, or the proceedings thereof of any force or effect, unless the required notice is given.⁵

§ 1638. Form and mode of notice. The notice of a corporate meeting need not be in any particular form, nor given by any particular person, unless there is some express requirement in the charter or by-laws.⁶ But provisions of the statute, charter or by-laws as to the

⁴*Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695; *In re Columbia Nat. Bank's Appeal*, 16 Wkly. Notes Cas. (Pa.) 357.

"There can be no complaint by others, where the stockholders themselves acquiesce in the disregard of formalities prescribed for their benefit alone." *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

Subsequent lienholders cannot question the validity of a corporate mortgage on the ground that notice of the meeting at which it was authorized was not given to all of the stockholders, or that the notice given did not sufficiently specify the purpose of the meeting. *Central Trust Co. v. Condon*, 67 Fed. 84, 104; *Campbell v. Argenta Gold & Silver Min. Co.*, 51 Fed. 1; *Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695; *Drewery v. Columbia Amusement Co.*, 87 S. C. 445, 69 S. E. 879.

Nor is such an objection available to a purchaser of the equity of redemption under a corporate mortgage. *Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695.

Attaching creditors cannot question the validity of corporate bonds on the ground that the statutory notice of the stockholders' meeting at which they were authorized was not given, where all the stockholders waived such notice. *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238.

Where a majority of the stock and stockholders were represented at a meeting whereat the directors were ordered to make an assignment for the benefit of creditors and to appoint a certain party as assignee, and necessity for acting immediately existed and the act of assignment was made by the board, a legal quorum being present, and no stockholder or director at any time raised objection, it was held that the creditors could not have the assignment set aside because notice of the meetings were not served upon some of the stockholders and directors. *State Nat. Bank of St. Louis v. Merchants' Bank of Grenada*, 83 Miss. 610, 35 So. 569.

⁵*Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695.

⁶*West Koshkonong Congregation v. Ottesen*, 80 Wis. 62, 49 N. W. 24.

As to the requirements concerning the notice of the first meeting, see Chap. 9.

The constitution of a religious corporation provided that meetings should be called by the minister, and that in case of a division the majority should be considered as the proper congregation and keep the corporate property. A division took place and the minister sided with the minority and refused to call a meeting. It was held that the provision for calling meetings became inoperative and that the majority had the right to convene and act

manner in which notice is to be given must, of course, be complied with.⁷

The notice must be a personal notice, unless it is otherwise provided by the charter or by-laws.⁸

Verbal notice is insufficient where the charter or by-laws require upon reasonable notice. *Lutheran Trifolded Congregation of Neenah v. St. Paul's English Evangelical Lutheran Congregation of Neenah*, 159 Wis. 56, 150 N. W. 190. And see *Vargo v. Vajo*, 76 N. J. Eq. 161, 73 Atl. 644, where it was held that a meeting of a religious society, called according to its custom and in a fair and reasonable manner, was valid, there being no specific method of calling meetings provided for in the constitution.

7 California. *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488.

Colorado. *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700.

Connecticut. *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99.

District of Columbia. *United States v. McKelden*, 1 MacArthur & M. 162.

Illinois. *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

Kentucky. *Shelby R. Co. v. Louisville, C. & L. R. Co.*, 12 Bush 62.

Massachusetts. *Wiggin v. First Freewill Bapt. Church*, 8 Metc. 301.

Michigan. *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247; *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

Minnesota. *Whipple v. Christie*, 122 Minn. 73, Ann. Cas. 1914 D 856, 141 N. W. 1107.

New Jersey. *Miller v. English*, 21 N. J. L. 317.

Oregon. *Riggs v. Polk County*, 51 Ore. 509, 95 Pac. 5.

West Virginia. *Reilly v. Oglebay*, 25 W. Va. 36.

England. *Swansea Dock Co. v. Leven*, 20 L. J. Exch. 447.

The provisions of the English Companies Act as to notice are only intended to apply in the absence of any

provision in the by-laws on the subject. If the by-laws contain such provisions, they govern rather than the statute. *Schickler v. Washington Brewery Co.*, 33 App. Cas. (D. C.) 35.

In *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225, it was held that a charter provision as to who should give the notice of the first meeting for the election of directors was merely directory, and that the validity of the acts of the directors chosen at such meeting could not be questioned collaterally because the notice was not given by the persons named.

Where the statute requires notice to be given by advertisement in a newspaper circulating in the district where the company has its principal place of business, publication in a paper which never goes into that district is insufficient. *Swansea Dock Co. v. Leven*, 20 L. J. Exch. 447.

⁸ *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Wiggin v. First Freewill Bapt. Church*, 8 Metc. (Mass.) 301; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453; *Stevens v. Eden Meeting-House Society*, 12 Vt. 688.

"At common law all notices were required to be personal, unless otherwise fixed by the by-laws, and notice by publication, or notice by mail would be nugatory." *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

Personal notice of a meeting to change the name of a mutual insurance company is not required under the Pennsylvania statute. *International Savings & Trust Co. v. Stenger*, 31 Pa. Super. Ct. 294.

written or printed notice.⁹ And published notice is insufficient where the statute requires a written or printed notice given personally or sent through the mails.¹⁰

It has been held that where an officer charged with the purely ministerial duty of sending out notices of a meeting regularly called refuses to send them, they may be sent by the officer charged with the duty of making the call and having the sole authority to make it.¹¹

The time and place of holding the meeting must be specified in the notice.¹² A notice that a meeting will be held on the happening of a contingency is insufficient.¹³

The notice need not be dated unless the charter or a by-law so requires.¹⁴

The notice must be given for the length of time, if any, prescribed by the statute, charter, or by-laws.¹⁵ If no time is prescribed, it must

⁹ *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

Where the by-laws require notice to be given by posting a written notice, no other mode of calling the meeting can be shown, and the giving of the required notice cannot be shown by parol unless the loss of the notification is first proved. *Stevens v. Eden Meeting-House Society*, 12 Vt. 688.

¹⁰ *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

¹¹ *Whipple v. Christie*, 122 Minn. 73, Ann. Cas. 1914 D 856, 141 N. W. 1107.

¹² It should specify the hour at which the meeting is to be held. *San Buenaventura Commercial Min. & Mfg. Co. v. Vassault*, 50 Cal. 534.

¹³ *Alexander v. Simpson*, 43 Ch. Div. 139.

A notice of a meeting to be held at a certain time and place, which states that in the event of certain resolutions not being passed, another meeting will be held immediately afterwards to confirm resolutions which have already been provisionally passed, is not open to the objection that it is conditional. *Tiessen v. Henderson*, [1899] 1 Ch. 861, distinguishing *Alexander v. Simpson*, 43 Ch. Div. 139.

¹⁴ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

¹⁵ **United States.** See *Cleveland City Forge Iron Co. v. Taylor Bros. Iron Works Co.*, 54 Fed. 82, 85.

Colorado. *Jones v. Pearl Min. Co.*, 20 Colo. 417, 38 Pac. 700.

Kentucky. *Shelby R. Co. v. Louisville, C. & L. R. Co.*, 12 Bush 62.

Louisiana. *Davies v. Monroe Waterworks & Light Co.*, 107 La. 145, 31 So. 694.

Massachusetts. *Wiggin v. First Freewill Bapt. Church*, 8 Mete. 301.

Michigan. *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247; *Westcott v. Minnesota Min. Co.*, 23 Mich. 145.

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

New York. In re *Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429.

Oregon. *Riggs v. Polk County*, 51 Ore. 509, 95 Pac. 5.

Where the statute requires publication for two weeks, but the notice is published for ten days only, the meeting is illegal. *United States v. McKelden*, 1 MacArthur & M. (D. C.) 162.

Where a written notice of an election of directors is required by the by-laws to be mailed thirty days prior to the holding of such election, notice mailed twelve days prior is insufficient. An election based upon the shorter notice, therefore, may be set

be given for a reasonable time.¹⁶ Generally in computing the time the first day will be excluded and the last included.¹⁷

A requirement that notice be published for a designated number of weeks is satisfied by publication in a daily newspaper once each week for the designated number of weeks.¹⁸ It has been held that a requirement that notice be published each day for one week preceding the election means each business day, and that the notice need not be published on Sunday.¹⁹

Notice given for the prescribed time is ordinarily sufficient, even as against a stockholder who resides, or is temporarily, at such a distance that the notice will not reach him in time to enable him to attend the meeting, provided there is no actual fraudulent intent to take advantage of his absence.²⁰ And this has been held to be true even where the purpose of giving a short notice is to prevent nonresident stockholders from attending the meeting.²¹

Fraudulent concealment of a notice of meeting from a stockholder may be ground for setting aside the proceedings at the meeting, although the notice may have been published as required by the charter or statute.²²

aside at the instance of a stockholder who has in no way waived his rights. *In re Keller*, 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133.

¹⁶ See *In re Long Island R. Co.*, 19. Wend. (N. Y.) 37, 32 Am. Dec. 429.

¹⁷ The rule of the Code of Civil Procedure of New York (§§ 787, 788), providing that, in computing the time for publication of legal notices, etc., the first day shall be excluded, and the last included, has been held to apply by analogy to a notice of a corporate election required by a by-law to be published not less than a certain number of days previous thereto. *The Seguranca*, 68 Fed. 781.

¹⁸ A statute which merely requires the notice to be published "at least two weeks before" the meeting "in some newspaper," and does not specify the kind of paper with respect to the frequency of issue, or require it to be published as often as the paper is published during such times, is satisfied by publication in a daily

newspaper once each week for two weeks. So where the meeting is set for March 3rd, publication on February 10th and February 17th is sufficient. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191. In this case the corporation was a foreign one, and it was held that presumably the law of the foreign state in this regard was the same as that of California.

¹⁹ *In re Excelsior Fire Ins. Co.*, 16 Abb. Pr. (N. Y.) 8.

²⁰ *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

²¹ A court of equity will not interfere merely because of the motives actuating those calling the meeting, where the action taken is in strict conformity to the statute and does not violate any provision of the charter or by-laws. *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 24 L. R. A. 776, rev'g 55 Fed. 7.

²² *Johnston v. Jones*, 23 N. J. Eq. 216. See also *Mulverhill v. Vicksburg*

Those charged with the duty of giving the notice may properly give, at the expense of the company, a more widespread and effective notice than that required by the by-laws to be given to stockholders of record, where, owing to numerous transfers of stock, it appears that the prescribed notice, although legally sufficient, would probably not be a fair or sufficient notice to actual stockholders.²³

Stockholders are conclusively presumed to know the provisions of the articles, by-laws, and general statutes on the subject of notice, and cannot escape their force and effect by disclaiming knowledge of their existence.²⁴

§ 1639. Statement of business to be transacted. In the case of special meetings, the notice must state the business to be transacted, and no other business than that stated can be transacted. It is sometimes expressly so provided by the charter or by-laws, but express provision is not necessary.²⁵ As a rule, it is otherwise in the case of a

Railroad, Power & Manufacturing Co., 88 Miss. 689, 40 So. 647.

²³ So it was held that they might give notice by publication where the by-laws merely provided for two days notice by mail to stockholder of record. *Lawyers Advertising Co. v. Consolidated Railway, Lighting & Refrigerating Co.*, 187 N. Y. 395, 80 N. E. 199, modifying 110 N. Y. App. Div. 892, 96 N. Y. Supp. 1133.

²⁴ *Schickler v. Washington Brewing Co.*, 33 App. Cas. (D. C.) 35.

²⁵ **United States.** *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379.

California. *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488.

Kentucky. *Shelby R. Co. v. Louisville, C. & L. R. Co.*, 12 Bush 62.

Maine. *Evans v. Osgood*, 18 Me. 213.

Maryland. *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668, 39 Atl. 527.

Massachusetts. *Evans v. Boston Heating Co.*, 157 Mass. 37, 31 N. E. 698; *American Tube-Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63; *People's Mut. Ins. Co. v. Westcott*, 14 Gray 440.

Michigan. *Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695; *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

New Hampshire. *Jones v. Concord & M. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614; *St. Mary's Benev. Ass'n v. Lynch*, 64 N. H. 213, 9 Atl. 98.

New York. *United Gold & Platinum Mines Co. v. Smith*, 44 Misc. 567, 90 N. Y. Supp. 199.

Rhode Island. *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

Vermont. *Warner v. Mower*, 11 Vt. 385.

England. *Tiessen v. Henderson*, [1899] 1 Ch. 861; *Wall v. London & Northern Assets Corporation*, [1898] 2 Ch. 469; *In re Bridport Old Brewery Co.*, 2 Ch. App. 191; *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan*, L. R. 6 Eq. 91.

At common law notices of meetings for any special or exceptional purpose were required to show the object of the call. *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

In Trammell v. Mower, 182 Ala. 347,

general meeting, which is for the transaction of all business incident to the corporate powers and interests, and, in the absence of provision to the contrary, all stated meetings are general.²⁶ But notice of unusual or extraordinary business to be transacted at a general meeting,²⁷ such as an increase of stock,²⁸ or an amendment of the by-

62 So. 528, a notice of a meeting to consider the question of mortgaging corporate real estate was held to be sufficient.

An amendment altering the terms of a resolution cannot be moved at a second meeting called simply for the purpose of confirming or rejecting the resolution. *Wall v. London & Northern Assets Corporation*, [1898] 2 Ch. 469.

Where the directors of a corporation are personally interested in a proposed scheme for its reconstruction, and are to be remunerated by means of a call, on shares, the notice convening the meeting to pass the resolution adopting the scheme must disclose such interest, or the resolution, if adopted, may be attacked by absent stockholders. *Tiessen v. Henderson*, [1899] 1 Ch. 861.

26 United States. *Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co.*, 47 Fed. 15, judgment affirmed 51 Fed. 309, 163 U. S. 564, 41 L. Ed. 265.

Alabama. *Medical & Surgical Society v. Weatherly*, 75 Ala. 248.

Maine. *Sampson v. Bowdoinham Steam Mill Corporation*, 36 Me. 78.

Maryland. *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668, 39 Atl. 527.

New Hampshire. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120.

Ohio. *State v. Bonnel*, 35 Ohio St. 10.

Pennsylvania. *Bagley v. Reno Oil Co.*, 201 Pa. 78, 56 L. R. A. 184, 50 Atl. 760.

Rhode Island. *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

Vermont. *Warner v. Mower*, 11 Vt. 385.

Wyoming. See *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612.

Especially is this true where there is a by-law providing that any business within the power of the corporation may be transacted at annual meetings, although the subject-matter thereof is not specified in the notice. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120.

Where the by-laws provide that "at the annual meetings any matter may be acted upon within the power of the corporation," it is immaterial that a matter voted upon at such a meeting was not named in the call. *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613.

See *In re Empire State Supreme Lodge Degree of Honor*, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, aff'd 103 N. Y. Supp. 1124, where it was held that the publication of certain articles was not sufficient as notice of an election of directors of a mutual insurance company.

27 Jones v. Concord & M. R. R., 67 N. H. 119, 38 Atl. 120; *Bagley v. Reno Oil Co.*, 201 Pa. 78, 56 L. R. A. 184, 50 Atl. 760. And see the cases cited in the following notes.

28 Jones v. Concord & M. R. R., 67 N. H. 119, 38 Atl. 120. See also *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488.

Under a statute permitting increase of the capital stock of a corporation "at any meeting called for the purpose," an increase of stock cannot be voted at an annual meeting, where the notice merely recites that it is to be held to act on the report of the

laws,²⁹ or an increase in the number of directors,³⁰ is generally necessary, and is often expressly required by the statute, charter or by-laws.

Neither the by-laws³¹ nor a usage or custom of the corporation³² can dispense with the necessity for specifying the business to be transacted, where the statute or charter requires it to be specified.

Even where notice is not required, as in the case of an adjourned meeting,³³ if it is sent with notice of the particular business to be then done, it has the effect of limiting the business which may be done to that so noticed.³⁴

A notice stating that the purpose of the meeting is "to transact such business as may be properly brought before said meeting," is not such as to apprise stockholders that an election of directors will be held,³⁵ or that an increase in the capital stock will be considered.³⁶ Nor does a notice specifying that the purpose of the meeting is to consider an amalgamation of the interests of the corporation with that

directors, "and to transact any other business that may be brought before the meeting." And it can make no difference that a by-law provides that "any business within the power of the corporation may be transacted at annual meetings, although the subject thereof is not specified in the notice," for the by-law is inconsistent with the statute. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120.

In *Jones v. Concord & M. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614, a notice was held to be sufficient to authorize an increase of stock at a general meeting.

²⁹ *Bagley v. Reno Oil Co.*, 201 Pa. 78, 56 L. R. A. 184, 50 Atl. 760.

Under a statute or charter providing that by-laws shall be altered only by a general meeting convened by public notice, as in the case of an election of directors, and that the president, when required by twenty members, shall call the general meeting by giving notice as in case of an election of directors, for the transaction of such business as may be specified in such notice, by-laws cannot be changed at an annual meeting where notice is only given of an election of directors.

Mutual Fire Ins. Co. v. Farquhar, 86 Md. 668, 39 Atl. 527. See § 507, supra.

³⁰ *Bagley v. Reno Oil Co.*, 201 Pa. 78, 56 L. R. A. 184, 50 Atl. 760.

³¹ Where the statute provides that the capital stock may be increased "at any meeting called for the purpose," it cannot be legally increased at an annual meeting unless the notice specifies that as one of the purposes for which the meeting is called, even though a by-law provides that "any business within the power of the corporation may be transacted at annual meetings, although the subject-matter thereof is not specified in the notice." *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120. See also the chapter on Stock and Stockholders, *infra*.

³² *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668, 39 Atl. 527.

³³ See § 1653, *infra*.

³⁴ *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379.

³⁵ *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440; *Dunster v. Bernards Land & Sand Co.*, 75 N. J. L. 132, 65 Atl. 123.

³⁶ *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120.

of another corporation and other business in relation thereto and such general business as may be presented, properly apprise the stockholders that the issuance of stock to compensate a director for services rendered will be considered at the meeting.³⁷

The mere statement of unnecessary matters in a notice of a corporate meeting does not invalidate the notice if no one is misled.³⁸ And transactions at a meeting which are within the purposes specified in the notice are not invalid because of other transactions not within such purposes, but the latter only are invalid.³⁹

§ 1640. Presumptions and proof of notice. In the absence of evidence to the contrary, it will be presumed that proper notice of a meeting was given.⁴⁰

³⁷ *United Gold & Platinum Mines Co. v. Smith*, 44 N. Y. Misc. 567, 90 N. Y. Supp. 199.

³⁸ *Langan v. Franklyn*, 29 Abb. N. Cas. (N. Y.) 102.

³⁹ *In re British Sugar Refining Co.*, 26 L. J. Ch. 369, 3 Kay & J. 408.

⁴⁰ *United States*. *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, aff'g 47 Fed. 15, aff'd 163 U. S. 564, 41 L. Ed. 265.

California. *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126.

Georgia. *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925.

Illinois. *Forest Glen Brick & Tile Co. v. Gade*, 55 Ill. App. 181, appeal dismissed 158 Ill. 39, 42 N. E. 65, aff'd 165 Ill. 367, 46 N. E. 286.

Louisiana. *Dunn v. New Orleans Bldg. Co.*, 8 La. 483.

Massachusetts. *Wallace v. Inhabitants of First Parish in Townsend*, 109 Mass. 263; *Sargent v. Webster*, 13 Metc. 497, 46 Am. Dec. 743.

Michigan. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473; *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. 671.

Missouri. *Johnson v. United Rys.*

Co. of St. Louis, 227 Mo. 423, 127 S. W. 63.

New York. *Beardsley v. Johnson*, 49 Hun 607, 1 N. Y. Supp. 608, aff'd 121 N. Y. 224, 24 N. E. 380.

North Carolina. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453.

Vermont. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

Presumption that secretary, who was also a stockholder, had notice. *Cushman v. Illinois Starch Co.*, 79 Ill. 281.

In the absence of allegations to the contrary, the execution of a corporate mortgage presupposes that notice of the stockholders' meeting at which it was authorized was given in the manner prescribed by the statute, and is therefore presumptive proof that the statutory requirements in that regard were complied with. The failure to comply with them is matter of defense. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

Where a stockholder testifies that he had no notice, there is evidence to overcome the presumption, and the question is then one for the jury. *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925.

Under a statute providing that a certificate of the secretary of state as to an increase of the capital stock of a corporation shall be received as evidence of the change and of the authority to effect the same, such a certificate is at least *prima facie* evidence that the notice required by law of the meeting of the stockholders at which the increase was authorized was given.⁴¹

The mailing of notices is sufficiently proved by the affidavit of the secretary of the corporation that he mailed them and his testimony that such affidavit correctly states the facts.⁴² It has been held that proof that notices were mailed in compliance with the law is competent, and is sufficient, when not contradicted, though the record of the meeting does not show that notice was given.⁴³ Proof that a notice was deposited in the mails, properly directed, and with postage prepaid, is *prima facie* evidence that it was received.⁴⁴

It has been held that where written notice is required, the giving of such notice cannot be shown by parol, unless the loss of the notice is first proved.⁴⁵ But even where this rule obtains, a party who himself introduces parol evidence to show notice cannot object to the consideration of similar evidence introduced by his adversary.⁴⁶

In quo warranto proceedings to test the right to a corporate office, the burden is on the petitioner to prove the want of proper notice of the meeting at which the election was held.⁴⁷

Proof of publication may generally be made by the affidavit or testimony of the publisher.⁴⁸

§ 1641. Waiver, estoppel and ratification. Provisions for notice, whether found in the constitution or statutes of the state, or in the

⁴¹ *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

⁴² *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488.

⁴³ *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473.

⁴⁴ *Ashley Wire Co. v. Illinois Steel Co.*, 60 Ill. App. 179, *aff'd* 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410.

That such proof is sufficient, when uncontradicted, to show the giving of notice by mail, see *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 Pac. 123.

⁴⁵ *Stevens v. Eden Meeting-House Society*, 12 Vt. 688.

⁴⁶ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

⁴⁷ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

⁴⁸ In *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 Pac. 123, it was held that publication was sufficiently shown where the record contained the affidavits of the publisher of the newspaper, in which publication was had, that notices, copies of which were attached to the affidavits, were published for the prescribed length of time, and it was admitted that the publisher would testify to the same effect if present.

charter or by-laws of the corporation, are for the benefit of the stockholders, and hence the stockholders may waive notice,⁴⁹ either expressly,⁵⁰ or their acts may be such as to constitute a waiver of no-

⁴⁹In *re Hammond*, 139 Fed. 898; *In re Goldville Mfg. Co. of Goldville*, South Carolina, 118 Fed. 892, *aff'd* 122 Fed. 569; *Bridgeport Electric & Ice Co. v. Meader*, 72 Fed. 115; *Kenton Furnace Railroad & Manufacturing Co. v. McAlpin*, 5 Fed. 737; *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453; *Lutheran Trifoldighed Congregation of Neenah v. St. Paul's English Evangelical Lutheran Congregation of Neenah*, 159 Wis. 56, 150 N. W. 190.

This is true of the provisions of the Constitution and statutes of Missouri requiring sixty days' notice of a meeting called for the purpose of voting on the issuance of bonds or an increase of stock. *State v. Cook*, 178 Mo. 189, 77 S. W. 559; *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238, overruling *State v. McGrath*, 86 Mo. 239, which held that a statutory requirement as to notice of a meeting to consider the question of an increase of stock was for the benefit of the public, and could not be waived.

"The provision of the statute * * *, requiring notice of the first meeting to be given to the subscribers to the capital stock of a corporation being organized, by mailing to them notices stating the object, time and place of such meeting, at least ten days before the time fixed for such meeting, is evidently intended only as a direction 'given with a view merely to the proper, orderly and prompt conduct' of the commissioners in calling such meeting, and a failure to obey that provision will not prejudice the rights of any persons interested therein if the same result is

reached in some other mode. The only persons interested in the result to be attained by giving notice of the object, time and place of a meeting of the subscribers to the capital stock of a corporation for the purpose specified in the statute are the subscribers themselves. We perceive no reason why such persons, where all agree thereto, may not waive the giving of the statutory notice, if the meeting is actually held, as the purpose of the statute in requiring the notices to be given has in such case been accomplished. The mere fact that the word 'shall' is used in the statute in providing for the notice does not render the provision mandatory." *J. W. Butler Paper Co. v. Cleveland*, 220 Ill. 128, 110 Am. St. Rep. 230, 77 N. E. 99, *aff'g* 121 Ill. App. 491. See, as to notice of the first meeting, § 268, *supra*.

But in so far as creditors are concerned there can be no dissolution of the corporation by an amendment of the charter unless the charter provision requiring published notice of a meeting to amend or alter the charter is complied with. So far as concerns creditors, the stockholders cannot waive this requirement. *Cleveland City Forge Iron Co. v. Taylor Bros. Iron Works Co.*, 54 Fed. 82, 85.

⁵⁰In *re Hammond*, 139 Fed. 898; *Bridgeport Electric & Ice Co. v. Meader*, 72 Fed. 115; *People v. Matthiessen*, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, *aff'g* 193 Ill. App. 328.

A meeting is valid though no notice is given if held with the written consent of all of the stockholders. *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

Written waivers of notice signed

tice.⁵¹ The requirement that the notice shall specify the business to be transacted at the meeting may also be waived by the stockholders.⁵²

It follows that if all the stockholders or members who are entitled to vote are present, the validity of a meeting is not affected by failure to give notice, or by defects or irregularities in giving notice.⁵³

by all the stockholders dispense with the necessity for notice. *J. W. Butler Paper Co. v. Cleveland*, 220 Ill. 128, 110 Am. St. Rep. 230, 77 N. E. 99, aff'g 121 Ill. App. 491; *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159; *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238.

As to the effect of signing an agreement for a meeting to be held on a certain day, see *Tramwell v. Mower*, 182 Ala. 347, 62 So. 528.

But a waiver signed by a part only of the stockholders and by a person who is not a stockholder will not dispense with the necessity for notice to the other stockholders. *Smith v. Schoodoc Pond Packing Co.*, 109 Me. 555, 84 Atl. 268.

A waiver signed by a stockholder who is under guardianship is ineffectual. *Smith v. Schoodoc Pond Packing Co.*, 109 Me. 555, 84 Atl. 268.

⁵¹ *In re Hammond*, 139 Fed. 898; *Bridgeport Electric & Ice Co. v. Meader*, 72 Fed. 115; *People v. Matthiessen*, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, aff'g 193 Ill. App. 328.

⁵² *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379; *Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695.

This is true though the statute provides that no meeting shall be legal or valid, or the proceedings thereof of any force or effect, unless a notice specifying the object thereof shall be given. *Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695.

⁵³ *United States. Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, rev'g on

other grounds 41 Fed. 531; *In re Goldville Mfg. Co. of Goldville, South Carolina*, 118 Fed. 892, aff'd 122 Fed. 569; *Bridgeport Electric & Ice Co. v. Meader*, 72 Fed. 115; *Campbell v. Argenta Gold & Silver Min. Co.*, 51 Fed. 1; *Kenton Furnace Railroad & Manufacturing Co. v. McAlpin*, 5 Fed. 737.

Alabama. *Nelson v. Hubbard*, 96 Ala. 238, 11 So. 428. See also *Tramwell v. Mower*, 182 Ala. 347, 62 So. 528.

California. *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

Connecticut. *Gold Bluff Mining & Lumber Corporation v. Whitlock*, 75 Conn. 669, 55 Atl. 175.

Illinois. *People v. Matthiessen*, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, aff'g 193 Ill. App. 328; *J. W. Butler Paper Co. v. Cleveland*, 220 Ill. 128, 110 Am. St. Rep. 230, 77 N. E. 99, aff'g 121 Ill. App. 491; *Thompson v. Citizens' Horse Ry. Co.*, 104 Ill. 462; *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

Indiana. *Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547; *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

Maryland. *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254.

Massachusetts. *Stebbins v. Merritt*, 10 Cush. 27.

Missouri. *State v. Cook*, 178 Mo. 189, 77 S. W. 559; *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238; *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502; *Manhattan Brass Co. v. Webster, Glass & Queensware Co.*, 37 Mo. App. 145.

And if all are present and participate, they may transact business not specified in the notice.⁵⁴ But the mere fact that all of the stockholders know in some other way than the one prescribed of the time and place of the meeting is not a waiver of notice.⁵⁵

A stockholder who is present and participates, without objection, in a meeting, cannot afterwards complain of failure to give notice, or defects therein, either to himself or to other stockholders.⁵⁶ And this

New Hampshire. See *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120.

New Jersey. In re *Griffing Iron Co.*, 63 N. J. L. 168, 41 Atl. 931, aff'd 63 N. J. L. 357, 57 L. R. A. 624, 46 Atl. 1097.

New York. *People v. Peck*, 11 Wend. 604.

North Carolina. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

Wisconsin. *Lutheran Trifoldhged Congregation of Neenah v. St. Paul's English Evangelical Lutheran Congregation of Neenah*, 159 Wis. 56, 150 N. W. 190.

England. In re *British Sugar Refining Co.*, 26 L. J. Ch. 369, 3 Kay & J. 408.

"If all the members consent to an organization which disregards the statute requirements as to notice, the organization is valid." *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420.

"It is pertinent to inquire what good or useful purpose would be subserved by requiring a public notice to be given for a stockholders' meeting if all the stockholders actually knew of the meeting, and were personally present at the meeting. A notice published in a paper is only constructive notice. It is never held to be as good as actual personal notice. Its sole purpose is to call the stockholders together. If they all get together they are as much present at the

meeting as if they had come upon notice. The notice is a means to an end. That end is to get the parties in interest together, or give them an opportunity to be present. But, when they are all present, the end is attained. A summons is a notice to bring a party into court. But, if the summons is never issued or served, and yet the party voluntarily comes into court, and tries the case, neither he nor the adversary party can be heard to say that the judgment is void, or even voidable. So it is with a stockholders' meeting, if all the stockholders are actually assembled in meeting. When assembled, the power to make a contract or execute a mortgage is just as full and complete as if a notice had been given of intention to hold the meeting. Their acts bind only themselves." *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 155, 61 S. W. 238.

If the real owner of shares is present, the proceedings are not invalid because of the absence of the nominal owner. *Wood v. Corry Water Works Co.*, 44 Fed. 146, 12 L. R. A. 168.

⁵⁴ *Gold Bluff Mining & Lumber Corporation v. Whitlock*, 75 Conn. 669, 55 Atl. 175; *Rex v. Theodorick*, 8 East 543. See also *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120.

⁵⁵ *People v. Matthiessen*, 193 Ill. App. 328, aff'd 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056.

⁵⁶ **United States.** *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, rev'g on other grounds 41 Fed. 531.

Illinois. *People v. Matthiessen*, 269

is equally true where he is represented and participates by proxy.⁵⁷ Nor, as a rule, can he object that business other than that specified in the notice was transacted.⁵⁸ But there is authority to the effect that a member who was present and voted against the action taken may object that such notice was not given to members who did not attend, on the theory that absent members might have attended and assisted him in preventing such action if they had been informed of the purpose of the meeting.⁵⁹

Where stock is owned by a partnership, one member of the firm may waive notice in behalf of all, and if he attends and participates in the meeting, the others are estopped to deny that they had notice, nor is the meeting invalid because they had no notice and did not attend.⁶⁰ And it is immaterial, under such circumstances, that one member of the firm dies before the meeting is held, since the surviv-

Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, aff'g 193 Ill. App. 328.

Indiana. Jones v. Milton & R. Turnpike Co., 7 Ind. 547.

Maine. Bucksport & B. R. Co. v. Buck, 68 Me. 81.

Missouri. In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

New Jersey. Weinburgh v. Union St. Ry. Advertising Co., 55 N. J. Eq. 640, 37 Atl. 1026.

New York. In re Keller, 116 App. Div. 58, 101 N. Y. Supp. 133.

North Carolina. Hill v. Atlantic & N. C. R. Co., 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

Oregon. Nickum v. Burekhardt, 30 Ore. 464, 60 Am. St. Rep. 822, 48 Pac. 474, 47 Pac. 788.

West Virginia. Germer v. Triple-State Nat. Gas & Oil Co., 60 W. Va. 143, 54 S. E. 509.

Wisconsin. Lutheran Trifolded Congregation of Neenah v. St. Paul's English Evangelical Lutheran Congregation of Neenah, 159 Wis. 56, 150 N. W. 190.

England. In re British Sugar Refining Co., 26 L. J. Ch. 369, 3 Kay & J. 408.

That a stockholder who has assigned his stock in trust receives no notice and is not present at the meeting is immaterial, where the trustees attend and vote in favor of the action taken, as they have a right to do under the trust agreement. Parker v. Hill, 68 Wash. 134, 122 Pac. 618.

⁵⁷ Handley v. Stutz, 139 U. S. 417, 35 L. Ed. 227, rev'g on other grounds 41 Fed. 531; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488; Synnott v. Cumberland Bldg. Loan Ass'n, 117 Fed. 379; Columbia Nat. Bank of Tacoma v. Mathews, 85 Fed. 934; Jones v. Milton & R. Turnpike Co., 7 Ind. 547; Foote v. Greilick, 166 Mich. 636, 132 N. W. 473. See also Tramwell v. Mower, 182 Ala. 347, 62 So. 528.

⁵⁸ Synnott v. Cumberland Bldg. Loan Ass'n, 117 Fed. 379. See also Jones v. Concord & M. R. R., 67 N. H. 119, 38 Atl. 120.

⁵⁹ Jones v. Concord & M. R. R., 67 N. H. 119, 38 Atl. 120.

⁶⁰ Kenton Furnace Railroad & Manufacturing Co. v. McAlpin, 5 Fed. 737.

ing partner has a right to the possession of the firm's personal property and to control and wind up its affairs.⁶¹

The mere presence of a stockholder at a meeting will not amount to a waiver of proper notice where he does not participate in it.⁶² Nor will the mere presence of his attorneys, where they are themselves stockholders, and where they take no part in the meeting and in no way assume to represent him.⁶³ And it has been intimated that a stockholder will not be estopped by participation in the meeting under protest.⁶⁴

The fact that a stockholder merely protests against holding the meeting, without giving the want of notice as a reason, will not estop him from subsequently attacking the validity of the meeting on that ground.⁶⁵ And the mere fact that he demands a pledge of the chairman that the meeting do nothing but adjourn does not amount to participation in the meeting.⁶⁶

Proceedings at a meeting held without proper notice may be ratified, expressly or by acquiescence, by all the absent stockholders or members.⁶⁷ And acts of the majority at a meeting which is illegal

⁶¹ *Kenton Furnace Railroad & Manufacturing Co. v. McAlpin*, 5 Fed. 737.

⁶² His presence is not a waiver, where he refuses to consent to the meeting being held and does not participate in it. *People v. Matthiessen*, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, aff'g 193 Ill. App. 328.

Where the notice of a special meeting does not specify that it is for the purpose of electing directors, the mere fact that a stockholder attends it is not a waiver of the right to object to the holding of the election, where he does not participate in the election. *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488.

⁶³ *In re Keller*, 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133.

⁶⁴ *In Bartlett v. Fourton*, 115 La. 26, 38 So. 882, it was held that stockholders who were present and participated in the election could not complain though they participated under protest, where it was not alleged that they were injured by the failure to give the required notice, but it was

intimated that if the allegation of protest had been accompanied by an allegation of injury the protest would have prevented an estoppel.

⁶⁵ *People v. Matthiessen*, 193 Ill. App. 328, aff'd 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056.

In *Smith v. Stone*, 21 Wyo. 62, 128 Pac. 612, it was held, however, that one who attends and participates in a meeting and objects to the adoption of a resolution solely on other grounds cannot thereafter object that the notice of the meeting did not specify that the matter covered by the resolution would be considered.

⁶⁶ *People v. Matthiessen*, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, aff'g 193 Ill. App. 328.

⁶⁷ *United States. Atlantic Trust Co. v. The Vigilancia*, 73 Fed. 452; *Bridgeport Electric & Ice Co. v. Meader*, 72 Fed. 115; *Central Trust Co. v. Condon*, 67 Fed. 84; *Central Trust Co. v. Bridges*, 57 Fed. 753.

^{*} *Alabama. Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

for want of proper notice may be afterwards ratified by the majority, at a regular and legal meeting.⁶⁸

A stockholder may be estopped by laches to object to want of notice, or defects therein.⁶⁹ And officers or stockholders who participated in calling a meeting cannot object that the call was irregular.⁷⁰

A corporation which has received and appropriated the benefits of a contract cannot escape liability thereon on the ground that

Arkansas. *J. K. Siphon Ventilator Co. v. Hutton*, 175 S. W. 30.

North Carolina. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

Wisconsin. *Lutheran Trifolded Congregation of Neenah v. St. Paul's English Evangelical Lutheran Congregation of Neenah*, 159 Wis. 56, 150 N. W. 190.

A stockholder who is not notified of a meeting may be estopped by his knowledge and approval, although not present. See *Young v. Toledo & S. H. R. Co.*, 76 Mich. 485, 43 N. W. 632.

One who receives stock authorized to be issued at a meeting cannot object that no notice of such meeting was given. *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, rev'g on other grounds 41 Fed. 531.

Where all of the stockholders ratify the issuance and pledging of corporate bonds, the bonds and pledge are valid though they were authorized at a meeting of which the prescribed notice had not been given. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

⁶⁸ *Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613. And see *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227; *Briton Medical, General & Life Ass'n v. Jones*, 61 L. T. (N. S.) 384.

That a vote was passed in respect

to a matter not named in the call may be cured by a subsequent ratification of the action taken. *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613.

Where a stockholder who had no notice of a special meeting at which a lease of corporate property was authorized, introduces at a subsequent stated meeting a resolution to have the lease set aside, which resolution is tabled, this is a ratification of the proceedings of the first meeting in respect to the lease and cures the failure to give notice. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

Where a lease of corporate property is authorized at a special meeting of which one of the stockholders has no notice and at which he is not present, but subsequently at a regular annual meeting, of which he has notice, the facts relating to the lease are reported by the president, and his report is adopted, this constitutes an approval of the lease and validates it. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

⁶⁹ *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. (U. S.) 381, 16 L. Ed. 488; *Farmers' Loan & Trust Co. v. Toledo*, A. A. & N. M. Ry. Co., 67 Fed. 49; *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

⁷⁰ *Bucksport & B. R. Co. v. Buck*, 68 Me. 81; *Christopher v. Noxon*, 4 Ont. 672.

proper notice was not given of the meeting at which it was authorized.⁷¹ And both a de facto consolidated corporation and its stockholders are estopped to deny the validity of its bonds on the ground that the required notice was not given to the stockholders of the constituent companies of the meetings at which the consolidation was authorized.⁷²

IV. CONDUCT OF MEETINGS AND ELECTIONS

§ 1642. In general. The mode of conducting corporate elections may be regulated by by-laws, if they are reasonable and not inconsistent with the charter.⁷³ Regulations are sometimes to be found in charters or in the general statutes.

Aside from express regulations, all that is necessary is that the meeting shall be conducted by the proper persons, with fairness and

⁷¹ *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, aff'd 148 Fed. 1019; *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, aff'g 47 Fed. 15, aff'd 163 U. S. 564, 41 L. Ed. 265; *Campbell v. Argenta Gold & Silver Min. Co.*, 51 Fed. 1; *J. K. Siphon Ventilator Co. v. Hutton* (Ark.), 175 S. W. 30. See also *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

A corporation which has received the benefits of a corporate mortgage, and paid interest upon it is estopped to deny its validity on the ground that the required notice of the stockholders' meeting at which the directors who authorized the execution of the mortgage were elected, had not been given. *The Vigilancia*, 73 Fed. 452.

Where the corporation has received and appropriated the proceeds of corporate bonds, neither it nor its creditors can attack their validity nor the validity of a mortgage given to secure them on the ground that proper notice of the meeting at which they were authorized was not given. *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

Where notice of a meeting called to pass on the issuance of bonds is waived by all of the stockholders, the corporation cannot deny the validity of the bonds authorized at such meeting because no notice was given. *Riesterer v. Horton Land & Lumber Co.*, 160 Mo. 141, 61 S. W. 238.

The recital in a deed of trust securing bonds that notice of the meeting at which they were authorized was given estops the corporation, as against bona fide holders, to contest the validity of the bonds on the ground of the insufficiency of the notice. *Georgia Granite R. Co. v. Miller*, 144 Ga. 665, 87 S. E. 897.

⁷² *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49.

⁷³ *People v. Crossley*, 69 Ill. 195; *Kearney v. Andrews*, 10 N. J. Eq. 70; *People v. American Institute of New York*, 44 How. Pr. (N. Y.) 468; *Juker v. Com.*, 20 Pa. St. 484; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

As to limitations upon the power to make by-laws generally, see Chap. 16.

As to the conduct of the meeting to organize, see Chap. 9.

good faith towards all who are entitled to take part, and in such a way as to enable them to express their vote upon questions coming before the meeting.⁷⁴

The ordinary parliamentary usages apply to such meetings.⁷⁵ The presiding officer may properly refuse to put a motion to do an act which the meeting has no legal right to do,⁷⁶ and his refusal to entertain an appeal from his ruling under such circumstances will not justify the meeting in selecting another presiding officer to take his place.⁷⁷ He may also stop debate after the matter under consideration has been reasonably discussed.⁷⁸

In order that the members may be held to have assented to any particular matter, so as to bind the corporation, their assent must have been in some way expressed.⁷⁹

If a meeting is held or conducted fraudulently or unfairly, even though a majority of the stockholders or members may express their assent, it will be illegal, and a court of equity will set the proceedings aside at the suit of injured stockholders or members.⁸⁰

⁷⁴ See *Fox v. Allensville*, C. S. & V. Turnpike Co., 46 Ind. 31; *People v. Albany & S. R. Co.*, 55 Barb. (N. Y.) 344, 38 How. Pr. 228; *Philips v. Wickham*, 1 Paige (N. Y.) 590; *In re Mohawk & H. R. Co.*, 19 Wend. (N. Y.) 135.

⁷⁵ *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

The rules of Cushing's Manual will govern debates at corporate meetings if adopted by the by-laws. *People v. American Institute of New York*, 44 How. Pr. (N. Y.) 468.

⁷⁶ He may refuse to entertain a motion to declare the places of certain absent directors vacant, where directors cannot be removed without notice or an opportunity to be heard, and a motion to elect directors singly where the statute and by-laws give the members the right to cumulate their votes at an election of directors. *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882.

⁷⁷ *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882.

⁷⁸ *Wall v. London & Northern Assets Corp.*, [1898] 2 Ch. 469.

⁷⁹ *Landers v. Frank St. M. E. Church of Rochester*, 114 N. Y. 626, 21 N. E. 420.

⁸⁰ *Johnston v. Jones*, 23 N. J. Eq. 216; *People v. Albany & S. R. Co.*, 55 Barb. (N. Y.) 344, 38 How. Pr. (N. Y.) 228; *State v. Smith*, 15 Ore. 98, 15 Pac. 137, 14 Pac. 814; *Com. v. Patterson*, 158 Pa. St. 476, 27 Atl. 998.

Where part of the stockholders at a meeting withdrew on the pretext of escaping disorder, but in reality to carry out a preconceived scheme to organize the meeting in their own interest, the call to withdraw being, not to those desiring an orderly meeting, but to those of their party, it was held that the meeting of the seceders was illegal, and its defects of organization were not cured by a subsequent invitation to the others to come over and vote. *Com. v. Patterson*, 158 Pa. St. 476, 27 Atl. 998.

It is always safer, of course, in holding a corporate meeting, to comply strictly with all provisions in the statutes, charter, and by-laws, for they may be such that a failure to comply therewith will render the proceedings void or voidable. But this result not always follows a noncompliance with such provisions. It is a general rule that mere irregularities will not render the proceedings invalid, if the substantial rights of stockholders or members are not affected,⁸¹ or where all of them are present and concur in the action taken.⁸² And the validity of the proceedings is not affected by failure to comply with provisions which are merely directory.⁸³

One who is present at a meeting at which he is elected a director and who accepts the office and exercises its duties, cannot escape its responsibilities because of irregularities in his election.⁸⁴

Nor can informalities or irregularities be taken advantage of by third persons, not members of the corporation, where the action taken affects only the conduct of the corporation within the scope of its chartered powers.⁸⁵

⁸¹ **Kentucky.** Beha v. Martin, 161 Ky. 838, 171 S. W. 393.

Massachusetts. Wardens of Christ Church v. Pope, 8 Gray 140.

New Jersey. Hardenburgh v. Farmers' & Mechanics' Bank of New Brunswick, 3 N. J. Eq. 68.

New York. People v. Albany & S. R. Co., 55 Barb. 344, 38 How. Pr. 228; In re Mohawk & H. R. Co., 19 Wend. 135.

Oregon. State v. Smith, 15 Ore. 98, 15 Pac. 137, 386, 14 Pac. 814.

⁸² An agreement as to the allotment of stock is valid, though made at a meeting which is not regular, if all the stockholders are present and concur in such agreement. Sheldon Canal Co. v. Miller (Tex. Civ. App.), 90 S. W. 206.

⁸³ Downing v. Potts, 23 N. J. L. 66; Union Nat. Bank of Troy v. Scott, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

A statutory provision that a list of stockholders shall be made out ten days before an election is merely directory, and noncompliance therewith

does not of itself avoid an election. Downing v. Potts, 23 N. J. L. 66.

The fact that the list of stockholders exhibited and acted upon was not a true list does not render an election invalid, even though this may have been known by the parties who exhibited it. Johnston v. Jones, 23 N. J. Eq. 216.

⁸⁴ Union Nat. Bank of Troy v. Scott, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

As to the duties and liabilities of de facto officers, see generally Chap. 42, *infra*.

⁸⁵ Council of Jewish Women v. Boston Section Council of Jewish Women, 212 Mass. 219, 98 N. E. 862.

Irregularities in an election of directors, or the fact that the election was illegal, cannot be made the basis of a collateral attack on the acts of the directors. Jones v. Bonanza Mining & Milling Co., 32 Utah 440, 91 Pac. 273.

Informalities in a meeting at which the issuance of bonds and a mortgage securing them was authorized cannot

The proceedings at a meeting are not invalid by reason of the presence of persons not stockholders or members, unless it is shown that they voted, and that their votes were necessary to carry the resolution complained of.⁸⁶

Statements, made by stockholders in the course of a meeting, which bear on the conduct and honesty of other stockholders or officers in respect to corporate affairs are privileged and cannot be made the basis of an action, provided they are pertinent to the matter in hand and are made in good faith and without malice,⁸⁷ and the same is true of communications between stockholders in regard to such matters.⁸⁸ But this immunity does not extend to newspaper publishers who publish a report of a corporate meeting.⁸⁹

§ 1643. Quorum. In the case of a select board, like a board of directors, a majority of the members is necessary to constitute a quorum, and a less number cannot hold a meeting and transact business; but this rule does not apply to a meeting of the stockholders or members of a corporation. In the absence of express provision to the contrary, any number who may be present, provided there are at least two, and assuming that notice of the meeting has been given, when necessary, constitute a quorum for the transaction of business, even though they neither constitute a majority of the members nor represent a majority of the stock.⁹⁰

be taken advantage of by a general creditor to avoid the bond and mortgage, where all the stockholders were present and voted in favor of issuing them. *William Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, aff'g 118 Fed. 892.

⁸⁶ *Madison Ave. Bapt. Church v. Baptist Church in Oliver Street*, 5 Rob. (N. Y.) 649.

⁸⁷ *Kimball v. Post Pub. Co.*, 199 Mass. 248, 19 L. R. A. (N. S.) 862, 127 Am. St. Rep. 492, 85 N. E. 103.

⁸⁸ Such as statements in a telegram reflecting on competency of a former manager of the corporation who was engaged in a controversy respecting an election. *Ashcroft v. Hammond*, 197 N. Y. 488, 90 N. E. 1117, rev'g 132 N. Y. App. Div. 3, 116 N. Y. Supp. 362.

⁸⁹ *Kimball v. Post Pub. Co.*, 199

Mass. 248, 19 L. R. A. (N. S.) 862, 127 Am. St. Rep. 492, 85 N. E. 103.

⁹⁰ **United States.** *Eagle Iron Co. v. Colyar*, 156 Fed. 954; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025.

Georgia. *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

Indiana. *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

Kentucky. *Gilechrist v. Collopy*, 119 Ky. 110, 82 S. W. 1018.

Maryland. *Compare University of Maryland v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72.

Minnesota. *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547; *Everett v. Smith*, 22 Minn. 53.

New York. *Ashcroft v. Hammond*, 132 App. Div. 3, 116 N. Y. Supp. 362, rev'd on other grounds 197 N. Y. 488,

In England it has been held that there must be at least two members present, and there are dicta to the same effect in a number of cases in this country.⁹¹ But there is authority to the effect that a meeting held by a single stockholder is valid, at least where he holds the proxies of other stockholders.⁹²

Sometimes, however, by express provision of the statute, charter, or by-laws, a majority of the members or stockholders, or persons representing a majority of the stock, or sometimes more or less, are necessary to constitute a quorum for the transaction of business, and less than the required number cannot hold a valid meeting, although they may adjourn.⁹³

90 N. E. 1117; *New York Electrical Workers' Union v. Sullivan*, 122 App. Div. 764, 107 N. Y. Supp. 886; *In re Election of Directors of Rapid Transit Ferry Co.*, 15 App. Div. 530, 44 N. Y. Supp. 539, rev'g 19 Misc. 409, 43 N. Y. Supp. 538; *Ex parte Willecks*, 7 Cow. 402, 17 Am. Dec. 525; *Madison Ave. Bapt. Church v. Baptist Church in Oliver Street*, 5 Rob. 649; *Field v. Field*, 9 Wend. 395.

Pennsylvania. *Craig v. First Presb. Church of Pittsburgh*, 88 Pa. St. 42, 32 Am. Rep. 417; *Granger v. Grubb*, 7 Phila. 350.

A majority of all the members is not necessary to do business at an annual meeting, where the number of members is indefinite and changing. *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882.

This is the rule where the statute provides that the directors shall be chosen "by a plurality of the votes of the stockholders voting at such election." *In re Election of Directors of Rapid Transit Ferry Co.*, 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539, rev'g 19 N. Y. Misc. 409, 43 N. Y. Supp. 538. Or where the statute provides that an election of directors shall be held by such of the stockholders as may attend for that purpose, without reference to the number of shares they may own. *Darrin v. Hoff*, 99 Md. 491, 58 Atl. 196.

⁹¹ *Sharp v. Dawes*, 2 Q. B. D. 26, 46 L. J. Q. B. 104.

See dicta in cases cited in preceding note.

⁹² *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547. In this case it is said: "It is immaterial whether the number present is only one or more than one. It was held in *Sharp v. Dawes*, 46 Law J. Q. B. 104, followed reluctantly in another case, that one person cannot constitute a quorum; that at least two persons are necessary to hold a corporate meeting; but this decision is based upon a narrow lexicographical definition of the word 'meeting,' as the coming together of two or more persons,—a reason that does not commend itself to our judgment." This holding was followed as the law of the case on a subsequent appeal. *Morrill v. Little Falls Mfg. Co.*, 60 Minn. 405, 62 N. W. 548. It is to be noted, however, that the stockholder who held the meeting in question in this case held the proxies of certain other stockholders and voted their stock as well as his own.

⁹³ *Peirce v. New Orleans Bldg. Co.*, 9 La. 397, 29 Am. Dec. 448; *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440, 10 Atl. 250; *Franklin Trust Co. v. Rutherford*, B. S. & C. Elec. Co., 57 N. J. Eq. 42, aff'd 58 N. J. Eq. 584; *Weinburgh v. Union St. Ry. Advertis-*

A by-law providing what shall constitute a quorum is invalid if in conflict with the provisions of a statute on the subject,⁹⁴ as, for example, a by-law providing that a majority of the entire stock is neces-

ing Co., 55 N. J. Eq. 640; *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

Provisions of the statutes as to what shall constitute a quorum are mandatory, and if the required amount of stock is not represented at the meeting, an election held thereat is invalid. *Hill v. Town*, 172 Mich. 508, 42 L. R. A. (N. S.) 799, 138 N. W. 334.

A statutory provision that "the stockholders holding a majority of the stock at any meeting of the stockholders, shall be capable of transacting the business of that meeting," means that a majority of all the stock of the corporation must be represented at the meeting before it can transact any business. *Hill v. Town*, 172 Mich. 508, 42 L. R. A. (N. S.) 799, 138 N. W. 334.

And the same is true of a by-law providing that "A majority of the stock present in person or by proxy at any meeting of the stockholders shall constitute a quorum." In re Election of Directors of Rapid Transit Ferry Co., 19 N. Y. Misc. 409, 43 N. Y. Supp. 538, rev'd on other grounds 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539.

In Georgia the statute requires a representation of a majority of the stock only at the meeting for organization. In respect to other meetings the common-law rule prevails. *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

In New York, in the case of membership corporations, the statute provides that the by-laws may fix the number of members, not less than one-third, or if one-third be nine or more, not less than nine, whose pres-

ence shall be necessary to constitute a quorum. *New York Electrical Workers' Union v. Sullivan*, 122 N. Y. App. Div. 764, 107 N. Y. Supp. 886. It has been held that the fair intentment of this provision "is that a quorum should be not less than one-third of the members, unless specifically provided that, if one third be nine or more, it be not less than nine." *New York Electrical Workers' Union v. Sullivan*, 122 N. Y. App. Div. 764, 107 N. Y. Supp. 886.

The statute, rather than the common-law rule, will govern if the provisions of the by-laws on the subject are for any reason invalid. *New York Electrical Workers' Union v. Sullivan*, 122 N. Y. App. Div. 764, 107 N. Y. Supp. 886.

In North Carolina a majority of all the stock issued and outstanding must be present in order to elect directors. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

In Pennsylvania at least a majority of the stock is necessary to constitute a quorum, and a by-law requiring more than a majority to elect directors is valid so long as it is used for a lawful purpose. *Lutz v. Webster*, 249 Pa. 226, 94 Atl. 834.

⁹⁴ *New York Investment & Improvement Co. v. Gannon*, 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539, rev'g sub nom. In re Election of Directors of Rapid Transit Ferry Co., 19 N. Y. Misc. 409, 43 N. Y. Supp. 538; *Clark v. Wild*, 85 Vt. 212, 81 Atl. 536. See also *Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855, aff'g 145 N. Y. App. Div. 916, 130 N. Y. Supp. 20.

As to the validity and effect of such by-laws, see § 516.

sary to constitute a quorum, where the statute provides that the election shall be held by such of the stockholders as may attend for that purpose, without reference to the number of shares they may own.⁹⁵ Nor can a course of corporate action affect the question, where the number necessary to constitute a quorum is prescribed by the statute.⁹⁶ And it has been held that even where the statute permits the number necessary to constitute a quorum to be fixed by the by-laws, a by-law requiring more than a majority must be deemed to be subordinate to a statute requiring an annual election of directors, and cannot be used to defeat it by preventing the holding of such an election.⁹⁷ Usually only stock which has actually been issued is to be taken into account in determining whether the required amount is represented.⁹⁸

Where a certain number are required to be present, and proceedings are begun when a sufficient number are present, but enough after-

⁹⁵ *Darrin v. Hoff*, 99 Md. 491, 58 Atl. 196.

As to by-laws regulating corporate meetings, see § 516.

Such a by-law is invalid where the statute provides that the directors shall be chosen "by a plurality of the votes of the stockholders voting at such election." *New York Investment & Improvement Co. v. Gannon*, 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539, rev'g sub nom. In re Election of Directors of Rapid Transit Ferry Co., 19 N. Y. Misc. 409, 43 N. Y. Supp. 538.

⁹⁶ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

⁹⁷ A by-law requiring four-fifths of the stock to constitute a quorum cannot be used by the holders of more than one-fifth, but less than a majority, of the stock to prevent the holding of an annual meeting for the election of directors, by refusing to attend it, for the purpose of continuing one of their number as president, especially where he has ceased to perform the duties of that office. Under such circumstances a court of equity will order an election at the instance of the other stockholders at which a ma-

jority of the stock shall constitute a quorum. *Lutz v. Webster*, 249 Pa. 226, 94 Atl. 834. See also § 516.

⁹⁸ A by-law providing that a quorum shall consist of one-third of the stockholders, holding at least one-third of the shares, does not require that one-third of the authorized shares of stock shall be represented, but only requires that those present shall hold one-third of the shares actually issued. *Castner v. Twitchell-Champlin Co.*, 91 Me. 524, 40 Atl. 558. In this case the court distinguishes *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440, 10 Atl. 250, which holds that under by-laws providing that the capital stock shall be a certain amount, divided into four hundred shares of a certain amount each, and that "no business shall be transacted at any meeting of the stockholders, unless a majority of the stock is represented," a majority of the full authorized number of shares must be represented, although all the shares have not been subscribed for and also states that the latter case seems to go to the extreme limit of strict construction, and must be regarded as overruled in so far as it conflicts.

wards leave, although wrongfully, to reduce the number below that required, nothing further can be done.⁹⁹

But it has been held that even a majority cannot capriciously withdraw, after the meeting is legally organized, for the very purpose of breaking a quorum and then obtain relief from the courts in respect to acts subsequently done by the meeting on the ground that a quorum was not present when such acts were done.¹ And it has also been held that "an adjourned meeting of a regular meeting may transact lawful business without reference to the number of those who attend."²

"A majority" of the stock represented at a meeting "cannot separate itself from the minority and be a quorum. All present are the quorum."³

The act of the stockholders at a meeting wherein only a minority of the stock is represented cannot be ratified and rendered valid by the subsequent assent of the holders of a majority of the stock, if such assent is given elsewhere than at a meeting of stockholders.⁴

In the absence of evidence to the contrary, it will be presumed that a quorum was present.⁵

§ 1644. Presiding officer. The charter or by-laws often provide who shall preside at meetings of the stockholders, and, when such is the case, their provisions should be complied with.⁶

⁹⁹ Ex parte Rogers, 7 Cow. (N. Y.) 526, 530n; *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

¹ *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

² This is true though a majority of the stock is not represented at the adjourned meeting. *Hiles v. C. A. Hiles & Co.*, 120 Ill. App. 617.

³ In re Election of Directors of Rapid Transit Ferry Co., 19 N. Y. Misc. 409, 43 N. Y. Supp. 538, rev'd on other grounds sub nom. *New York Investment & Improvement Co. v. Gannon*, 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539, quoted with approval in *Hill v. Town*, 172 Mich. 508, 42 L. R. A. (N. S.) 799, 138 N. W. 334.

⁴ *Peirce v. New Orleans Bldg. Co.*, 9 La. 397, 29 Am. Dec. 448.

⁵ *Citizens' Mut. Fire Ins. Co. v.*

Sortwell, 8 Allen (Mass.) 217; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628. See also *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

⁶ *People v. Peck*, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

Where the by-laws provided that the president, if present, should preside; and that, in his absence, a president pro tempore should be chosen, but the president, although present at a meeting, did not preside, and no president pro tempore was chosen, and no person who participated was authorized to receive the ballots and declare the result, and only a portion of the stockholders present participated in the election, it was held that there was no legal election. *State v. Pettineli*, 10 Nev. 141.

Where no provision is made in the charter or by-laws for a chairman, he may be selected by the stockholders at the organization of the meeting.⁷ No particular formality is required in his selection in the absence of a provision to the contrary.⁸

If a person assumes to act as chairman and the stockholders acquiesce, it is sufficient, although he has never been formally elected or appointed.⁹ And a stockholder who acquiesces in the organization of the meeting and participates in the transaction of business thereat, cannot subsequently contend that the president of the corporation had no right to act as chairman without election by the stockholders.¹⁰

The presiding officer need not be a stockholder unless this is expressly required.¹¹

The president may appoint another person to call the meeting to order and to act for him in his absence, until a chairman is chosen by the stockholders.¹²

But the regular presiding officer of a nonstock corporation has no authority to appoint a substitute to preside in his place where the constitution prescribes who shall preside in case of his absence or inability to act.¹³ By attempting to do so, however, he does not forfeit his right to further preside at that meeting, but may resume the chair, and thereafter legally put motions and declare them carried.¹⁴

§ 1645. Inspectors of elections. In the absence of express provision to the contrary, the power to appoint inspectors of elections is in the stockholders or members,¹⁵ and not in the directors, though it is

⁷ *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

⁸ *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

⁹ *In re Argus Printing Co.*, 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

¹⁰ *In re Argus Printing Co.*, 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

¹¹ *Stebbins v. Merritt*, 10 Cush. (Mass.) 27; *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

¹² *People v. Albany & S. R. Co.*, 55 Barb. (N. Y.) 344, 38 How. Pr. 228, aff'd 5 Lans. (N. Y.) 25, 57 N. Y. 161.

¹³ The first vice president cannot appoint such a substitute where the constitution provides that the second vice president shall preside in such circumstances. *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

¹⁴ *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

¹⁵ *State v. Merchant*, 37 Ohio St. 251.

If inspectors chosen at one annual meeting to act at the next one do not qualify and act because restrained by injunction from so doing, the stockholders attending the meeting may choose other inspectors. *People v. Albany & S. R. Co.*, 55 Barb. 344,

sometimes provided that they shall be appointed by the latter.¹⁷ A by-law may vest the power in the president.¹⁸ And statutes sometimes provide that the president shall himself act as inspector.¹⁹ Statutory provisions as to the number of inspectors must be complied with.²⁰

An election is not invalid because the inspectors were not stockholders as required by the by-laws,²¹ nor because they were not sworn in the form prescribed by the charter or by-laws, or failed to subscribe the oath,²² or to file it.²³

An inspector may be voted for as a candidate.²⁴ And the fact that one of the inspectors was a candidate for office does not render an election void, or even voidable,²⁵ unless he acts fraudulently or illegally.²⁶ Nor is the election invalidated by the fact that the inspectors are employees of the company, provided they hold the election fairly and

judgment affirmed on this point 5 Lans. (N. Y.) 25, 57 N. Y. 161.

¹⁷ State v. Merchant, 37 Ohio St. 251.

Where the charter provides for the election of three inspectors by the stockholders, any two of whom may act, and authorizes the directors to fill vacancies among the inspectors so chosen, the directors may provisionally appoint substitutes for the inspectors elected before any vacancy occurs, and those so appointed may act when the vacancy does occur. In re Excelsior Fire Ins. Co., 16 Abb. Pr. (N. Y.) 8, rev'd 16 Abb. Pr. (N. Y.) 11, 38 Barb. (N. Y.) 297.

A stockholder cannot complain that commissioners of election were appointed by the president instead of by the directors, though he participated in the election under protest, unless he shows that he was injured thereby. Bartlett v. Fourton, 115 La. 26, 38 So. 882.

¹⁸ Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

¹⁹ Umatilla Water Users' Ass'n v. Irvin, 26 Ore. 414, 108 Pac. 1016.

²⁰ Where the statute requires the appointment of two or more inspectors,

an election held under the appointment and authority of one inspector will be set aside. In re Lighthall Mfg. Co., 47 Hun (N. Y.) 258.

²¹ People v. Albany & S. R. Co., 55 Barb. (N. Y.) 344, 38 How. Pr. (N. Y.) 228, judgment affirmed 5 Lans. (N. Y.) 25, 57 N. Y. 161. In this case the validity of such a by-law was doubted, but it was held that in any event the election of inspectors who were not stockholders was merely voidable, and not void.

²² In re Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361; In re Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635; In re Mohawk & H. R. Co., 19 Wend. (N. Y.) 135.

²³ The New York statute requiring the oath of the inspectors to be filed is directory merely, and a failure to file it does not invalidate the election. Union Nat. Bank of Troy v. Scott, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

²⁴ Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

²⁵ Ex parte Willecocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

²⁶ Dickson v. McMurray, 28 Grant Ch. (U. C.) 533.

honestly and do not perpetrate any fraud upon the minority stockholders or permit others to do so.²⁷

The duties of inspectors are both ministerial and judicial.²⁸ Generally they have power to pass upon the eligibility of voters,²⁹ but not upon the eligibility of the candidates for office.³⁰

While they should not interest themselves in securing votes for any particular candidate, the fact that they suggest and advise stockholders to cumulate their votes in favor of a successful candidate furnishes no ground for setting aside the election,³¹ regardless of their motive in so doing.³²

§ 1646. Business which may be transacted. At a general or stated corporate meeting, the stockholders or members may transact any ordinary business which may be brought before the meeting,³³ but cannot transact extraordinary or unusual business unless notice thereof has been given to all the stockholders or members.³⁴ And at a special meeting, no business at all can be transacted except that

²⁷ That they are employees of the company, subject to the direction of its officers and were appointed inspectors by the directors who seek to retain control of the corporation, is not ground for appointing a master to supervise the election. *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

²⁸ *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

"They determine judicially that the votes are receivable or not, and as ministerial officers, they receive or reject." *In re Mohawk & H. R. Co.*, 19 Wend. (N. Y.) 135.

"Their office is ministerial rather than judicial. The charter declares who may vote and the inspectors are bound by it. To be sure, they must in some cases exercise their judgment when a question arises on the construction of the charter. But so must every ministerial officer, when a question arises on the extent of his powers." *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

Ordinarily the tellers or inspectors perform only ministerial duties, and

they cannot be given judicial duties which will override or interfere with the power of the court to inquire into the regularity of the company's action. *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

In *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016, it is suggested that an inspector is "a judicial officer to the extent that his decision is valid until set aside by some competent tribunal."

²⁹ See § 1648, *infra*.

³⁰ *In re Election of Directors of St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

³¹ This is true of the members of an election committee designated by the by-laws to have charge of the election. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012.

³² This is true though their motive is to retain their positions as officers of the corporation. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012.

³³ See § 1639, *supra*.

³⁴ See § 1639, *supra*.

specified in the notice.³⁵ Of course, if all persons who are entitled to vote are present and do not object, any business may be transacted, in the absence of express charter or statutory restrictions, whether included in the notice or not.³⁶

The general law, charter, or by-laws sometimes contain express provisions as to the business which may be transacted at particular meetings.³⁷

§ 1647. Number necessary to decide or elect. "It is of the essence of all elections that the will of the majority, properly expressed, shall govern."³⁸ And usually the vote of a majority of those present at a meeting is necessary to elect officers or to decide any question.³⁹

Provided a quorum is present, so that the meeting may be legally held,⁴⁰ the vote of a majority of those present is sufficient to elect directors or other officers, or to decide any question, unless there is some express provision to the contrary, although they may not be a majority of all the stockholders or members, nor own a majority of the stock.⁴¹ But a majority of the subscribed capital stock is some-

³⁵ See § 1642, *supra*.

³⁶ See § 1639, *supra*.

³⁷ Where the by-laws of a corporation require it to hold regular meetings, at each of which a particular kind of business is to be transacted, it cannot, at a regular meeting, transact any business not specified in its by-laws to be transacted at such meeting, unless at the regular meeting at which such business was required to be transacted the majority of the members have voted to postpone it until the meeting in question. *Weatherly v. Medical & Surgical Soc. of Montgomery Co.*, 76 Ala. 567.

A charter provision that the president shall annually give notice of the election of directors to be held on a day specified in the charter does not prevent the meeting then held from being made, by by-law or custom, an occasion for the transaction of other business. *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668, 39 Atl. 527.

See also *Evans v. Boston Heating Co.*, 157 Mass. 37, 31 N. E. 698; *At-*

lantic De Laine Co. v. Mason, 5 R. I. 463.

³⁸ *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347, *aff'g sub nom.* In re *Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280.

³⁹ *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

⁴⁰ See § 1643, *supra*.

⁴¹ **Kentucky.** *Gilchrist v. Collopy*, 119 Ky. 110, 82 S. W. 1018.

Massachusetts. *Inhabitants of First Parish in Sudbury v. Stearns*, 21 Pick. 148.

Michigan. *Hill v. Town*, 172 Mich. 508, 42 L. R. A. (N. S.) 799, 138 N. W. 334.

Minnesota. *State v. Chute*, 34 Minn. 135, 24 N. W. 353.

Missouri. *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53.

New York. In re *Rapid Transit Ferry Co.*, 15 App. Div. 530, 44 N. Y. Supp. 539; *Madison Ave. Bapt. Church v. Baptist Church in Oliver Street*, 5 Rob. 649.

times required by the statute or charter to constitute a valid election.⁴²

In the case of cumulative voting, a majority of the votes cast is sufficient to elect, although it may not amount to a majority of the shares, and a statutory provision requiring a majority of the number of shares has been held not to apply under such circumstances where the statute also permits cumulative voting.⁴³

By the weight of authority, a majority of the votes actually cast will decide, although some of the stockholders or members who are present may refuse to vote, and, therefore, the majority of the votes cast may be by less than a majority of the persons present or stock represented,⁴⁴ this on the theory that "those who have an opportunity to vote and refrain, though they have a majority of the stock, must be held to acquiesce in the result of the votes actually cast."⁴⁵

Sometimes a statute, charter or by-law requires a larger vote than a majority on a particular question, or even a unanimous vote.⁴⁶

Ohio. *Schwartz v. State*, 61 Ohio St. 497, 56 N. E. 201.

Pennsylvania. *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153; *Craig v. First Presb. Church of Pittsburgh*, 88 Pa. St. 42, 32 Am. Rep. 417; *Granger v. Grubb*, 7 Phila. 350; *In re Gowen's Appeal*, 10 Wkly. Notes Cas. 85.

Canada. *Austin Min. Co. v. Gemmel*, 10 Ont. 696.

This is the common-law rule. *New York Electrical Workers' Union v. Sullivan*, 122 N. Y. App. Div. 764, 107 N. Y. Supp. 886; *New York Investment & Improvement Co. v. Gannon*, 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539, rev'g on other grounds sub nom. *In re Election of Directors of Rapid Transit Ferry Co.*, 19 N. Y. Misc. 409, 43 N. Y. Supp. 538.

Where the statute provides that a corporation may be dissolved "with the assent of three-fourths of the stock represented at such meeting," the assent of three-fourths of the entire stock is not necessary. *Dreifus v. Colonial Bank & Trust Co.*, 123 La. 61, 48 So. 649.

⁴² *In re Argus Printing Co.*, 1 N.

D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

⁴³ The requirement of a majority of shares must be construed to apply when the shares are voted without cumulating. *Schwartz v. State*, 61 Ohio St. 497, 56 N. E. 201, aff'g 19 Ohio Cir. Ct. 350.

⁴⁴ *Inhabitants of First Parish in Sudbury v. Stearns*, 21 Pick. (Mass.) 148; *State v. Chute*, 34 Minn. 135, 24 N. W. 353; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53. But see, to the contrary, *Com. v. Wickersham*, 66 Pa. St. 134.

⁴⁵ *State v. Chute*, 34 Minn. 135, 24 N. W. 353.

⁴⁶ *Merriman v. National Zinc Corporation*, 82 N. J. Eq. 493, 89 Atl. 764; *Lowenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440, 28 Atl. 454; *Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855, aff'g 145 N. Y. App. Div. 916, 130 N. Y. Supp. 20.

A charter provision that it "may be amended by a vote of two-thirds at any regular or special meeting of the company" merely requires a favorable vote by two-thirds of the stock represented and voting at the meet-

By-laws on this subject are invalid if in conflict with the statute, as, for example, a by-law requiring a vote of more than a majority to increase or decrease the number of directors where the statute requires only a majority.⁴⁷ But, though the statute requires only a majority vote on a question, a provision in the certificate of incorporation requiring unanimous consent is valid, where the statute further provides that the certificate may contain any limitation upon the powers of the corporation or of the directors and stockholders which does not exempt them from the performance of any obligation or duty imposed by law.⁴⁸

An agreement that directors shall be elected by a vote other than that prescribed by the statute is not valid, as, for example, an agreement requiring more than a plurality of votes where the statute provides that a plurality shall be sufficient.⁴⁹

A by-law or a charter or statutory provision requiring the affirmative vote of a majority of the stockholders, or of a majority of those present at the meeting, means a majority in interest rather than a majority in number only.⁵⁰ The computation should be based on the amount of stock outstanding at the time of the meeting rather than on the amount of capital authorized.⁵¹ Stock which has never been issued,⁵² or which is owned by the corporation itself,⁵³ is not to be counted.

ing, and not two-thirds of the outstanding stock. *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

⁴⁷ *Katz v. H. & H. Mfg. Co.*, 109 N. Y. App. Div. 49, 95 N. Y. Supp. 663, *aff'd* 183 N. Y. 578, 76 N. E. 1098. See also *Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855, *aff'g* 145 N. Y. App. Div. 916, 130 N. Y. Supp. 20.

See generally § 517.

⁴⁸ *Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855, *aff'g* 145 N. Y. App. Div. 916, 130 N. Y. Supp. 20.

⁴⁹ *Reiss v. Levy*, 161 N. Y. Supp. 1048.

⁵⁰ *Bank of Los Banos v. Jordan*, 167 Cal. 327, 139 Pac. 691; *Weinburgh v. Union St. Ry. Advertising Co.*, 55 N. J. Eq. 640, 37 Atl. 1026.

See also § 517.

⁵¹ *Market St. Ry. Co. v. Hellman*,

109 Cal. 571, 42 Pac. 225; *Foot v. Greilick*, 166 Mich. 636, 132 N. W. 473; *Somerville v. St. Louis Mining & Milling Co.*, 46 Mont. 268, L. R. A. 1915 B 811, 127 Pac. 464; *Greenpoint Sugar Co. v. Whiting*, 69 N. Y. 328, *aff'g* 7 Hun (N. Y.) 44; *Atlantic Trust Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539, 76 N. Y. Supp. 647.

⁵² *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

⁵³ *Green v. Seymour*, 3 Sandf. Ch. (N. Y.) 285.

Treasury stock is not to be counted. *Somerville v. St. Louis Mining & Milling Co.*, 46 Mont. 268, L. R. A. 1915 B 811, 127 Pac. 464.

Stock which has been issued and then purchased by the corporation cannot be counted. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

That stock owned by the corporation cannot be voted, see § 1673, *infra*.

The general doctrine as to the power of a majority of the stockholders or members of a corporation to bind and control the minority, and the limitations upon their power, are treated at length in other sections.⁵⁴

§ 1648. Determination of eligibility of voters. Generally the inspectors or judges of election have power to determine the eligibility of voters in the first instance.⁵⁵ Their decision is subject to review by the courts,⁵⁶ especially where they have been guilty of fraud.⁵⁷ And it has been held that an appeal to the courts is the only remedy for an erroneous exercise of their power in this regard⁵⁸ and that no appeal from their decision lies to those present at the meeting and claiming the right to vote.⁵⁹

But it has also been held that if no method is prescribed by the charter or general law for determining the eligibility of voters, and no tellers or inspectors are appointed by the meeting for that purpose, the question is, in each instance, one for the meeting as a whole to determine, subject to review by the court, and that the president has no authority to decide it.⁶⁰

The right of particular persons to vote will be considered in subsequent sections.⁶¹

§ 1649. Effect of legal disability of individual stockholders. If the stockholders of a corporation are legally notified of a corporate meet-

⁵⁴ See the chapter on Stock and Stockholders, *infra*.

⁵⁵ *Triesler v. Wilson*, 89 Md. 169, 42 Atl. 926; *In re Mohawk & H. R. Co.*, 19 Wend. (N. Y.) 135. See also *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

This is true of the president, where the statute provides that he shall act as inspector of elections and certify who are elected directors. *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

"Inspectors are required to determine the admissibility of the votes that may be offered." *In re Election of Directors of St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

⁵⁶ See § 1700 *et seq.*, *infra*.

⁵⁷ Their decision is not conclusive where they have been guilty of fraud

though a by-law provides that it shall be conclusive in all cases. *Triesler v. Wilson*, 89 Md. 169, 42 Atl. 926.

⁵⁸ *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

⁵⁹ "To permit such an appeal to those present and claiming the right to vote would in effect allow persons to be judges of their own qualifications and place the election of directors at the mercy of any body of persons who saw fit to make a claim, however groundless, of the right to participate in the election." *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

⁶⁰ *State v. Chute*, 34 Minn. 135, 24 N. W. 353; *State v. Cronan*, 23 Nev. 437, 49 Pac. 41.

⁶¹ See §§ 1656-1676, *infra*.

ing, and it is legally held and conducted, the law looks upon their acts and proceedings as the acts and proceedings of the corporation, and not of the individual stockholders, presuming that the individual stockholders are competent to transact business; and the proceedings will not be rendered invalid by the fact that one of the stockholders is under a legal disability by reason of coverture, infancy, or insanity.⁶²

§ 1650. Voting, count of vote and announcement of result. The method of voting may be prescribed by the charter or by-laws, and stockholders have a right to insist that the provisions in this respect shall be followed.⁶³

The length of time for which the polls are to be kept open is usually fixed by the charter or by-laws, or provision is there made for determining it.⁶⁴ An election is not void or voidable because the polls were kept open and votes received after the time fixed for closing them in the charter, by-laws or notice,⁶⁵ nor because the polls, after having been closed, were opened to receive additional votes.⁶⁶ But after the votes have been counted, and the result announced, the polls cannot be reopened and additional votes received.⁶⁷

⁶² *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

⁶³ Though the person calling a meeting to order refuses to put to the meeting, for vote by the head, a motion naming a certain person for chairman, another stockholder has no right to put such motion, and proceed to a separate organization of a body of the stockholders, where a by-law provides for voting by stock. *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188.

See § 517.

⁶⁴ Where the by-laws provide for an election committee composed of certain officers of the company, and that it shall be their duty to make all arrangements for the election, and that all questions as to the qualification of voters, validity of proxies, and the reception or rejection of votes shall be decided by them, they have the sole right to determine when the polls shall close, and their action in

this regard will not be disturbed unless an abuse of such discretion is shown. Under such circumstances the board of directors have no power to fix the time when the polls shall close in the notice of the meeting, and their action in so doing is of no effect. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012. In this case it was further held that keeping the polls open from ten a. m. on one day until noon the next day was not an abuse of discretion.

⁶⁵ *Rudolph v. Southern Beneficial League*, 23 Abb. N. Cas. (N. Y.) 199; *People v. Albany & S. R. Co.*, 55 Barb. (N. Y.) 344, 38 How. Pr. 228, aff'd 5 Lans. (N. Y.) 25, 57 N. Y. 161; *In re Mohawk & H. R. Co.*, 19 Wend. (N. Y.) 135.

⁶⁶ *Hardenburgh v. Farmers' & Mechanics' Bank of New Brunswick*, 3 N. J. Eq. 68.

⁶⁷ *Forsyth v. Brown*, 2 Pa. Dist. Ct. 765, 33 Wkly. Notes Cas. 72.

In the absence of mandatory provision to the contrary in the charter or by-laws, the voting at a corporate meeting may be either by ballot, or viva voce, or by a show of hands. And even when the charter or by-laws provide for voting by ballot, a vote taken in either of the other modes is valid if no one objects.⁶⁸

While technically the word "ballot" means a little ball,⁶⁹ as the term is commonly used, a ballot is "a paper so prepared by printing or writing thereon as to show the voter's choice."⁷⁰

Ballots need not be in any particular form unless required by the statute, charter or by-laws.⁷¹ But they must specify the name or names of the person or persons voted for,⁷² and the number of votes it is desired to cast for each of them.⁷³ A ballot must be rejected if it is too uncertain to show for whom it was intended.⁷⁴

Where ballots are attached to proxies, the ballots, and not merely the proxies, are to be counted, and hence proxies to which no ballots are attached cannot be counted.⁷⁵

The by-laws sometimes provide for the nomination of candidates before the balloting begins. But it has been held that even where the by-laws provide that the election shall be by nomination and ballot, if the names of the candidates are written or printed on the ballot, this may be taken to be both a nomination and ballot, and that under such circumstances persons receiving a majority of the votes cast will

⁶⁸ *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Christ Church v. Pope*, 8 Gray (Mass.) 140.

"In the absence of a statute or by-law otherwise providing, stockholders may select a chairman to preside at the annual meeting by a viva voce vote." *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

⁶⁹ *Wirth v. Fehlberg*, 30 R. I. 536, 76 Atl. 438.

⁷⁰ *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

⁷¹ *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

A by-law to the effect that tickets having other things on them besides the names shall not be counted, is valid, and tickets on which an eagle is engraved are within its provisions.

Com. v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

⁷² *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

⁷³ A ballot for directors cannot be counted where the number of votes cast for each is not noted after the names of the persons voted for. *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

⁷⁴ *People v. Pangburn*, 3 N. Y. App. Div. 456, 38 N. Y. Supp. 217, where the names of both candidates, one printed and the other written, were on a ballot, and the voter failed to erase the name printed.

⁷⁵ Where two proxies with no ballots attached and two ballots with no proxies attached are found in the same envelope on a count by the court, the ballots are properly apportioned to the proxies. *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281.

be elected, even though they were not orally nominated before the voting commenced, especially where the ballot contains blank lines which it states are for any other names the stockholder cares to vote for and the voters are required to sign their ballots.⁷⁶

A stockholder or member may change his vote at any time before the result is finally announced.⁷⁷ And before that time it is proper to permit him to correct his ballot so that it will express his true intention.⁷⁸

Ignorance or inexperience of a stockholder or one to whom he has given a proxy is no excuse for a mistake in preparing his ballot.⁷⁹

Under some statutes all objections to the voting of stock which the books of the company show to have been regularly transferred to the holders must be made in writing, supported by affidavit.⁸⁰

It has been held that a statutory provision that an objection to the vote of any person claiming the right to vote shall be offered at the time his ballot is tendered, does not peremptorily require that the objection and the offer of the ballot be simultaneous, but that it is sufficient if it is made at a time when it may be considered and passed upon by the election officers, and the disputed ballot rejected if unlawfully offered.⁸¹ After the inspectors have received an unchallenged vote, they cannot reject it in the count on the ground of illegality.⁸²

If an election is otherwise valid, its validity is not in any way affected by the fraud or illegal conduct of the presiding officer in counting the ballots and declaring the result,⁸³ or by the unauthorized

⁷⁶ *Wirth v. Fehlberg*, 30 R. I. 536, 76 Atl. 438.

⁷⁷ *State v. McGann*, 64 Mo. App. 225.

The right to do so does not depend in any way upon whether the vote is viva voce or by ballot. *State v. McGann*, 64 Mo. App. 225.

⁷⁸ *Zierath Combination Drill Co. v. Croake*, 21 Cal. App. 222, 131 Pac. 335.

An election will not be set aside and a new one ordered on the ground that a voter was not permitted to correct his ballot, where it does not appear that he requested permission to correct it, and there is evidence to the effect that he was given an opportunity to do so but refused to take advantage of it. In *re P. B. Mathia-*

son Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

⁷⁹ In *re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

⁸⁰ *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829.

⁸¹ An objection is not void because made ten or fifteen minutes after the ballot is offered, where the election is still in progress and there is no question as to the identity of the ballot objected to. *Coolbaugh v. Herman*, 221 Pa. 496, 70 Atl. 830.

⁸² *People v. White*, 11 Abb. Pr. (N. Y.) 168; *Hartt v. Harvey*, 10 Abb. Pr. (N. Y.) 321, 32 Barb. 55, 19 How. Pr. 245.

⁸³ Where, at an election of directors, certain persons receive the requisite

act of the meeting, after the votes have been properly counted by the proper officer, the result announced, and the presiding officer has withdrawn, in electing a president pro tem. and recounting the ballots.⁸⁴

Where the president, who is also by statute the inspector of an election, is violently interfered with in the discharge of his duties, and may reasonably expect further violence if he continues to discharge them in accordance with his ideas of the law, he is justified in refusing to preside further or remain in attendance, and those whose violence cause him to vacate his office as inspector cannot take advantage of their own lawless conduct to reorganize the meeting and recount the votes.⁸⁵

The right of particular persons to vote at corporate meetings,⁸⁶ the number of votes to which each stockholder is entitled,⁸⁷ and the right to vote by proxy,⁸⁸ are treated in subsequent sections.

§ 1651. Reconsideration. A vote or resolution of the stockholders at a corporate meeting may be reconsidered and revoked at any time before rights have vested under or in pursuance of it.⁸⁹ But resolutions adopted at an adjourned meeting declaring an election of directors at the original meeting to be illegal because not in accordance with the by-laws do not amount to a reconsideration of the vote electing such directors, and, if the original election was in fact legal, are of no force or effect, and another election held pursuant to them is a mere idle form.⁹⁰

§ 1652. Separate elections by rival factions. If there are rival factions at a corporate meeting, one cannot withdraw and hold a valid

number of votes, the fact that the presiding officer insists on counting certain votes which should not be counted, announces the result otherwise than it really is, and issues certificates of election to those not entitled to them, and declares the meeting adjourned, although a majority vote against the adjournment, in no way affects the title to office of those in fact elected. *State v. Smith*, 15 Ore. 98, 15 Pac. 137, 14 Pac. 814.

⁸⁴ *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

⁸⁵ *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

⁸⁶ See §§ 1657-1676, *infra*.

⁸⁷ See § 1681, *infra*.

⁸⁸ See § 1683 et seq., *infra*.

⁸⁹ *Terry v. Eagle Lock Co.*, 47 Conn. 141 (increase of stock).

In the absence of a provision in its constitution or by-laws to the contrary, the corporation has a right, before adjournment, to reconsider its action in electing certain persons as directors and to elect a new board, and this may be done after a minority of the stockholders have withdrawn. *State v. Ellison*, — S. C. —, 90 S. E. 699.

⁹⁰ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

meeting elsewhere,⁹¹ even though such faction constitutes the majority,⁹² at least unless such action is taken in good faith to escape disorder.⁹³

Where each of two rival factions assumes to organize the meeting, and rival chairmen are elected, the first regular and formal proceeding for organization will be recognized by the courts as valid. The redress of any person aggrieved by such organization is to be sought through the courts, and not by disorder in attempting to carry on two elections at once, and those who participate in such a course, refusing to participate in the regular election, cannot have it set aside on the ground that it was made by a minority.⁹⁴ But if part of the stockholders secede from a meeting and hold another meeting, and those who remain do not represent enough stock to hold a meeting under the provisions of the statute or charter, they cannot hold an election. In such a case, neither election is valid.⁹⁵

It has been held that where the stockholders assemble in two separate bodies at the time and place appointed for holding an election, and each faction organizes separately and holds a separate election, the court will consider all the votes cast at both meetings in determining who was elected.⁹⁶

⁹¹ *In re Argus Printing Co.*, 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347; *Jenkins v. Baxter*, 160 Pa. St. 199, 28 Atl. 682. And see *Com. v. Patterson*, 158 Pa. St. 476, 27 Atl. 998.

⁹² *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

"A minority must have a right to insist that, after a meeting is organized, the majority shall not withdraw from it, and organize another meeting, at which the minority must appear or lose their rights. Once concede the right, and there is no limit to the number of wrecked meetings which may, at the caprice of a majority, precede the transaction of any business." *In re Argus Printing Co.*, 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347, quoted with approval in *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

⁹³ *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

⁹⁴ *In re Pioneer Paper Co.*, 36 How. Pr. (N. Y.) 105. And see *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

The rights of duly elected directors, whom the presiding officer refuses to recognize as such, are not affected by an irregular and unofficial meeting reorganized by those remaining after adjournment, at which meeting they are declared elected, for their rights are derived from the election alone. *State v. Smith*, 15 Ore. 98, 15 Pac. 137, 14 Pac. 814.

⁹⁵ *In re Argus Printing Co.*, 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

⁹⁶ *In re Election of Directors of Cedar Grove Cemetery Co.*, 61 N. J. L. 422, 39 Atl. 1024.

The right to continue a meeting after an adjournment is considered in another section.⁹⁷

§ 1653. Adjournment or postponement. In the absence of provisions to the contrary in the charter, statutes or by-laws, the stockholders or members at a corporate meeting may, by vote of the majority, adjourn to another day, or to a later hour on the same day.⁹⁸ But even a majority of the stockholders may not adjourn an annual meeting over the protest of the minority stockholders, or any of them, for the purpose of preventing the minority from exercising their legal right to elect other directors and of continuing the old board of directors in existence so that they can elect corporate officers.⁹⁹

The chairman or inspectors may be given discretionary power to adjourn from day to day.¹ But generally a regularly convened meeting can be adjourned only by the act of the meeting itself,² and the chairman or presiding officer has no right to adjourn it against the will of the stockholders.³ There is authority to the effect that if he attempts to do so, and refuses to preside, or to permit the meeting to be continued in the office of the company, the stockholders may adjourn to another room, and hold the meeting without him.⁴

⁹⁷ See § 1653, *infra*.

⁹⁸ *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *State v. Cronan*, 23 Nev. 437, 49 Pac. 41; *Warner v. Mower*, 11 Vt. 385.

The meeting has power to adjourn to another day. *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882.

A valid election is not affected by the fact that an adjournment was taken in the belief that no election had been made, and that the person elected acquiesced in the adjournment. *Booker v. Young*, 12 Gratt. (Va.) 303.

That the commissioners appointed by the charter to receive subscriptions and call a meeting to elect directors cannot adjourn the meeting after the corporation has been organized, see *Hardenburgh v. Farmers' & Mechanics' Bank of New Brunswick*, 3 N. J. Eq. 68.

As to the power of such commissioners generally, see § 259.

⁹⁹ *West Side Hospital of Chicago v. Steele*, 124 Ill. App. 534.

¹ In *re Chenango County Mut. Ins. Co.*, 19 Wend. (N. Y.) 635.

Where the charter of a corporation provided that the chairman of any meeting might, with the consent of the members present, adjourn the meeting from time to time and from place to place, it was held that the adjournment was to be the act of the chairman, and not that of the meeting, and that he was not bound to adjourn a meeting because a majority of the members present desired an adjournment. *Salisbury Gold Min. Co. v. Hathorn*, [1897] A. C. 268.

² *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509.

³ *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509; *State v. Cronan*, 23 Nev. 437, 49 Pac. 41.

⁴ *State v. Cronan*, 23 Nev. 437, 49 Pac. 41.

But on the other hand it has been held that where the president adjourns a stated meeting for the election of officers, the proper course for those who object is to appeal from his ruling and put the matter to a vote,⁵ and that even if such adjournment is wrongful, this does not give a minority of the shares a right to call a new meeting on their own authority and hold a binding election.⁶

Where an annual meeting is adjourned by viva voce vote of the stockholders, the remedy of dissenting stockholders who claim that there should have been a stock vote on the question is to take the necessary parliamentary steps to have the adjournment set aside, and, if they fail to do so, they have no right, even though they hold a majority of the stock, to hold a meeting and elect officers.⁷

After a motion to adjourn has carried and a sufficient number of stockholders have withdrawn to reduce the number of those present below a quorum, an election of officers cannot be lawfully held thenceforth at that meeting, though the adjournment was carried by an illegal vote.⁸ Of course if an adjournment is in all respects legal, a continuation of the meeting by dissenting stockholders is invalid, and an election held by them is of no effect.⁹

It has been held that where, after a motion to adjourn has been declared carried, all the stockholders leave the room and the story of the building where the meeting was held, the meeting will be deemed to have been adjourned and abandoned, although the motion was irregularly put to vote and was not lawfully carried.¹⁰

An adjourned meeting is but a continuation of the original meeting.¹¹ The stockholders or members present may transact, at the

⁵ *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

⁶ "To permit this would be to concede to a minority of the shares the power to govern the corporation," *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

⁷ *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801.

⁸ *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

⁹ *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

In *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882, it was held that where one faction declared an annual meeting adjourned until the

next day, when they met and undertook to complete the business of the meeting, and the other faction refused to recognize the adjournment but remained and assumed to elect directors, the meeting would be deemed to have been dissolved without electing directors, so that the old directors and officers would hold over.

¹⁰ *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350.

¹¹ In re *Hammond*, 139 Fed. 898; *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379; *Medical & Surgical Society v. Weatherly*, 75 Ala. 248; *State v. Cronan*, 23 Nev. 437, 49 Pac. 41; *State v. Bonnell*, 35 Ohio St. 10.

adjourned meeting, any business which might have been transacted at the meeting as called,¹² but no other business.¹³

No notice of the adjourned meeting need be given absent stockholders or members, unless it is required by the charter or by-laws.¹⁴ Proceedings at an adjourned meeting will not be valid if the adjournment was taken and the meeting held fraudulently, and in the absence of stockholders who had no notice of it,¹⁵ or if there was a failure to give notice of the original meeting, and a notice was necessary.¹⁶ And it has been held that where a notice of the adjourned meeting is given which specifies the business to be transacted thereat,

“Whether the meeting is continued * * * from day to day, or from time to time, many days intervening, it is evident it must be considered the same meeting, without any loss or accumulation of powers.” *Warner v. Mower*, 11 Vt. 385.

¹² *United States*. In re *Hammond*, 139 Fed. 898; *Synnott v. Cumberland Bldg. Loan Ass’n*, 117 Fed. 379.

Alabama. *Medical & Surgical Society v. Weatherly*, 75 Ala. 248.

Nevada. *State v. Cronan*, 23 Nev. 437, 49 Pac. 41.

Ohio. *State v. Bonnell*, 35 Ohio St. 10.

Pennsylvania. *Granger v. Grubb*, 7 Phila. 350.

Vermont. *Warner v. Mower*, 11 Vt. 385.

¹³ *Christopher v. Noxon*, 4 Ont. 672. See also *Warner v. Mower*, 11 Vt. 385.

¹⁴ *United States*. *Synnott v. Cumberland Bldg. Loan Ass’n*, 117 Fed. 379.

Colorado. *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 Pac. 123.

Iowa. See *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

New York. See *People v. Batchelor*, 22 N. Y. 128; *Smith v. Law*, 21 N. Y. 296.

Ohio. *State v. Bonnell*, 35 Ohio St. 10.

Vermont. *Clark v. Wild*, 85 Vt. 212,

Ann. Cas. 1914 C 661, 81 Atl. 536. See also *Warner v. Mower*, 11 Vt. 385.

A by-law providing that no notice of an adjourned annual meeting for the election of directors need be given, is valid where the statute provides that such meeting shall be held at a time and place fixed by the by-laws, though it also requires notice of such meeting to be given. In re *Hammond*, 139 Fed. 898.

¹⁵ Where the meeting is fraudulently and intentionally concealed from certain of the stockholders, it is invalid. *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350.

Where no meeting was held at the time fixed in the notice of a meeting, and a meeting was held several hours later by a small number of the stockholders and an adjournment taken to the next day, and a meeting was then held by a minority of the stockholders without notice to the others, who were in the vicinity for the purposes of the meeting and might have been readily notified, it was held that the election at such meeting was invalid. *State v. Bonnell*, 35 Ohio St. 10.

¹⁶ *United States v. McKelden*, 1 MacArthur & M. (D. C.) 162; *Wiggin v. First Freewill Bapt. Church*, 8 Mete. (Mass.) 301.

As to the necessity for giving notice of meetings generally, see § 1637, *supra*.

it will have the effect of limiting the business which may be transacted to that so specified, even though no notice was necessary.¹⁷

It has been said that "an adjourned meeting of a regular meeting may transact lawful business without reference to the number of those who attend."¹⁸

The right of a person to vote at an adjourned meeting is to be determined by his status as a stockholder at the time when such meeting is held.¹⁹ And stockholders not present or represented at the original meeting and new stockholders, who have become such since the original meeting, are entitled to vote.²⁰

The objection that the meeting was adjourned to meet in another city may be waived,²¹ and the action taken at the adjourned meeting may be ratified and thereby validated at a subsequent regular meeting.²²

§ 1654. Presumptions. It will always be presumed, in the absence of evidence to the contrary, that a corporate meeting was regularly and fairly conducted, and that provisions of the statutes, charter, or by-laws were complied with.²³ So it will be presumed that a quorum was present.²⁴

¹⁷ *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379.

¹⁸ Such is the case though a majority of the stock is not represented at the adjourned meeting. *Hiles v. C. A. Hiles & Co.*, 120 Ill. App. 617.

¹⁹ Since stockholders not represented at the first meeting and new stockholders may vote at an adjourned meeting, the legal status as to such meeting cannot be determined until it is held and the vote taken, and an injunction cannot issue to restrain certain stockholders from voting at such a meeting to be held in the future. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

²⁰ *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

²¹ *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

²² A lease authorized at the adjourned meeting is validated as to the objection that the adjournment

was taken to another city, where, at a subsequent stated or regular meeting, a resolution to set the lease aside is introduced and defeated. *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854.

²³ *Brackett v. Persons Unknown*, 53 Me. 228; *Blanchard v. Dow*, 32 Me. 557; *Wallace v. Inhabitants of First Parish in Townsend*, 109 Mass. 263; *Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 9 L. R. A. (N. S.) 606, 55 S. E. 854; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

It will be presumed in the absence of an averment to the contrary that the holders of two-thirds of the stock in each of the constituent companies voted in favor of their consolidation, where the statute requires their consent and the consolidation has been perfected. *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49.

²⁴ See § 1643, *supra*.

§ 1655. Effect of failure to attend or withdrawal. That a stockholder does not attend a corporate meeting does not lessen the binding force thereof as to him where he had received due notice that the meeting would be held.²⁵ And he must recognize the validity of an election regularly held by those who do attend.²⁶ But where no legal election can be held, stockholders may ignore the call for one, and are not estopped to attack the election held pursuant to such notice because they fail to attend it and protest.²⁷

A stockholder who designedly absents himself from a meeting surrenders no right appertaining to the ownership of his stock except the right to participate in such meeting.²⁸

A stockholder who voluntarily withdraws from a meeting without just cause is in no better position than those who voluntarily absent themselves in the first instance, and cannot complain of the acts of those who remain and carry on the meeting in a regular and lawful manner.²⁹

V. THE RIGHT TO VOTE AND PERSONS ENTITLED TO DO SO

§ 1656. Nature and extent of the right. The right to vote is a right which is inherent in and incidental³⁰ to the ownership of cor-

²⁵ *Hinds & Adams Counties v. Natchez, J. & C. R. Co.*, 85 Miss. 599, 107 Am. St. Rep. 305, 38 So. 189.

²⁶ *Lutz v. Webster*, 249 Pa. 226, 94 Atl. 834; *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153; *In re Gowen's Appeal*, 10 Wkly. Notes Cas. (Pa.) 85.

²⁷ *In re Empire State Supreme Lodge*, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, aff'd 103 N. Y. Supp. 1124.

²⁸ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

²⁹ *Com. v. Vandergrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

As to the right of stockholders to withdraw and hold a separate election see § 1652, *supra*.

³⁰ *United States. Bigelow v. Calumet & Hecla Min. Co.*, 167 Fed. 704, aff'd 167 Fed. 721.

Connecticut. Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

New Jersey. Thomas Maddock

Sons' Co. v. Biardot, 81 N. J. Eq. 233, 87 Atl. 66; *Lowenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440, 28 Atl. 454.

New York. Stokes v. Continental Trust Co., 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090, rev'g 99 App. Div. 377, 91 N. Y. Supp. 239; *Kinnan v. Sullivan County Club*, 26 App. Div. 213, 50 N. Y. Supp. 95; *Lord v. Equitable Life Assur. Soc. of United States*, 47 Misc. 187, 94 N. Y. Supp. 65, aff'd 109 App. Div. 252, 96 N. Y. Supp. 10.

Pennsylvania. Com. v. Dalzell, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

"The power to vote is inherently attached to and inseparable from the real ownership of each share." *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315.

"Unless otherwise provided by the organic law of the corporation, the right of a stockholder to vote upon

porate stock, and as such is a property right.³¹ And it follows that the stockholder cannot be deprived of it,³² and that it cannot be essen-

his stock at all meetings of shareholders is a right inherent in the ownership of the shares, and as such a property right." *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147.

As to the right to separate the voting power from the ownership of the stock, see § 1697, *infra*, and Chap. 40 on Voting Trusts.

31 United States. *Lucas v. Milliken*, 139 Fed. 816; *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147; *Smith v. Atchison, T. & S. F. R. Co.*, 64 Fed. 272.

Missouri. *State v. Greer*, 78 Mo. 188.

New York. *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 Misc. 417, 108 N. Y. Supp. 67; *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090, rev'g 99 App. Div. 377, 91 N. Y. Supp. 239; *Page v. American & British Mfg. Co.*, 129 App. Div. 346, 113 N. Y. Supp. 734; *Kinnan v. Sullivan County Club*, 26 App. Div. 213, 50 N. Y. Supp. 95; *Lord v. Equitable Life Assur. Soc. of United States*, 47 Misc. 187, 94 N. Y. Supp. 65, aff'd 109 App. Div. 252, 96 N. Y. Supp. 10.

Pennsylvania. *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

Virginia. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

Provisions of the statute that each stockholder shall have one vote for each share of stock owned by him are not merely directory, but secure to the stockholders an important and

valuable right. *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

"The stockholders of a corporation, as such, have no direct power of management, and even by united action they can neither bind nor loose the company by making contracts or controlling investments. The capital stock owned by them is property. It represents an investment upon which they are entitled to dividends, provided they are earned, and whether they can be earned or not depends on the management. Indeed, the safety of the entire investment depends on the power to manage the corporate business, because * * * careless and improvident management might impair the value of the stock or utterly destroy it. The right to vote for directors, therefore, is the right to protect property from loss and make it effective in earning dividends. In other words, it is the right which gives the property value and is part of the property itself, for it cannot be separated therefrom. * * * With the right to vote, as we may assume, his property is safe and valuable. Without that right, as we may further assume, his property is not safe and may become of no value. To absolutely deprive him of the right to vote, therefore is to deprive him of an essential attribute of his property." *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67.

32 *Smith v. Atchison, T. & S. F. R. Co.*, 64 Fed. 272; *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div.

tially impaired,³³ either by the legislature or by the corporation, with-

937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67; *Elger v. Boyle*, 69 N. Y. Misc. 273, 126 N. Y. Supp. 946.

"The power of the individual stockholder to vote in proportion to the number of his shares is vital, and cannot be cut off or curtailed by the action of all the other stockholders, even with the co-operation of the directors and officers." *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090, rev'g 99 N. Y. App. Div. 377, 91 N. Y. Supp. 239.

"A stockholder may not be deprived of his right to participate in the management of the affairs of the corporation by voting on his stock in the same manner and to the same extent as other stockholders in the proportion that his holdings bear to theirs." *Bond v. Atlantic Terra Cotta Co.*, 122 N. Y. Supp. 425, rev'g on other grounds 66 N. Y. Misc. 546, 123 N. Y. Supp. 1085.

In *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237, it is said: "The power of electing the directors of a railroad corporation is lodged by the statute in the hands of the stockholders. The exercise of this power having been regulated by the statute, the corporation cannot, by its by-laws, resolutions or contracts, either give or take it away. Were the statute silent in this respect, the election of the directors, like the election or appointment of subordinate officers, would be subject to the regulation and control of the corporation; but the statute having expressly declared who shall be entitled to vote for directors, its provisions are imperative upon the corporation, constituting a part of the law of its being; and the corporation has no authority to extend or limit the right as regulated by

the statute." Quoted with approval in *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Ft. Lyon Canal Co.*, 173 Fed. 601.

"Articles of association, though entered into by all the organizers, cannot, nor can a by-law of the corporation, take away from any stockholder this right to vote his shares of stock, in person or by his proxy, at all future elections by the stockholders; otherwise the voting power, connected by statute with the ownership of each share of stock, might be permanently separated." *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

A stockholder's shares cannot be placed in a voting trust without his consent, either by a charter provision or otherwise, so as to completely deprive him of their control, even upon the ground that it is for his own as well as for the general good. Hence a provision of the charter placing the right to vote the stock of certain subscribers is void where they do not consent to it. *Lebus v. Stansifer*, 154 Ky. 444, 157 S. W. 727.

See generally Chap. 40 on Voting Trusts, *infra*.

³³ *Tucker v. Russell*, 82 Fed. 263; *Smith v. Atchison, T. & S. F. R. Co.*, 64 Fed. 272; *State v. Greer*, 78 Mo. 188; *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67; *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090, rev'g 99 N. Y. App. Div. 377, 91 N. Y. Supp. 239; *Page v. American & British Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

An amendment adopted by the directors of a mutual insurance com-

out his consent.³⁴ And this is equally true though he is given what others might regard as a better right by way of a substitute.³⁵ Nor can the legislature indirectly impair such right by authorizing the directors, with the consent of only a majority of the stockholders, to so amend the charter as to have that effect.³⁶

Pursuant to this principle it has been held that, in the absence of a statutory provision to the contrary, when the corporation was formed or when he became a member, a stockholder cannot, without his consent, be deprived of his right to take his proportionate share of new stock issued for money,³⁷ that a reduction of stock must be upon lines

pany, pursuant to statutory authority to enfranchise its policy holders, which gives policy holders the right to vote for twenty-eight out of fifty-two directors and limits the stockholders to the right to vote but for twenty-four, is invalid as to nonconsenting stockholders. *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67.

Where the charter of a mutual insurance company provides that the directors may give the policy holders the right to vote, and the legislature has reserved the right of amendment, a statute providing for the enfranchisement of policy holders is valid, though the method therein prescribed for doing so varies in unessential details from that prescribed by the charter. *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67. See also *Lerd v. Equitable Life Assur. Soc.*, 109 N. Y. App. Div. 252, 96 N. Y. Supp. 10, aff'g 47 N. Y. Misc. 187, 94 N. Y. Supp. 65.

³⁴ As to by-laws regulating the right to vote, see § 517 and, generally, Chap. 16.

As to charter amendments, see the

chapter on Amendment or Repeal of Charters.

³⁵ An amendment adopted by the directors of a mutual insurance company, pursuant to statutory authority to enfranchise its policy holders, which gives policy holders the right to vote for twenty-eight out of fifty-two directors and limits stockholders to the right to vote for but twenty-four, is invalid in so far as it attempts to deprive the stockholders of the right to vote for all of the directors. And this is true although it gives them the absolute power to elect twenty-four directors where otherwise they might be deprived of any representation on the board. *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67.

³⁶ *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67.

³⁷ *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090, rev'g 99 N. Y. App. Div. 377, 91 N. Y. Supp. 239; *Bond v. Atlantic Terra Cotta Co.*, 137 N. Y. App. Div. 671, 122 N. Y. Supp. 425, reversing on other grounds

which will leave each stockholder the same proportionate interest and right in the corporation as he had before,³⁸ that the right to vote as fixed by the statutes or charter cannot be enlarged or restricted by by-laws,³⁹ that provisions of the articles that the corporation shall always be managed by a board of directors consisting of certain named persons, unless they shall become incapacitated, resign or die, or that certain named persons shall hold certain specified corporate offices as long as they shall remain stockholders unless they become incapacitated, absent themselves from business, resign or die, are invalid;⁴⁰ and that where the corporate charter provides for voting on the noncumulative plan, neither the legislature nor a constitutional provision subsequently adopted can authorize cumulative voting unless power to alter or amend the charter has been reserved.⁴¹

If the statute prescribes who shall be entitled to vote for directors, the corporation cannot, by a contract, limit the right of the persons so designated,⁴² nor confer the right upon persons not designated.⁴³

"As a rule, a stockholder in a corporation has the right to vote his stock as he pleases,"⁴⁴ unless restricted by public policy or legisla-

66 N. Y. Misc. 546, 123 N. Y. Supp. 1085.

See generally as to the right of stockholders in this regard, the chapter on Stock and Stockholders, *infra*.

38 "If, therefore, the capital stock be divided into preferred and common stock, there must be a reduction of both in the proportion that the issue of each bears to the other." If there can be no reduction of the preferred stock, there can be none of the common without unanimous consent, and in such case the general authority to reduce capital stock should be held inapplicable. *Page v. American & British Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

As to the right to reduce the corporate stock and limitations thereon, see generally the chapter on Stock and Stockholders.

39 See § 1659, *infra*. See also § 517, *supra*.

40 Such provisions are inconsistent with statutory provisions that each stockholder shall be entitled to one vote for each share of stock owned by

him. *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

41 See § 1682, *infra*.

42 The validity of a corporate contract giving to another corporation the right to select a certain number of directors is a limitation upon a statutory right of the stockholders to elect the directors, and its validity will not be determined in a suit to which they are not parties. *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Ft. Lyon Canal Co.*, 173 Fed. 601.

43 Where the statute gives the right to vote for directors to the stockholders, a provision in a contract made by the corporation giving the right to vote to a person to whom it issues stock in trust as security for an existing indebtedness is void. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. See generally § 1664.

44 *South & N. A. R. Co. v. Gray*, 160 Ala. 497, 49 So. 347. To the same effect, see *Moses v. Scott*, 84 Ala. 608, 4 So. 742; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R.

tion,⁴⁵ "and no other stockholder can control his conduct, or gainsay his discretion."⁴⁶ Nor can his motive in voting as he did be inquired into.⁴⁷ The majority stockholders have the same right in this respect as is enjoyed by the minority,⁴⁸ subject to the limitation that they may not vote it for the purpose of oppressing or defrauding the minority stockholders.⁴⁹

§ 1657. Persons entitled to vote—In general. In the absence of express charter or statutory provision to the contrary, the general rule is that every member of a corporation not having a capital stock, and every legal owner of shares in a stock corporation, has a right to be present and vote at all corporate meetings.⁵⁰

A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045; *Pennsylvania R. Co. v. Pennsylvania Co. for Ins. on Lives & Granting Annuities*, 205 Pa. 219, 54 Atl. 783. See also *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108.

⁴⁵ *Pennsylvania R. Co. v. Pennsylvania Co. for Ins. on Lives & Granting Annuities*, 205 Pa. 219, 54 Atl. 783.

⁴⁶ *Moses v. Scott*, 84 Ala. 608, 4 So. 742, quoted with approval in *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

⁴⁷ "It would be a dangerous and far-reaching precedent to permit an inquiry into the motive which is alleged to control or influence the shareholder in his choice of a directory." *Tomlin v. Farmers' & Merchants' Bank*, 52 Mo. App. 430.

Where cumulative voting is permitted, the court will not inquire into the motive governing the disposition of a stockholder's votes. *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509.

⁴⁸ *South & N. A. R. Co. v. Gray*, 160 Ala. 497, 49 So. 347.

As to the relative rights of the majority and minority stockholders generally, see chapter on Stock and Stockholders, *infra*.

As to the right of the holders of a majority of the stock to combine for the purpose of controlling the corporation, see § 1696 and also Chap. 40, *infra*.

⁴⁹ See § 1698 and also Chap. 40, *infra*.

⁵⁰ **United States.** *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Ft. Lyon Canal Co.*, 173 Fed. 601; *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147.

California. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

Idaho. *Haynes v. Griffith*, 16 Idaho 280, 101 Pac. 728.

Indiana. *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

New Jersey. *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33.

Pennsylvania. *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

England. *Pender v. Lushington*, 6 Ch. Div. 70, 46 L. J. Ch. Div. 317.

See also other cases more specifically cited in the notes following.

A stockholder "has the right to vote for directors and upon all propositions subject by law to the control of the stockholders." *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12

On the other hand, as a general rule, a person who is not a stockholder or member has no right to vote.⁵¹ And in the absence of express provisions to the contrary, the right is to be determined as of the time when the election or meeting is held.⁵²

L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090, rev'g 99 N. Y. App. Div. 377, 91 N. Y. Supp. 239.

"The general rule is that the test of the right to vote as a stockholder at corporate meetings is the ownership of shares, as disclosed by the proper record books of the corporation." Royal Consol. Min. Co. v. Royal Consol. Mines Co., 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123.

When each shareholder is entitled to only one vote, each voter must be the holder of at least one entire share of stock. In re Provident Building & Loan Ass'n of Passaic, 62 N. J. L. 590, 41 Atl. 952.

Where thirty shares of preferred and thirty shares of common stock were issued to a trustee to be held in trust for a purchaser until said preferred stock was paid for, whereupon it was to be transferred to the purchaser together with share for share of the common stock, and there was no provision that he should be entitled to none of the stock until he had paid for it all, it was held that, where the purchaser had paid for twenty shares and had paid a ten per cent. deposit on the remaining ten, he was, at least equitably, the beneficial owner of at least twenty shares, and his trustee was entitled to vote the same. In re Election of Directors of Conlon Elec. Washer Co., 154 N. Y. Supp. 366.

In an action for an assault committed in ejecting the plaintiff from a stockholders' meeting, a notice to him to attend the meeting is admissible as tending to show a recognition of his ownership of certain stock, especially where the secretary testified that in issuing such notice he was

governed by the records as they appeared on the corporate books. And where the certificate issued to the plaintiff's assignor shows on its face that it was issued pursuant to an order of court and this order is proved, the defendant cannot go back of the order or show that the stock in question had been canceled before it was made. Noller v. Wright, 138 Mich. 416, 101 N. W. 553.

As to the right to vote stock pending an appeal from a judgment directing a corporation to issue a certificate of stock, the certificate having been executed and deposited in court to abide the appeal, see *Durfee v. Harper*, 22 Mont. 373, 56 Pac. 589.

As to the right of preferred stockholders to vote, see chapter on Stock and Stockholders, *infra*.

As to the determination of the eligibility of voters, see § 1648.

⁵¹ *People v. Devin*, 17 Ill. 84; *Johnston v. Jones*, 23 N. J. Eq. 216; *Com. v. Woodward*, 4 Phila. (Pa.) 124.

⁵² *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892. See also *In re Election of Directors of New York & Westchester Town Site Co.*, 145 N. Y. App. Div. 623, 130 N. Y. Supp. 414.

Persons not stockholders on the day of an election cannot vote, although they may have been stockholders on the day when the election should have been held. *Johnston v. Jones*, 23 N. J. Eq. 216.

But where a statute required directors to be elected annually, and an election was held more than a year after a previous election or after organization, it was held that shareholders who acquired their stock more than a year after the previous elec-

In the absence of express provision to the contrary, the rule is that the right to vote shares of stock is in the person who has the legal title, and this is to be determined, at least *prima facie*, from the books of the corporation, where the stock is transferable on books.⁵³

When a person appears on the books as a stockholder, his vote cannot be rejected on the ground that the shares were transferred to him by other shareholders for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that he is not the beneficial owner of the shares.⁵⁴

A stockholder does not lose his right to vote by being a director.⁵⁵

Nonresident or alien shareholders or members of a corporation have the same right to vote as residents or citizens,⁵⁶ unless there is some express valid charter or statutory provision to the contrary.⁵⁷

It has been intimated that infant stockholders may vote,⁵⁸ in the

tion or after organization, were not entitled to vote. *Vandenburgh v. Broadway Underground Connecting Ry. Co.*, 29 Hun (N. Y.) 348. And see *People v. Tibbits*, 4 Cow. (N. Y.) 358.

After the charter of a national bank has expired and it is in process of liquidation, its stock is not transferable, and only those persons who were stockholders when the liquidation commenced are entitled to vote for directors. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 1 L. R. A. 781, 19 N. E. 353.

For provisions restricting the right to persons who have held stock for a certain length of time before the meeting, see § 1665, *infra*.

⁵³ *Connecticut*. *State v. Ferris*, 42 Conn. 560.

North Dakota. In *re Argus Printing Co.*, 1 N. D. 435, 26 Am. St. Rep. 639.

Pennsylvania. *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

Rhode Island. *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

England. *Pender v. Lushington*, 6 Ch. Div. 70, 46 L. J. Ch. Div. 317.

The right is *prima facie* in the

holder of the legal title as shown by the corporate records. *Blinn v. Riggs*, 110 Ill. App. 37.

As to the effect of the stock or transfer book as evidence of the right to vote, see chapter on Corporate Books and Records, *infra*.

⁵⁴ In *re Argus Printing Co.*, 1 N. D. 435, 26 Am. St. Rep. 639; *Pender v. Lushington*, 6 Ch. Div. 70, 46 L. J. Ch. Div. 317.

⁵⁵ *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, *rev'g* on other grounds 64 N. J. Eq. 90, 53 Atl. 601.

⁵⁶ *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

⁵⁷ See § 1658, *infra*.

⁵⁸ In *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 2 L. R. A. 549, 20 N. E. 55, it is said: "There would seem to be no legal obstacle in the way of minors taking part in corporate meetings, consulting, advising or even voting. The only objection to their doing so grows out of their inexperience and the immaturity

absence of a provision of a statute depriving them of that right.⁵⁹

A subscriber for stock has no right to vote unless his subscription is such as to make him a stockholder.⁶⁰ But if his subscription makes him a stockholder, his right to vote is the same as that of any other stockholder.⁶¹

Ordinarily a certificate of stock is not necessary to constitute one a stockholder,⁶² and the right of a person who owns stock to vote the same is not affected by the fact that no certificate has been issued to him.⁶³

Payment for stock is not necessary, in the absence of an express

of their judgments, but these are disqualifications which are not necessarily confined to persons, under the age of twenty-one years, and no one would allege them as a legal bar to the admission of an adult to membership."

In New Jersey the statute governing building and loan associations provides that members under sixteen shall not have the right to vote. In *re* United Towns Building & Loan Ass'n, 79 N. J. L. 31, 74 Atl. 310.

⁵⁹ See § 1658, *infra*.

⁶⁰ *Owensboro Seating & Cabinet Co. v. Miller*, 130 Ky. 310, 113 S. W. 423.

⁶¹ *Cummings v. State* (Okla.), 149 Pac. 864.

Where existing stockholders subscribed for the unsubscribed stock of a corporation under an agreement whereby the directors were given the right to sell it, and the net proceeds of the sale were to belong to the corporation and were to be credited to the stock account of said subscribers, and a part of the stock so subscribed for was sold and the proceeds placed in the treasury of the corporation, it was held that the subscribers were entitled to vote the stock remaining unsold, since the corporation had dealt with them as its owners. *Georgia Life Ins. Co. v. Bell*, 141 Ga. 502, 80 S. E. 765.

See also *Windsor Hotel Co. v. Schenk*, — W. Va. —, 84 S. E. 911, where it is held that an informal

antecedent subscriber to the stock of a corporation subsequently to be formed is entitled to an opportunity to pay the initial statutory instalment of his subscription and to participate in the first meeting of the stockholders held for the purpose of organization, and that tender of such privileges is a condition of the subscription and nonperformance thereof by the incorporators releases the subscriber.

⁶² See § 1658, *infra*.

⁶³ *Georgia Life Ins. Co. v. Bell*, 141 Ga. 502, 80 S. E. 765; *Beckett v. Houston*, 32 Ind. 393; *Cummings v. State* (Okla.), 149 Pac. 864. See also *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160.

A by-law providing that each stockholder shall be entitled to one vote for each share of stock standing in his name on the stock books of the company is not to be construed as restricting the voting power of stock for which no certificate has been issued, to the extent that it cannot be voted on a fundamental change in the charter. To give it such a construction would make it conflict with the statute, which contemplates the vote of all the stock on such questions. *Georgia Life Ins. Co. v. Bell*, 141 Ga. 502, 80 S. E. 765.

Even if the issuance of a certificate is necessary, a certificate issued by de

provision, to make a person a stockholder,⁶⁴ or to entitle him to vote.⁶⁵ But delinquents are sometimes deprived of the right by express provisions of the charter or statute.⁶⁶

§ 1658. — Charter or statutory provisions. Where the charter or general law expressly declares who shall be entitled to vote and how they shall be entitled to vote, or imposes other restrictions, its provisions are controlling.⁶⁷ The charter or general law may exclude nonresident stockholders,⁶⁸ or other corporations,⁶⁹ or may restrict the right to vote to persons who are registered as stockholders on the books of the corporation,⁷⁰ or to members over a certain age,⁷¹ or fix the right to vote as, between trustees and cestuis que trust,⁷² limit the number of votes to be cast by any one stockholder,⁷³ or restrict the right to vote to actual bona fide owners of stock,⁷⁴ or bona fide stock-

facto officers is sufficient. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

⁶⁴ See § 1658, *infra*.

⁶⁵ *Georgia*. *Georgia Life Ins. Co. v. Bell*, 141 Ga. 502, 80 S. E. 765.

Illinois. See *Blinn v. Riggs*, 110 Ill. App. 37.

Indiana. *Lincoln v. State*, 36 Ind. 161.

Iowa. See *Price v. Holcomb*, 89 Iowa 123, 56 N. W. 407.

New Jersey. *Downing v. Potts*, 23 N. J. L. 66; *Savage v. Ball*, 17 N. J. Eq. 142. See also *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160.

New York. *People v. Albany & S. R. Co.*, 55 Barb. 344, *aff'd* 57 N. Y. 161.

Ohio. *Henderson v. Hogan*, 1 Cinc. L. Bul. 227.

Oklahoma. *Cummings v. State*, 149 Pac. 864.

"It is not necessary that a stockholder shall have paid for his stock in full, to enable him to vote the full number of shares at an election." *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, rehearing denied 96 N. W. 1007.

⁶⁶ See § 1658, *infra*.

⁶⁷ *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 9 L. R. A. 650, 8 So. 150; *People's Home Sav. Bank*

v. Superior Court City & County of San Francisco, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340; *State v. Hunton*, 28 Vt. 594.

"The charter of a business corporation may regulate the voting capacity of its stockholders * * *." *Bartlett v. Fourton*, 115 La. 26, 38 So. 882.

⁶⁸ *State v. Hunton*, 28 Vt. 594.

⁶⁹ See § 1672, *infra*.

⁷⁰ See § 1665, *infra*.

⁷¹ In *New Jersey* the statute governing building and loan associations provides that members under sixteen shall not have the right to vote. In *re United Towns Building & Loan Ass'n*, 79 N. J. L. 31, 74 Atl. 310.

⁷² See § 1666, *infra*.

⁷³ See § 1681, *infra*.

⁷⁴ Where the general law provided that each stockholder should be entitled to as many votes as he "owns" shares of stock, it was held that only owners of shares could vote, and that a stockholder who had transferred his shares could not vote them, even in the presence and with the consent of the transferee, and even though they still stood on the books in his name. *Com. v. Woodward*, 4 Phila. (Pa.) 124.

holders,⁷⁵ or to persons who have held stock for a certain length of

Under a statute providing that each stockholder, either in person or by proxy, should be entitled to as many votes as he might "own," or represent by proxy, shares of stock, it was held that one who "held" shares of stock was recognized as a stockholder, as well as one who "owned" them. *State v. Leete*, 16 Nev. 242.

A contract giving an option to purchase stock and a deposit of the stock subject to the option, in which the seller retains the right to vote the same, do not deprive him of his right to vote, under a statute providing that it shall not be lawful for any person to vote upon any stock where the certificates are not in his possession or under his control, or where he has ceased to retain the title. In *re Newcomb*, 42 N. Y. St. 442, 18 N. Y. Supp. 16.

⁷⁵ *Haynes v. Griffith*, 16 Idaho 280, 101 Pac. 728.

Formerly in California the statute restricted the right to vote to bona fide stockholders. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582. Under this provision it was held that the nature of a stockholder's title was open to inquiry. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582. And it was further held that the statute conferred the right to vote upon "stockholders" and not upon "owners" of stock, and that one might be a "bona fide stockholder" without having the sole, or any beneficial interest in the shares. *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123. It was said that "one may be a bona fide stock-

holder without being the owner of the stock. He may have caused himself to be registered as a stockholder in the utmost good faith, both towards the corporation and also towards his fellow stockholders, and yet he may not be the owner of the stock. The owner of the stock may have pledged it as security for his indebtedness, and the creditor may have caused it to be transferred to his own name upon the books of the corporation without changing its ownership.

* * * It may be placed in the name of one as trustee to hold under an express trust, without any interest in the stock, but for the sole purpose of applying the income or disposing of the proceeds of its sale according to the terms of the trust. It may be the property of an estate and transferred into the name of the executor. In all such cases the transfer would be in good faith, and the person in whose name it was registered would be a bona fide stockholder." *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, quoted with approval in *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123.

In *Royal Consol. Min. Co. v. Royal Consol. Mines Co.*, 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123, it was held that a person in whose name the stock was registered was a bona fide stockholder though others had an uncertain, future and contingent interest in an unascertainable number of the shares. But a person in whose name stock has been registered upon the books of the corporation is not a bona fide stockholder where he has never had any interest in the stock, but is only a dummy for the real owner, and when the admitted object of such registration was for the purpose of

time,⁷⁶ or in whose name the stock has stood on the books of the company for a certain length of time.⁷⁷

Persons who have not paid valid assessments on their stock are sometimes deprived of the right to vote.⁷⁸ And under the federal statutes a stockholder in a national bank is not entitled to vote where his liability on his subscription is past due and unpaid.⁷⁹

In the case of nonstock or membership corporations, the right to vote is usually restricted to members who have paid their dues, or have made a valid tender of the same.⁸⁰

Usually honorary members of such a corporation have no right to vote, but the right to do so may be given them by the charter or the general law under which the corporation is formed.⁸¹

enabling the real owner to avoid certain statutory liabilities, whether such purpose would be effectual or not. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582. This provision has since been amended by omitting the words "bona fide." See Civ. Code, § 312. (A history of this provision will be found in a note to § 312, in *Deering's 1915 Civil Code.*)

⁷⁶ Where a statute limits the right to vote at an election of directors to stock held in the stockholder's name a certain number of days before the election, a stockholder who subscribed less than the prescribed number of days before an election cannot be allowed to vote. *Van Dyke v. Stout*, 8 N. J. Eq. 333. See also *In re Vernon*, 1 Pennew. (Del.) 202, 40 Atl. 60; *In re Leslie*, 58 N. J. L. 609, 33 Atl. 954; *In re Glen Salt Co.*, 17 N. Y. App. Div. 234, 45 N. Y. Supp. 568, aff'd 153 N. Y. 688, 48 N. E. 1104.

See *In re Glen Salt Co.*, *supra*, as to the effect of a corporation's failure to take from the post office a registered letter containing a transfer of stock for registration, which was received at the post office in time to have allowed the transfer to be registered.

⁷⁷ *Royal Consol. Min. Co. v. Royal*

Consol. Mines Co., 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123; *Haynes v. Griffith*, 16 Idaho 280, 101 Pac. 728.

In North Carolina it is provided that no share of stock shall be voted on at any election where it has been transferred on the books of the corporation within twenty days next preceding such election. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

As to the effect of the stock books as evidence of the right to vote generally, see chapter on Corporate Books and Records, *infra*.

⁷⁸ In Oregon this is true of a water users' association composed of land holders within an irrigation district covered by a government reclamation project. *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

⁷⁹ The provision that no stockholder "whose liability is past due and unpaid" shall be allowed to vote, refers only to the liability of a stockholder on his stock subscription and does not disqualify a stockholder who is liable as surety on notes running to the bank, which are past due and unpaid. *United States v. Barry*, 36 Fed. 246.

⁸⁰ *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281.

⁸¹ *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281.

A statute that authorizes a corporation to give to its stock a voting power different from that prescribed by the constitution is void.⁸² And the same is true of a provision in a charter of a corporation giving to its stock a voting power different from that contemplated by the statute under which it was created,⁸³ or a provision in the constitution of a corporation restricting the right to vote as given by the statute.⁸⁴

When the charter or a general statute prohibits voting by particular persons—as nonresidents, other corporations, etc.—or limits the number of votes to be cast by any one stockholder, the prohibition or restriction cannot be evaded by a transfer of shares, where the transfer is merely to enable them to be voted by the transferee, the beneficial ownership remaining in the transferor, and if the transferees attempt to vote under such circumstances and the corporation will not exclude them, a stockholder may sue for and obtain an injunction.⁸⁵ It has been held that an agreement to retransfer stock which has been transferred for the purpose of evading such statutes may be enforced.⁸⁶

§ 1659. — By-laws. A majority of the stockholders or members of a corporation may adopt reasonable by-laws, not inconsistent with the charter or any statute, regulating the method of voting at corporate election; ⁸⁷ and a by-law may take away or restrict a stockholder's right

⁸² *Brooks v. State*, 26 Del. 1, 79 Atl. 790, rev'g 24 Del. 129, 74 Atl. 599.

Where the constitution provides that each shareholder shall be entitled to one vote for each share of stock he may hold, a statute authorizing a corporation to give its stock such preferences and voting powers as it may express in its certificate of incorporation is unconstitutional. *Brooks v. State*, 26 Del. 1, 79 Atl. 790, rev'g 24 Del. 129, 74 Atl. 599.

⁸³ *Brooks v. State*, 26 Del. 1, 79 Atl. 790, rev'g 24 Del. 129, 74 Atl. 599.

⁸⁴ Where the statute gives a vote to each member of building and loan associations, a provision of the constitution of such associations that stock less than one year old cannot vote is void. *In re United Towns Building & Loan Ass'n*, 79 N. J. L. 31, 74 Atl. 310.

⁸⁵ *Mack v. De Bardeleben Coal &*

Iron Co., 90 Ala. 396, 9 L. R. A. 650, 8 So. 150; *Bartlett v. Fourton*, 115 La. 26, 38 So. 882; *Webb v. Ridgely*, 38 Md. 364; *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; *State v. Hunton*, 28 Vt. 594.

A statute restricting the voting power of a stockholder to a certain number of shares does not prevent a person from voting as proxy shares owned bona fide by his wife or others and also voting his own shares to the full limit. *Conant v. Millaudon*, 5 La. Ann. 542.

⁸⁶ *Scott v. Scott*, 68 N. H. 7, 38 Atl. 567.

⁸⁷ *State v. Tudor*, 5 Day (Conn.) 329, 5 Am. Dec. 162; *Beckett v. Houston*, 32 Ind. 393; *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

See generally, § 517, *supra*.

to vote if he consents to it.⁸⁸ But it is not within the power of the majority to deprive a stockholder or member, without his consent, of the right to vote, or the number of votes which he has by virtue of the charter and of his contract of membership, or to impose new qualifications, or unreasonable restrictions upon the exercise of the right.⁸⁹ Nor, where the charter or general law prescribes who shall be entitled to vote, can the right be conferred upon others by a by-law.⁹⁰

It has been held that a by-law providing that each stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the company is not to be construed as preventing the owner of stock, to whom a formal certificate has not been issued, from voting it on the question of amending the charter in a fundamental particular, where the statute contemplates a vote of all the stock under such circumstances.⁹¹

§ 1660. — Restrictions by consent or agreement. The stockholders and the corporation may by contract impose restrictions on the voting

⁸⁸ *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

⁸⁹ **United States.** See *Arkansas Valley Sugar Beet & Irrigated Land Co. v. Ft. Lyon Canal Co.*, 173 Fed. 601.

California. *People's Home Sav. Bank v. Superior Court City & County of San Francisco*, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452; *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

Delaware. *Brooks v. State*, 26 Del. 1, 79 Atl. 790, rev'g 24 Del. 129, 74 Atl. 599.

Georgia. See *Georgia Life Ins. Co. v. Bell*, 141 Ga. 502, 80 S. E. 765.

Illinois. *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, aff'g 53 Ill. App. 396.

Indiana. *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

New Jersey. *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33; *Loewenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440, 28 Atl. 454.

South Carolina. *St. Luke's Church v. Mathews*, 4 Desauss. 578, 6 Am. Dec. 619.

See § 517, *supra*.

The corporation cannot, by a by-

law, take away from delinquent stockholders the right to vote, after the stock has been issued even though the stockholders agree to take their stock subject to the by-laws. *Kinnan v. Sullivan County Club*, 26 N. Y. App. Div. 213, 50 N. Y. Supp. 95.

Where the power to elect directors is, by statute, lodged in the stockholders, a resolution passed by the board of directors of a corporation providing for the issuance of stock in trust to secure an existing indebtedness and giving the trustee the right to vote such stock is void. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

A corporation not for profit cannot, by a by-law, provide for the election of its trustees by delegates selected by constituent assemblies, instead of by its members as provided by the statute. *People v. Hoyne*, 182 Ill. App. 42.

⁹⁰ *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626, aff'g 53 Ill. App. 396.

⁹¹ *Georgia Life Ins. Co. v. Bell*, 141 Ga. 502, 80 S. E. 765.

power which do not violate any statutory or constitutional provisions.⁹² So a stockholder has no right to vote at corporate meetings if it is so stipulated when the stock is issued, for the stipulation is then a term of his contract.⁹³

One may also accept the ownership of stock with a condition which involves consent on his part that another shall vote it. So one who accepts stock bequeathed to him by will is bound by restrictions as to its voting power contained in the will.⁹⁴ And even after persons have become stockholders, they may surrender or restrict their power to vote by agreement, by consenting to by-laws or otherwise,⁹⁵ provided the agreement does not violate any charter or statutory provision, and is not contrary to public policy.⁹⁶ So the holder of stock may qualify his ownership by his own consent that another may vote in his stead,⁹⁷ as in the familiar instance of a vote by proxy.⁹⁸ And, as we shall see in subsequent sections, the right to vote as between the vendor and vendee,⁹⁹ or the pledgor and pledgee of stock¹ may be fixed

⁹² *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872.

⁹³ *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664, 36 L. R. A. 826; *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496.

"Unless expressly forbidden by statute, the articles of incorporation may divide the stock into common and preferred, and may provide that the preferred stockholders shall be deprived of voting power in consideration of the preferences over the common stock which is given them. Such a provision is but an arrangement between two classes of stockholders, which does not concern the public, and does not violate any rule of the common law or any rule of public policy." *People v. Koenig*, 118 N. Y. Supp. 136.

As to the validity and effect of provisions depriving preferred stockholders of the right to vote, see chapter on Stock and Stockholders, *infra*.

⁹⁴ *Elger v. Boyle*, 69 N. Y. Misc.

273, 126 N. Y. Supp. 946.

⁹⁵ *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723; *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

⁹⁶ An agreement which violates express provisions of the constitution and statutes relative to the right to vote is void, and cannot be ratified or made valid by estoppel. *Durkee v. People*, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340, aff'g 53 Ill. App. 396.

As to the validity of agreements giving bondholders or other creditors the right to vote, see § 1676, *infra*.

As to the validity of combinations and pooling agreements among stockholders, see § 1696, *infra*.

As to the validity of voting trusts, see Chap. 40 on Voting Trusts, *infra*.

⁹⁷ *Elger v. Boyle*, 69 N. Y. Misc. 273, 126 N. Y. Supp. 946; *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908.

⁹⁸ See § 1683 et seq., *infra*.

⁹⁹ See § 1663, *infra*.

¹ See § 1664, *infra*.

by the terms of the contract between them, and as between one holding stock in trust and the beneficiary by the terms of the instrument creating the trust.²

It has been held that where the constitution provides that each stockholder shall be entitled to one vote for each share of stock he may hold, a stockholder may waive the privilege thereby conferred upon him, in the sense that he may use or reject it, as he pleases,³ but he cannot, by any act of his own, change the character of his stock or deprive it of the voting power so given it, either while it is in his own hands or in the hands of any subsequent holder.⁴

A private agreement between the holder of the legal title to shares and another does not affect his right to vote as between him and the corporation.⁵ Nor is the corporation bound by an agreement between its stockholders as to who shall be entitled to vote their stock, to which it is not a party.⁶

An agreement by a corporation owning common stock in another corporation, whereby it guarantees the payment of dividends on the preferred stock of the latter corporation so long as it exists, does not preclude it from voting its stock in favor of the dissolution of the latter corporation, although it would thereby be relieved from any further liability under such agreement.⁷

² See § 1666, *infra*.

³ *State v. Brooks*, 26 Del. 1, 79 Atl. 790, rev'g 24 Del. 129, 74 Atl. 599.

That stockholders may refuse to exercise the right to vote but cannot deprive themselves of it, see § 1697 and Chap. 40, *infra*.

⁴ The right is not waived in this sense by a preferred stockholder because he joins in the incorporation of a company which by its charter takes from preferred stockholders the right to vote. *Brooks v. State*, 26 Del. 1, 79 Atl. 790, rev'g 24 Del. 129, 74 Atl. 599.

As to the right to separate the voting power from the ownership of the stock, see § 1697, *infra*, and Chap. 40 on Voting Trusts, *infra*.

⁵ *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

⁶ A party will not be permitted to rescind a contract with a corporation

because of a failure of certain parties to stand to their agreement to give proxies, since the corporation is not concerned with an agreement made by stockholders with reference to the authorization of other parties to vote for them. *Kennedy v. Monarch Mfg. Co.*, 123 Iowa 344, 98 N. W. 796.

See also *Clark v. National Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930, where it is held that a corporation was not liable to pay for the services of a depositary and transfer agent who assisted in the transfer of stock to trustees pursuant to a voting trust agreement entered into by a majority of its stockholders in conformity with the recommendation of its board of directors.

⁷ *Windmuller v. Standard Distilling & Distributing Co.*, 115 Fed. 748, 114 Fed. 491.

§ 1661. — **Stock illegally issued.** Of course, the holder of a certificate of stock which is void because illegally issued has no right to vote the same, and, if he does so, the vote is of no effect whatever. This is true, for example, where a corporation or its directors undertake to increase the capital stock without authority, and issue certificates for the additional stock,⁸ or where the corporation illegally issues stock to itself,⁹ or illegally issues it to a third person as trustee as collateral security for an existing indebtedness.¹⁰

When certificates of stock or shares have been illegally issued, a court of equity will, at the suit of a stockholder, cancel the certificates or shares and enjoin the holders from voting them.¹¹

Persons who participate in the issuance of stock cannot object that the holder thereof has no right to vote the same because it was illegally issued.¹² And one who consents that stock shall be placed with a certain person, or procures it to be so placed, cannot object to his voting it on the ground that he acquired it wrongfully.¹³ But one

⁸ *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568. See also *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147.

As to the right to increase the stock of a corporation and the effect of an attempt to do so without authority, see chapter on Stock and Stockholders, *infra*.

⁹ Where stock is issued in the name of the corporation and by it pledged to a bank to secure a note, with power to sell the same if the note is not paid, and upon default the stock is accordingly sold and bid in by the bank, the bank is not entitled to vote it, since the corporation has no power to issue stock to itself, and it therefore carries notice of its illegality on its face. And especially is this true where the evident purpose of the transaction is to give to the faction then in control of the corporation the advantage of the vote of such shares without having paid full value for them. *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829.

As to the right of a corporation to hold its own stock, see Chap. 30.

As to the right of a corporation to

vote shares of its own stock, see § 1673, *infra*.

¹⁰ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. See also *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630.

As to the right to issue stock for such a purpose, see chapter on Stock and Stockholders, *infra*.

¹¹ *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756. See also *State v. Kennan*, 35 Wash. 52, 76 Pac. 516.

This is true where stock is issued in excess of the amount authorized by the articles and without consideration. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

¹² *Hinds & Adams Counties v. Natchez, J. & C. R. Co.*, 85 Miss. 599, 107 Am. St. Rep. 305, 38 So. 189.

One who has participated in the issue of watered stock is estopped to object that the holder has no right to vote the same. *Wisner v. Delhi Land & Improvement Co.*, 46 La. Ann. 1223, 15 So. 690.

¹³ *Hinds & Adams Counties v. Natchez, J. & C. R. Co.*, 85 Miss. 599, 107 Am. St. Rep. 305, 38 So. 189.

who procures stock to be issued to him in excess of the amount authorized by the articles, by means of false representations and without consideration, will not be permitted to assert that a stockholder who voted therefor, relying on such representations, is estopped to question the validity of the shares.¹⁴

§ 1662. — Stockholders having a personal interest. At a stockholders' meeting, each stockholder represents himself and his own interests solely and in no sense acts as a trustee or representative of others, and his right to vote upon a measure coming before the meeting is not in any way affected by the fact that he has a personal interest therein different or separate from that of the other stockholders.¹⁵ A stockholder, therefore, may vote on a resolution authorizing the directors to purchase property from himself, or to enter into a contract with himself, or in which he is interested, or to ratify such a purchase or contract,¹⁶ and the ratification or adoption of such a con-

¹⁴ "He cannot take advantage of his own false representations, nor claim that acts of others based thereon and done in reliance upon their truth, put him in a better position." *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

¹⁵ *United States. Windmuller v. Standard Distilling & Distributing Co.*, 115 Fed. 748, 114 Fed. 491; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299.

California. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

Illinois. Blinn v. Riggs, 110 Ill. App. 37.

Indiana. Green v. Felton, 42 Ind. App. 675, 84 N. E. 166.

Minnesota. Bjorngaard v. Goodhue County Bank, 49 Minn. 483, 52 N. W. 48.

New Jersey. Merriman v. National Zinc Corporation, 82 N. J. Eq. 493, 89 Atl. 764; *Colgate v. United States Leather Co.*, 73 N. J. Eq. 72, 67 Atl. 657; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R.

A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601.

New York. Gamble v. Queens County Water Co., 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; *Socorro Mountain Min. Co. v. Preston*, 17 Misc. 220, 40 N. Y. Supp. 1040.

England. North-West Transp. Co. v. Beatty, 12 App. Cas. 589.

There is no such trust relation between the stockholders as will impose on a stockholder the burden of showing that he acted in good faith in voting in favor of a proposition in the adoption of which he was personally interested. *Merriman v. National Zinc Corporation*, 82 N. J. Eq. 493, 89 Atl. 764.

¹⁶ *United States. Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299.

California. Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

Minnesota. Bjorngaard v. Goodhue County Bank, 49 Minn. 483, 52 N. W. 48.

New Jersey. Merriman v. National Zinc Corporation, 82 N. J. Eq. 493, 89 Atl. 764; *Colgate v. United States Leather Co.*, 73 N. J. Eq. 72, 67 Atl.

tract is valid, even if carried by his vote.¹⁷ And this is equally true of a stockholder who is also a director.¹⁸ A stockholder may also vote to discontinue an action in which he is interested as a defendant.¹⁹

He may vote in favor of the dissolution of the corporation, although he is influenced to do so by a desire to terminate his contract with the corporation which is beneficial to it but onerous to himself.²⁰ Stockholders may also vote on the question of their own salary as officers of the corporation.²¹

But the rights of the majority stockholders in this regard are subject to the general rule that they will not be allowed to control the corporation in the interest of themselves individually, and in fraud of the rights of the minority.²²

657; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601.

New York. Gamble v. Queens County Water Co., 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201.

England. *North-West Transp. Co. v. Beatty*, 12 App. Cas. 589.

¹⁷ *Colgate v. United States Leather Co.*, 73 N. J. Eq. 72, 67 Atl. 657; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254; *North-West Transp. Co. v. Beatty*, 12 App. Cas. 589.

¹⁸ *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201.

Stockholders may vote to ratify a purchase of property from themselves which they as directors have assumed to make. *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48; *North-West Transp. Co. v. Beatty*, 12 App. Cas. 589.

In so voting he does not act as a director nor in his fiduciary capacity as such, but votes solely in the right of the shares of stock which he owns. *Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L.

R. A. 742, 54 Atl. 1, rev'g 64 N. J. Eq. 90, 53 Atl. 601.

That directors may not vote upon questions in which they are personally interested, see Chap. 42, *infra*.

¹⁹ *Socorro Mountain Min. Co. v. Preston*, 17 N. Y. Misc. 220, 40 N. Y. Supp. 1040.

²⁰ *Windmuller v. Standard Distilling & Distributing Co.*, 115 Fed. 748, 114 Fed. 491.

²¹ See chapter on Compensation of Officers, *infra*.

²² *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48; *Merriman v. National Zinc Corporation*, 82 N. J. Eq. 493, 89 Atl. 764; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201. See also *North-West Transp. Co. v. Beatty*, 12 App. Cas. 589.

"This right of the majority (statutory or other) either to originally direct or to affirm contracts or other proceedings in which the directors or the majority stockholders are interested is not, however, absolute, but is subject to the necessary qualification that the majority, although they may deal with the assets of the com-

§ 1663. — Effect of transfers and sales of stock. In the absence of provisions to the contrary, if stock has been transferred, the right to vote the same is in the transferee, unless there is some valid agreement to the contrary;²³ and the transferor is not entitled to vote.²⁴

Any transfer of stock that is sufficient to pass the title is sufficient to entitle the transferee to vote the stock, unless some specific mode of transfer is made necessary by the charter or by-laws of the corporation or a general law.²⁵

A conditional sale of stock, without a transfer of title, does not deprive the seller of the right to vote, or entitle the purchaser to vote,²⁶ unless the contract so provides.²⁷ Nor is the right to vote affected by an executory contract to sell.²⁸

The effect of the books of a corporation as evidence of the right to vote, and of the requirement that transfers must be registered, is considered in a subsequent paragraph.²⁹

§ 1664. — Right to vote as between pledgor and pledgee. In the absence of statutory provision to the contrary, when a pledgee of shares appears on the books of the corporation as the absolute holder of the legal title, or, if the pledgor does not claim the right, even when

pany, cannot so deal with them as to divide these assets, more or less, between themselves, to the exclusion of the minority.' Colgate v. United States Leather Co., 73 N. J. Eq. 72, 67 Atl. 657.

For a discussion of this general rule, see the chapter on Stock and Stockholders.

²³ People v. Devin, 17 Ill. 84; Com. v. Stevens, 168 Pa. St. 582, 32 Atl. 111; Com. v. Woodward, 4 Phila. (Pa.) 124.

The vote of a transferee of stock cannot be rejected on the count because of the pendency of a suit between creditors of the original holder of the stock and the transferee, involving the validity of the transfer, nor because of an injunction sued out by such creditors against the corporation and the transferee enjoining his exercise of ownership over the stock, the injunction not being intended to

affect the right to vote the stock. Com. v. Stevens, 168 Pa. St. 582, 32 Atl. 111.

²⁴ Com. v. Woodward, 4 Phila. (Pa.) 124.

As against his vendee, one who has sold his stock is not entitled to vote his stock, or to authorize a third person to do so, though, as against the corporation, the vendee is not entitled to vote it because of his failure to have it transferred to him on the corporate books. Witham v. Cohen, 100 Ga. 670, 28 S. E. 505.

²⁵ People v. Devin, 17 Ill. 84.

²⁶ In re Argus Co., 138 N. Y. 557, 34 N. E. 388.

²⁷ Com. v. Patterson, 158 Pa. St. 476, 27 Atl. 998.

²⁸ State v. McDaniel, 22 Ohio St. 354. And see In re Newcomb, 18 N. Y. Supp. 16.

²⁹ See § 1665, *infra*.

he appears thereon as the holder of the title as collateral security merely, he is entitled to vote the shares.³⁰

If the pledgee is registered as the owner, the corporate officers will not look behind the books to ascertain who is the real owner of the shares.³¹ But the pledgor of shares is entitled to vote them, in the absence of agreement to the contrary, if they remain in his name on the books, or, even when they are on the books in the name of the pledgee, if the books are not made conclusive evidence of the right to vote.³²

Even when shares are on the books in the name of the pledgee, he

30 United States. *Becher v. Wells Flouring Mill Co.*, 1 Fed. 276.

New Jersey. *Canadian Improvement Co. v. Lea*, 74 N. J. Eq. 234, 69 Atl. 455.

New York. *Vail v. Hamilton*, 85 N. Y. 453; *Ex parte Willcocks*, 7 Cow. 402, 17 Am. Dec. 525; *In re Barker*, 6 Wend. 509.

North Dakota. *In re Argus Printing Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. 347.

Pennsylvania. *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

Rhode Island. *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

A pledgee who appears on the books as the holder of stock is a stockholder within the meaning of a statute restricting the right to vote to "bona fide stockholders." *In re Argus Printing Co.*, 1 N. D. 435, 26 Am. St. Rep. 639.

"In the absence of any agreement between the parties on this point, it would seem that the right to vote should follow the legal title. If that was allowed to remain in the pledgor, his right to vote could not be questioned, while, on the other hand, if the legal title was transferred to the pledgee, his prima facie right would be equally clear." *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

As to the effect of the stock or

transfer books as evidence generally, see § 1665, *infra*.

31 Haskell v. Read, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

"The duty of the corporation is to recognize the registered holder shown on its transfer books." *Canadian Improvement Co. v. Lea*, 74 N. J. Eq. 234, 69 Atl. 455.

32 United States. *Becher v. Wells Flouring Mill Co.*, 1 Fed. 276; *Vowell v. Thompson*, 3 Cranch C. C. 428, Fed. Cas. No. 17,023; *Scholfield v. Union Bank*, 2 Cranch C. C. 115, Fed. Cas. No. 12,475. See also *Gibson v. Richmond & D. R. Co.*, 37 Fed. 743, 2 L. R. A. 467.

California. See *Spreckels v. Nevada Bank of San Francisco*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329; *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045.

Massachusetts. *Merchants' Bank v. Cook*, 4 Pick. 405.

New York. *McHenry v. Jewett*, 90 N. Y. 58, 26 Hun 453; *Ex parte Willcocks*, 7 Cow. 402, 17 Am. Dec. 525; *In re Barker*, 6 Wend. 509.

North Dakota. *In re Argus Printing Co.*, 1 N. D. 435, 26 Am. St. Rep. 639, 48 N. W. 347.

Ohio. *Cleveland City Ry. Co. v. First Nat. Bank*, 68 Ohio St. 582, 67 N. E. 1075; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594.

has not the legal title, as between himself and the pledgor, and as between them the right to vote is in the pledgor, in the absence of agreement to the contrary. And it has been held, therefore, that, if necessary, he may sue in equity to compel the pledgee to transfer the shares to him, for the purpose of voting, or to give him a proxy to vote them.³³

A court of equity may look behind the books, and may enjoin the pledgee from voting the shares in prejudice of the rights of the pledgor.³⁴ And the court is not concluded by the books in a statutory proceeding to determine the validity of an election.³⁵ It has been

Oregon. *State v. Smith*, 15 Ore. 98, 15 Pac. 137, 14 Pac. 814.

Rhode Island. *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

Vermont. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

Virginia. *Cohen v. Big Stone Gap Iron Co.*, 111 Va. 468, Ann. Cas. 1912 A 203, 69 S. E. 359.

As a rule the right to vote pledged stock remains in the pledgor. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

Prima facie the pledgor has a right to vote the stock until it has been registered in the name of the pledgee. *Reynolds v. Bridenthal*, 57 Neb. 280, 77 N. W. 658.

One to whom stock has been assigned as collateral security is not entitled to notice of a stockholders' meeting where the stock has never been transferred to him on the books of the company. *Osborn v. Detroit Kraut Co.*, — Mich. —, 160 N. W. 442.

As to the effect of the stock or transfer books as evidence generally, see § 1665, *infra*.

³³ *Vowell v. Thompson*, 3 Cranch C. C. (U. S.) 428, Fed. Cas. No. 17,023; *J. H. Wentworth Co. v. French*, 176 Mass. 442, 57 N. E. 789; *In re Argus Printing Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. 347; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

The right of the pledgor to vote

the stock, where the legal title is in the pledgee, must be obtained by application of a court of equity for a proxy. The court, if it finds that the pledgee is under an obligation to give a proxy, will so decree. *Canadian Improvement Co. v. Lea*, 74 N. J. Eq. 234, 69 Atl. 455.

Voting upon stock by the pledgee thereof, even contrary to the rights of the pledgor, is not a conversion of the stock. *Heath v. Silverthorn Lead Mining & Smelting Co.*, 39 Wis. 146.

³⁴ *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

But a mere threatened violation of the pledgor's naked legal right to vote is not sufficient to warrant the granting of an injunction. If the complaint fails to show injury to the plaintiff's property, inadequacy of the legal remedy, a pressing or serious emergency, or any other special ground of jurisdiction, it fails to show that the plaintiff is entitled to final relief by injunction, and when that is the final relief sought, he is not entitled to a temporary injunction under such circumstances. *McHenry v. Jewett*, 90 N. Y. 58, rev'g 26 Hun (N. Y.) 453.

³⁵ The court may look behind the transfer book and determine whether a transfer of shares appearing thereon was a sale or merely a pledge. *Strong v. Smith*, 15 Hun (N. Y.) 222.

held also that where, under the terms of the contract of pledge, the pledgee has no right to have the stock transferred to him on the books of the company, the fact that he does so will not deprive the pledgor of the right to vote.³⁶

On the other hand it has been held that one to whom a corporation has issued a part of its unissued stock as collateral security for money loaned to it is entitled to vote such stock, especially where it is so agreed at the time the stock is issued and the money loaned.³⁷

In some jurisdictions, statutes have been enacted expressly providing that pledgors of stock shall be entitled to vote the same at all corporate meetings,³⁸ in the absence of express agreement to the con-

³⁶ State v. Smith, 15 Ore. 98, 15 Pac. 138, 14 Pac. 814.

³⁷ Granite Brick Co. v. Titus, 226 Fed. 557.

³⁸ Miller v. Murray, 17 Colo. 408, 30 Pac. 46; Strong v. Smith, 15 Hun (N. Y.) 222; Carnegie Trust Co. v. Security Life Ins. Co., 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412; American Bonding & Trust Co. v. Pacific Brewing & Malting Co., 34 Wash. 10, 74 Pac. 826; Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co., 6 Wash. 597, 34 Pac. 155.

There is such a statute in Rhode Island. Sayles v. Brown, 40 Fed. 8.

In New Jersey it is provided that the pledgor shall have the right to vote the stock, "unless in the transfer to the pledgee on the books of the corporation he shall have expressly empowered the pledgee to vote thereon, in which case only the pledgee or his prexy may represent said stock and vote thereon." Canadian Improvement Co. v. Lea, 74 N. J. Eq. 234, 69 Atl. 455; Thomas v. International Silver Co., 72 N. J. Eq. 224, 73 Atl. 833. "The transaction is a contract between the parties, settling as between them who shall exercise the voting power incident to the ownership of the stock. It is in its nature a proxy given by the pledgor to the pledgee to represent the voting power of the owner, and may be revoked by the

pledgor at any time by redeeming his pledge." Thomas v. International Silver Co., 72 N. J. Eq. 224, 73 Atl. 833. It has been held that this statute was intended to apply to cases where the stock is transferred to one as "pledgee," or, at least, where the transfer gives notice to the corporation that the transferee is a pledgee, and that it does not cast upon the corporation the burden of determining, as between the parties, whether the transaction by which the transfer is effected is a pledge or not. Canadian Improvement Co. v. Lea, 74 N. J. Eq. 234, 69 Atl. 455.

The Massachusetts statute providing that a certificate of stock issued as a pledge shall so state and also give the name of the pledgor, who alone shall be responsible as a stockholder, is not complied with by a certificate stating that it is held as collateral security for the note of a certain person, naming him, but not stating that he is the pledgor, and the pledgee holding the certificate is entitled to vote the stock. J. H. Wentworth Co. v. French, 176 Mass. 442, 57 N. E. 789.

Under a statute authorizing persons holding stock as trustees to vote the same, but providing that the pledgor may vote stock pledged, one to whom stock has been transferred to hold as collateral security for an indebtedness

trary, or providing that the pledgee shall give a proxy to the pledgor.³⁹

A pledgee having the title to stock on the books, without any reservation by the pledgor of the right to vote, is not deprived of his right to vote the same by a statute providing that the pledgor's vote shall be received when he reserves the right to vote.⁴⁰

The parties may determine by agreement who shall have the right to vote pledged stock.⁴¹ But the pledgee can acquire from the pledgor only such rights in this regard as the pledgor himself may have.⁴² And hence stock owned by the corporation itself, although pledged by it, cannot be voted by the pledgee, where the corporation has no right to vote it.⁴³

Where stock is deposited in escrow as security for a note, with instructions to the holder to deliver the certificate to the payee of the note, in whose name it is made out, in full payment of the note in case it is not paid at maturity, and, upon nonpayment of the note, the stock is so delivered and the stock is transferred to the payee on the books of the company, he then has the right to vote the same.⁴⁴

If the right to vote remains in the pledgor, he is under no implied obligation to exercise it exclusively in the interest of the pledgee, and especially can no promise or duty on his part be implied which would be inconsistent with his obligations to the other shareholders or his good faith towards the creditors of the corporation.⁴⁵

to a third person is not entitled to vote as trustee, but the transaction is in effect a pledge, and, in the absence of express agreement, the pledgor is entitled to vote. *National Bank of Commerce in Denver v. Allen*, 90 Fed. 545.

³⁹ See *In re Utica Fire Alarm Tel. Co.*, 115 N. Y. App. Div. 821, 101 N. Y. Supp. 109, quoting the New York statute to this effect.

⁴⁰ *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

⁴¹ *State v. Smith*, 15 Ore. 98, 15 Pac. 138, 14 Pac. 814. See also *Hopkin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

"If * * * stock is pledged as a collateral, whether the debtor or creditor shall vote depends on the terms on which the pledge is made." *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

In *Goetzinger v. Donahue*, 138 Wis. 103, 119 N. W. 823, the evidence was held to sustain a finding that by arrangement and understanding of the parties the pledgor was to have the right to vote pledged stock, although it was not expressly so stipulated in their written contract.

⁴² *Thomas v. International Silver Co.*, 72 N. J. Eq. 224, 73 Atl. 833.

If the pledgor is disqualified, the disqualification extends to the pledgee. See *Clarke v. Central Railroad & Banking Co. of Georgia*, 50 Fed. 338, 15 L. R. A. 683, rev'd on other grounds 62 Fed. 328.

⁴³ See § 1673, *infra*.

⁴⁴ *Haynes v. Griffith*, 16 Idaho 280, 101 Pac. 728.

⁴⁵ *Gibson v. Richmond & D. R. Co.*, 37 Fed. 743, 2 L. R. A. 467.

§ 1665. — Stock or transfer books as evidence. In some jurisdictions the transfer or other stock books of a corporation are, by express statutory provision, made conclusive evidence of who are stockholders and entitled to vote, and the inspectors or other officers have no power to inquire further.⁴⁶ A person appearing on the books as a stock-

⁴⁶ **Illinois.** *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159.

Louisiana. *Monseaux v. Urquhart*, 19 La. Ann. 482.

Minnesota. *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547.

Nevada. *State v. Cronan*, 23 Nev. 437, 49 Pac. 41; *State v. Leete*, 16 Nev. 242.

New Jersey. In re *Cedar Grove Cemetery Co.*, 61 N. J. L. 422, 39 Atl. 1024; In re *Leslie*, 58 N. J. L. 609, 33 Atl. 954; In re *St. Lawrence Steamboat Co.*, 44 N. J. L. 529; *Downing v. Potts*, 23 N. J. L. 66.

New York. Ex parte *Willcocks*, 7 Cow. 402, 17 Am. Dec. 525; *People v. Tibbits*, 4 Cow. 358; In re *Long Island R. Co.*, 19 Wend. 37, 32 Am. Dec. 429.

North Dakota. In re *Argus Printing Co.*, 1 N. D. 435, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

Ohio. *Cleveland City Ry. Co. v. First Nat. Bank*, 68 Ohio St. 582, 67 N. E. 1075.

England. *Pender v. Lushington*, 6 Ch. Div. 70, 46 L. J. Ch. Div. 317.

For a detailed discussion of corporate books and records as evidence, see the chapter on Corporate Books and Records, *infra*.

One to whom stock has been assigned as collateral security is not entitled to notice of a stockholders' meeting, where the stock has never been transferred to him on the books of the company. *Osborn v. Detroit Kraut Co.*, — Mich. —, 160 N. W. 442. See further, in this connection, § 1657, *supra*.

In New Jersey the statute provides that the stock books and the stock

transfer books shall be the only evidence as to who are stockholders and entitled to vote. In re *Election of Directors United States Cast Iron Pipe & Foundry Co.*, 74 N. J. L. 315, 65 Atl. 849; *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347, *aff'g* sub nom. In re *Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280.

The statute further provides that the directors shall cause the officer having charge of the stock and transfer books to make, at least ten days before every election, a list of all stockholders entitled to vote at the election with their residences and the number of shares held by each. *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347, *aff'g* sub nom. In re *Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280.

The directors are required to produce the books and the list at the election, and it is provided that if they neglect or refuse to do so they shall be ineligible to any office at such election. *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347, *aff'g* sub nom. In re *Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280.

"The statute contemplates that the stock list shall be used at the election as a convenient memorandum of the names of voters and their respective interests * * *." *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347, *aff'g* sub nom. In re *Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280.

It is specifically provided that in case the right to vote upon any share of stock is questioned, the inspectors shall refer to the stock book to determine the controversy, and that in the case of a discrepancy between the

holder cannot be required by the inspectors to make oath, in order to determine his qualifications as a voter.⁴⁷

In other jurisdictions, by express provision, and even in the absence of such provision, where stock is transferable on the books, the books are *prima facie* evidence of the right to vote.⁴⁸ The inspectors or other

books, the transfer book shall control. In re Election of Directors Consolidated Telephone & Telegraph Co. (N. J. L.), 43 Atl. 433; Stratford v. Malory, 70 N. J. L. 294, 58 Atl. 347, *aff'g* sub nom. In re Jersey City Paper Co., 69 N. J. 594, 55 Atl. 280; Downing v. Potts, 23 N. J. L. 66.

"The duty of the corporation is to recognize the registered holder shown on its transfer books." Canadian Improvement Co. v. Lea, 74 N. J. Eq. 234, 69 Atl. 455.

One who is not a registered stockholder on the books of the company is not entitled to vote shares of which he is the *bona fide* owner. In re Schwartz & Gray, 77 N. J. L. 415, 72 Atl. 70.

The inspectors are bound by the stock and transfer books, and have no right to permit a person to vote where such books show that he is not a stockholder. In re Delaware River & A. R. Co. (N. J. Eq.), 68 Atl. 1104.

The New York statute makes the books containing the record of membership of the corporation evidence of the right to vote, and provides that all persons who appear therefrom to be members may vote. Under it only stockholders of record are entitled to vote. In re Utica Fire Alarm Tel. Co., 115 N. Y. App. Div. 821, 101 N. Y. Supp. 109. But the statute does not require that the original stockholders shall have their holdings recorded in order to qualify them to consent to the giving of a corporate mortgage. Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614, *aff'g* 17 N. Y. App. Div. 152, 45 N. Y. Supp. 141;

Vail v. Hamilton, 85 N. Y. 453, *aff'g* 20 Hun (N. Y.) 355.

In North Carolina it is provided that in case the right to vote upon any share of stock shall be questioned, the stock books of the corporation shall be referred to to ascertain who are the stockholders, and that in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote. Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

⁴⁷ People v. Kip, 4 Cow. (N. Y.) 382n; People v. Tibbits, 4 Cow. (N. Y.) 358.

⁴⁸ Connecticut. State v. Ferris, 42 Conn. 560.

Idaho. Haynes v. Griffith, 16 Idaho 280, 101 Pac. 728.

Nebraska. Reynolds v. Bridenthal, 57 Neb. 280; 77 N. W. 658.

Pennsylvania. Com. v. Patterson, 158 Pa. St. 476, 27 Atl. 998; Com. v. Dalzell, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

Rhode Island. Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291.

Corporate officers in conducting an election will not look behind the books to determine who is the real owner of shares registered in the name of a certain person. Haskell v. Read, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

In People v. Hill, 16 Cal. 113, it was held that the fact that stock stood upon the books of the corporation in the individual name of a decedent was *prima facie* evidence that it belonged to his separate estate, but that it might be shown that it in fact belonged to a firm of which he was a member, so that the surviving partner had a right to vote it.

officers cannot be required to decide, or decide, a dispute as to title to stock.⁴⁹

In the case of a nonstock corporation it has been held that entries by the bookkeeper on the membership book after the name of a member for any year that he "declined to pay," "refused to pay," "resigned," or "asked name to be taken off," should be presumed to have been made by authority of the board of directors, and will terminate the membership of such person, unless clearly shown to have

In *People v. Robinson*, 64 Cal. 373, 1 Pac. 156, it was held that a transfer of stock not entered on the books of the company has no validity except as between the parties to the transfer, and that an election would not be set aside because stock was voted by the person in whose name it was entered on the books of the company, though he had previously assigned the certificates, and though his vote determined the result.

In *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, it was held that under a statute requiring every person voting to be "a bona fide stockholder having stock in his own name on the stock books of the corporation," the nature of a stockholder's interest was open to inquiry for the purpose of determining whether he was a bona fide stockholder, and that persons who appeared on the books as stockholders were not entitled to vote if it was shown that they were not the bona fide owners, but that the stock had been transferred to them by the real owners merely to avoid liability to creditors of the corporation. The statute has since been amended by omitting the words "bona fide," and now provides that the voter must be "a stockholder, having stock in his own name on the stock books of the corporation." Civ. Code, § 312. (See note in *Deering's* 1915 Civ. Code

under the above section as to the history of the statute and the purpose of the change therein.)

In *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488, it was held that a recital in a document was insufficient to overcome the showing of the corporate books that a certain person owned certain stock.

In *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889, it is held that the stock and transfer book is the criterion for determining the amount of stock held by any person, and for which he is entitled to cast a vote for any person at a stockholders' meeting.

Under the Kentucky statute, holders of stock who appear to be such on the stock books of a corporation at the date of any meeting of its stockholders are prima facie entitled to vote such stock. *Bernheim v. Louisville Property Co.*, 221 Fed. 273.

In Pennsylvania, where the statute makes the certificate and transfer books prima facie evidence of the right to vote, a person who has made an executory or conditional sale of stock, placing the same in the hands of a third person in escrow, and under an agreement that the purchaser may vote the same, has no right to vote. *Com. v. Patterson*, 158 Pa. St. 476, 27 Atl. 998.

⁴⁹ *Haynes v. Griffith*, 16 Idaho 280, 101 Pac. 728; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

been made in error, or unless the member has been duly reinstated according to the custom and practice of the corporation.⁵⁰

When stock is transferable only on the books of the corporation, a transferee cannot vote stock until his transfer has been registered. His remedy is in equity to compel the corporation to register the transfer, or to compel the transferor to give him a proxy to vote, and until this is done he cannot vote.⁵¹ But the fact that it has not been so transferred is no defense to an action for assault in ejecting him from the meeting where he has done all that he can to procure the transfer, especially where the denial of his right to attend was based on another ground.⁵²

It is otherwise, however, where there is no provision requiring transfers to be made on the books. In such a case, a transferee, if he produces evidence of the transfer, is entitled to vote, although the shares may still stand on the books in the name of the transferor.⁵³

Even when the books are by statute made conclusive evidence of the right to vote, a person who appears on the books as the holder of stock is not entitled to vote the same, where it appears that he holds the stock in trust for the corporation itself, which is the real owner.⁵⁴

An executor is entitled to vote stock standing on the books in the name of his testator, for in voting the stock he represents the testator's estate.⁵⁵

§ 1666. — Trustees and cestuis que trust. A person who appears on the books of a corporation or otherwise as the absolute owner of stock clearly has the right to vote the same, although in fact he may hold the same as trustee. And even when shares are in the name of a person as trustee on the books, he is entitled to vote them unless the cestui que trust objects, and takes steps to have them registered in his own name.⁵⁶ But one who transfers stock to another in trust is en-

⁵⁰ *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281.

⁵¹ *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 21 L. R. A. 174, 55 N. W. 547; *In re Argus Printing Co.*, 1 N. D. 435, 26 Am. St. Rep. 639, 48 N. W. 347.

In *West Virginia* stock must be voted in the name of the assignor where it has not been transferred to the assignee on the books. *Third Nat. Bank of Cincinnati v. Jackson*, 156

Fed. 144, rev'd on other grounds 167 Fed. 26.

⁵² *Noller v. Wright*, 138 Mich. 416, 101 N. W. 553.

⁵³ *People v. Devin*, 17 Ill. 84. And see *People v. Hill*, 16 Cal. 113.

⁵⁴ See § 1673, *infra*.

⁵⁵ See § 1667, *infra*.

⁵⁶ *United States. Farmers' Loan & Trust Co. v. Young*, 54 Fed. 759. *California. Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

titled to vote it where it has not been transferred to the trustee on the books of the company.⁵⁷

Statutes in some states expressly provide that persons holding stock as trustee shall have the right to vote it.⁵⁸

Under some statutes only "active" trustees are permitted to vote, and then only when the character of the trusteeship is disclosed on the face of the certificate or transfer books in connection with the trustee's name.⁵⁹ And it is provided that if the person named in the certificate or transfer books is disqualified for this reason, the beneficial owner of the stock shall have the right to vote it upon furnishing to the judges of election satisfactory evidence of his ownership.⁶⁰

Louisiana. *Conant v. Millaudon*, 5 La. Ann. 542.

Massachusetts. See *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

New Jersey. See *Thomas Maddock Sons' Co. v. Biardot*, 81 N. J. Eq. 233, 87 Atl. 66.

New York. *Haines v. Kinderhook & H. Ry. Co.*, 33 App. Div. 154, 53 N. Y. Supp. 368; *Lewisohn Bros. v. Anaconda Copper Min. Co.*, 26 Misc. 613, 56 N. Y. Supp. 807; *In re Mohawk & H. R. Co.*, 19 Wend. 147; *In re Barker*, 6 Wend. 509.

Pennsylvania. *Com. v. Dalzell*, 152 Pa. St. 217, 34 Am. St. Rep. 640, 25 Atl. 535.

Rhode Island. *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

As to voting trusts, see Chap. 40.

A trustee has the right to vote in the absence of any provision in the trust agreement. *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345.

One to whom stock has been issued as trustee without the knowledge or consent of the owner is not a "bona fide stockholder," within a statute limiting the right to vote to bona fide stockholders. *Stewart v. Mahoney Min. Co.*, 54 Cal. 149.

As to the effect of the stock or transfer books as evidence generally,

see § 1665, *supra*, and the chapter on Corporate Books and Records, *infra*.

⁵⁷ *Third Nat. Bank of Cincinnati v. Jackson*, 156 Fed. 144, *rev'd* on other grounds *sub nom. Conway v. Third Nat. Bank*, 167 Fed. 26.

⁵⁸ In Pennsylvania the statute gives trustees the right to vote the stock. *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

In North Carolina it is provided that a person holding stock as trustee may vote thereon as a stockholder unless the instrument creating the trust provides to the contrary. *Haywood v. Wright*, 152 N. C. 421, 67 S. E. 982. This provision, rather than the statute giving persons the right to vote stock held by them for life with remainder over, applies where a life interest in stock is bequeathed to a person in trust, and the trustee has the right to vote the stock under such circumstances. *Haywood v. Wright*, 152 N. C. 421, 67 S. E. 982.

⁵⁹ *Com. v. Roydhouse*, 233 Pa. 234, 82 Atl. 74; *Coolbaugh v. Herman*, 221 Pa. 496, 70 Atl. 830.

⁶⁰ *Com. v. Roydhouse*, 233 Pa. 234, 82 Atl. 74.

A by-law providing that a stockholder's right to vote depends upon being registered as owner of the shares on the corporate books for twenty days before an election, does

The right to vote as between the trustee and the beneficiary may be determined by the instrument creating the trust.⁶¹ And trustees are bound by restrictions on their voting power contained in such an instrument.⁶² It may give the right to the trustee,⁶³ or, on the other hand, may provide that the right to vote the stock shall remain in the settlor,⁶⁴ or that he may require the trustee to give him a proxy to vote it,⁶⁵ or that it shall be voted as directed by him.⁶⁶

It is sometimes provided by statute that the right of a person hold-

not affect the right of the beneficial owner to vote under such circumstances. *Com. v. Roydhouse*, 233 Pa. 234, 82 Atl. 74.

⁶¹ See *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345; *Haywood v. Wright*, 152 N. C. 421, 67 S. E. 982, and cases cited in the following notes.

⁶² Testamentary trustees are bound by restrictions contained in the will. *Elger v. Boyle*, 69 N. Y. Misc. 273, 126 N. Y. Supp. 946.

In *Byington v. Piazza*, 131 N. Y. App. Div. 895, 115 N. Y. Supp. 918, it was held that a temporary injunction would issue restraining a trustee from voting the stock held in trust in favor of an increase in the number of directors, pending the determination of a suit involving his right to do so under the trust agreement which provided that at each annual election such stock should be voted "for the re-election of the present first permanent board of directors."

⁶³ See *Parker v. Hill*, 68 Wash. 134, 122 Pac. 618, where it was held that persons to whom stock had been assigned under a written declaration of trust had an undoubted right to vote it.

⁶⁴ In *Georgia Granite R. Co. v. Miller*, 144 Ga. 665, 87 S. E. 897, it was held that, under the terms of a deed of trust, the right to vote stock covered by it was in the grantor, as between him and the trustee; *Hammerstein v. Equitable Trust Co. of New York*, 156 N. Y. App. Div. 644,

141 N. Y. Supp. 1065, aff'd 209 N. Y. 429, 103 N. E. 706, trust to secure the performance of an agreement to pay alimony.

⁶⁵ *Pennsylvania R. Co. v. Pennsylvania Co. for Ins. on Lives & Granting Annuities*, 205 Pa. 219, 54 Atl. 783.

⁶⁶ Complainant and the administrator of his deceased partner organized a corporation to take over the business of the firm. Pending a division of the stock, it was deposited in trust under an agreement that until its division it was to be voted as directed by the administrator. Later the administrator transferred his interest to the defendant. It was held that the agreement giving the administrator the right to direct how the stock should be voted was valid so long as he remained the owner of an interest in it, but that it was invalid in so far as it authorized him to direct the vote after he had parted with his interest, since an irrevocable power of voting or directing the voting of stock cannot legally be vested in a person who is neither interested in the stock nor a representative of persons who are so interested. It was further held that the power of direction was personal to the administrator and did not pass to the defendant, and that the latter would be enjoined from directing the trustee how to vote it. *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345.

ing stock in a representative or fiduciary capacity to vote it shall be as provided by any agreement between him and the beneficial owner, provided such agreement, or a copy thereof, shall have been furnished to the corporation.⁶⁷

If the voting power is in the trustee, he is under obligation to exercise it for the benefit of the cestuis que trust, according to his own best judgment.⁶⁸

A trustee under a mortgage for the benefit of bondholders is not obliged to vote in accordance with the direction of the holders of a majority of the bonds unless the mortgage so provides, but may exercise his judgment and discretion in the matter, having regard to the general interests of the trust.⁶⁹ But it has been held that mere naked trustees who hold the bare legal title to stock, not coupled with any interest, are bound to vote in accordance with the wishes of the holders of the beneficial interest.⁷⁰

§ 1667. — Executors, administrators, surviving partners. An executor or administrator has the right, in some states by express statutory provision, to vote shares belonging to the estate of his decedent, and it can make no difference that the shares stand on the books of the corporation in the name of the decedent.⁷¹ Furthermore, an adminis-

⁶⁷ *Carnegie Trust Co. v. Security Life Ins. Co.*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

⁶⁸ *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345.

If trustees in whom the power to vote stock is vested use such power to the detriment of or in hostility to the interests of persons adjudged to be the owners of the stock, they thereby commit a breach of trust, and may be removed and new trustees appointed. *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204.

So a trustee under a voting trust may be removed where by virtue of his holding a majority of the stock in that capacity he has procured himself to be elected director and president and has voted and caused to be paid to himself as president a large unearned salary. *Barbour v. Weld*, 201 Mass. 513, 87 N. E. 909.

And a trustee may be removed and

compelled to account where, by virtue of the controlling interest which, as trustee, he has in the stock, he elects a board of directors to suit himself, has himself elected president, and procures the passage of resolutions giving himself a salary and enabling him to sell property to the corporation at excessive prices. *Elias v. Schweyer*, 27 N. Y. App. Div. 69, 50 N. Y. Supp. 180.

⁶⁹ *Toler v. East Tennessee, V. & G. Ry. Co.*, 67 Fed. 168.

⁷⁰ *American Nat. Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795. See also *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590.

⁷¹ *United States*. See *Wanneker v. Hitchcock*, 38 Fed. 383.

California. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

Kentucky. *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

trator may vote stock acquired by him in his representative capacity after the death of his intestate and which stands in his name as administrator.⁷²

The surviving partner of one in whose name stock belonging to the partnership stands on the books of the corporation is entitled to vote the stock, and not the executor or administrator of the deceased partner, if there is no statute making the books conclusive evidence of the right to vote.⁷³

§ 1668. — Receivers. A receiver ordinarily has power to vote stock coming into his hands in his official capacity.⁷⁴ But he must exercise this power in furtherance of the best interests of the receivership, and has no right to vote the stock for his private or individual gain.⁷⁵ Under some circumstances he may be instructed by the court to vote in a particular manner.⁷⁶

§ 1669. — Bankrupts. A bankrupt in whose name stock stands on the books of the corporation is entitled to vote the same, although the title has passed to the assignee in bankruptcy under the Bankruptcy Act.⁷⁷

§ 1670. — Partners. Either member of a partnership may vote shares of stock standing in the name of the firm on the books of the

New Jersey. In re Election of Directors Cape May & D. Bay Nav. Co., 51 N. J. L. 78, 16 Atl. 191.

New York. In re North Shore Staten Island Ferry Co., 63 Barb. 556. See also In re Hirsch's Estate, 116 N. Y. App. Div. 367, aff'd 188 N. Y. 584, 81 N. E. 1165.

Pennsylvania. In re Lafferty's Estate, 154 Pa. St. 430, 26 Atl. 388; Tunis v. Hestonville, M. & F. Passenger R. Co., 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88.

An executor having letters of probate granted at the testator's domicile has the right, by comity, on producing the same, to vote in another state on stock standing in the name of his testator, under a statute authorizing executors holding stock to vote the same. In re Cape May & D. Bay Nav. Co., *supra*.

As to voting when there are several executors, see this section, *infra*.

⁷² Jones v. Green, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

⁷³ People v. Hill, 16 Cal. 113. See also Kenton Furnace R. & Mfg. Co. v. McAlpin, 5 Fed. 737, 748.

⁷⁴ See Strang v. Edson, 198 Fed. 813, where an order providing for the turning over of certain stock to a receiver expressly provided that he should have "full power to vote thereon."

The court may compel the judgment debtor to execute a proxy to a receiver appointed in a creditor's suit. Atkinson v. Foster, 27 Ill. App. 63, aff'd 134 Ill. 472, 25 N. E. 528.

⁷⁵ Strang v. Edson, 198 Fed. 813.

⁷⁶ See American Inv. Co. v. Yost, 25 Abb. N. Cas. (N. Y.) 274.

⁷⁷ State v. Ferris, 42 Conn. 560.

corporation, or, where the books are not made conclusive evidence of the right to vote, when it stands in the name of the other partner.⁷⁸ And this is true of a surviving partner.⁷⁹ If the partners disagree as to the vote, neither can vote the stock.⁸⁰

§ 1671. — State and municipal corporations. The state may vote stock owned by it.⁸¹ And a municipal corporation owning stock in a railroad company or other corporation has the right to vote the same by its proper officers.⁸²

§ 1672. — Private corporation holding stock in another. As a general rule a corporation holding stock in another corporation, and having authority to do so under its charter, is entitled to vote the stock to the same extent as any other stockholder.⁸³ But when a corpora-

⁷⁸ *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737; *People v. Hill*, 16 Cal. 113.

⁷⁹ *People v. Hill*, 16 Cal. 113. See also *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737. See also § 1667.

⁸⁰ See § 1674, *infra*.

⁸¹ *State v. New Orleans, J. & G. N. R. Co.*, 20 La. Ann. 489. See also *Gibson v. Richmond & D. R. Co.*, 37 Fed. 743, 2 L. R. A. 467.

⁸² *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 36 L. Ed. 755; *State v. New Orleans, J. & G. N. R. Co.*, 20 La. Ann. 489.

⁸³ *United States. Bigelow v. Calumet & H. Min. Co.*, 167 Fed. 721, *aff'g* 167 Fed. 704; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299; *Clarke v. Richmond & W. P. Terminal Railroad & Warehouse Co.*, 62 Fed. 328, *rev'g* 50 Fed. 338, 15 L. R. A. 683; *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. 146.

Alabama. *American Refrigerating & Construction Co. v. Linn*, 93 Ala. 610, 7 So. 191. The statute expressly authorizes foreign corporations to vote stock in other corporations, provided they are authorized to do so by their charters. *Henry L. Doherty*

& *Co. v. Rice*, 186 Fed. 204; *South & N. A. R. Co. v. Gray*, 160 Ala. 497, 49 So. 347.

California. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

Maryland. *Davis v. United States Elec. Power & Light Co.*, 77 Md. 35, 25 Atl. 982.

Mississippi. See *Southern Elec. Securities Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785.

New Jersey. *State v. Rohlfss (N. J. L.)*, 19 Atl. 1099. See also *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, *modifying* 65 N. J. Eq. 36, 55 Atl. 66.

New York. *Oelbermann v. New York & N. Ry. Co.*, 77 Hun 332, 29 N. Y. Supp. 545, 76 Hun 613, 29 N. Y. Supp. 545.

Washington. *Theis v. Spokane Falls Gas Light Co.*, 49 Wash. 477, 95 Pac. 1074.

"A corporation, empowered to own stock, has an incidental right to vote it, and the exercise of such right violates no public policy in the absence of a statutory prohibition and when no monopoly is thereby created." *Toledo Traction, Light & Power Co. v. Smith*, 205 Fed. 643.

Where a sale of all of its stock by a corporation automatically ousts its

tion has no power under its charter to acquire and hold stock in another corporation, and nevertheless purchases the same ultra vires, it cannot compel the other corporation to transfer the stock to it on its books, so as to entitle it to vote, nor vote after such a transfer has been made.⁸⁴ If it threatens to vote, it will be enjoined at the suit of other stockholders.⁸⁵

A corporation, even when it has the power to purchase and hold stock, may be enjoined from voting stock held by it in another corporation at a meeting of the latter for the election of directors or other business, where it appears that its purpose is to control the other corporation in its own interest, or in the interest of its own officers or stockholders, or the like,⁸⁶ or where its purpose is, or the effect of permitting it to vote will be, to lessen competition or create a monopoly.⁸⁷ And the circumstances may be such that a corporation

officers and directors from office, it cannot thereafter vote stock in another corporation owned by it, since there is then no agency in existence which can act for it in casting such a vote. *O'Connor v. International Silver Co.*, 68 N. J. Eq. 680, 62 Atl. 408, aff'g 68 N. J. Eq. 67, 59 Atl. 321.

It is doubtful whether, after the formal dissolution of a corporation by proclamation for failure to pay its franchise tax, its directors, as trustees, have power to vote stock of other corporations owned by it. In *re Delaware River & A. R. Co.* (N. J. Eq.), 68 Atl. 1104.

As to the right of one corporation to acquire the stock of another corporation, see Chap. 30.

⁸⁴ *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

As to the right of a corporation to acquire stock in another corporation, see Chap. 30.

⁸⁵ *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. (N. Y.) 20; *Parsons v. Tacoma Smelting & Re-*

fining Co., 25 Wash. 492, 65 Pac. 765.

⁸⁶ *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14 So. 752; *Mack v. De Bardeleben Coal & Iron Co.*, 90 Ala. 396, 9 L. R. A. 650, 8 So. 150; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108; *State v. McDaniel*, 22 Ohio St. 354. And see *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 34 L. R. A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043, rev'g 78 Hun (N. Y.) 213, 28 N. Y. Supp. 933.

As to the relative rights of majority and minority stockholders generally, see the chapter on Stock and Stockholders, *infra*.

⁸⁷ A temporary injunction may be granted in a suit to restrain a corporation from voting stock in another corporation for the purpose of obtaining control of the latter and thereby creating a monopoly. *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869. The bill in this case was dismissed on final hearing 167 Fed. 704, aff'd 167 Fed. 721. See also *Toledo Traction, Light & Power Co. v. Smith*, 205 Fed. 643; *Henry L. Doherty & Co. v. Rice*, 186 Fed. 204. And see *Clarke v. Richmond & W. P. Terminal*

may be precluded, on grounds of public policy, and aside from any question of fraud, from voting shares owned by it in another corporation.⁸⁸

§ 1673. — Right of corporation to vote its own shares. Shares of its own stock purchased or otherwise acquired by a corporation, or unissued shares, are in suspension until they are reissued or issued. A corporation cannot, in any proper sense, be a stockholder in itself, and shares of its own stock, therefore, held by a corporation, cannot be voted.⁸⁹

Railway & Warehouse Co., 62 Fed. 328, rev'g 50 Fed. 338, where it was held that a corporation of one state was not deprived of its right to vote stock of a corporation of another state owned by it by a provision of the constitution of the latter state prohibiting corporations from buying stock in other corporations or making agreements with them for the purpose of, or where it would have the effect of, lessening competition or creating a monopoly, and that it was error to enjoin it from voting such stock on the ground that by doing so it would violate such provision.

⁸⁸ In a Louisiana case it was held that, whether or not a gas company had an implied power to acquire and hold stock in another gas company, such right was one of "imperfect ownership," that is, only giving the right to enjoy and dispose of the stock when possible without injuring the rights of others, within Louisiana Rev. Civ. Code, art. 492, and that it could not legally vote the shares, whether held in its own name or the name of others, since such action would be against public policy. *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476, 25 So. 408.

⁸⁹ *United States v. United States v. Columbian Ins. Co.*, 2 Cranch C. C. 266, Fed. Cas. No. 14,840.

California. Market St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225;

Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

Louisiana. Monsseaux v. Urquhart, 19 La. Ann. 482.

Massachusetts. Com. v. Boston & A. R. Co., 142 Mass. 146, 7 N. E. 716; *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377.

New York. Vail v. Hamilton, 85 N. Y. 453, aff'g 20 Hun 355; *Ex parte Holmes*, 5 Cow. 426; *Ex parte Desdoity*, 1 Wend. 98.

Vermont. State v. Smith, 48 Vt. 266.

"It cannot vote or authorize others to vote upon them." *Clark v. National Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930.

Where the statute makes the written assent of two-thirds of the stockholders a condition precedent to the mortgaging of corporate property, the corporation cannot assent in behalf of shares of its own stock owned by it; nor can a stockholder who assents in behalf of stock which he himself owns be deemed to represent and assent in behalf of a proportionate amount of the stock owned by the corporation. *Vail v. Hamilton*, 85 N. Y. 453, aff'g 20 Hun (N. Y.) 355.

In *Farwell v. Houghton Copper Works*, 8 Fed. 66, it is said that if a corporation can vote shares of its own stock purchased by it at a sale for nonpayment of assessments, it

In some states such a provision is expressly made by statute.⁹⁰

Shares owned by the corporation cannot be voted even when they are held in the name of a trustee for it,⁹¹ nor, as a rule, can they be voted by one to whom they have been pledged by it,⁹² even though the statute gives the pledgor the right to permit the pledgee to vote pledged stock.⁹³ And especially is this true where the pledging is not in good faith, but solely for the purpose of avoiding a statutory prohibition against the corporation voting its own stock.⁹⁴ It has been held, however, that a person to whom a corporation lawfully issues a part of its unissued stock as collateral security for money loaned to it is entitled to vote the same, especially where it is so agreed at the time the stock is issued and the money loaned.⁹⁵ And also that one

must be voted in such a manner as to represent the interest of every stockholder, and that it could not be voted by the corporate treasurer unless all the stock was represented at the meeting, and all consented to have the treasurer cast the vote.

⁹⁰ In New Jersey the statute provides that "shares of stock of a corporation belonging to said corporation shall not be voted on directly or indirectly." *McNeely v. Woodruff*, 13 N. J. L. 352; *Thomas v. International Silver Co.*, 72 N. J. Eq. 224, 73 Atl. 833; *O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321, aff'd 68 N. J. Eq. 680, 62 Atl. 408. See also *In re Election of Directors St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

A corporation which purchases all of the stock of another corporation cannot vote shares of its own stock owned by the vendor corporation. *O'Connor v. International Silver Co.*, 68 N. J. Eq. 680, 62 Atl. 408, aff'g 68 N. J. Eq. 67, 59 Atl. 321.

⁹¹ *United States*. *Woodruff v. Dubuque & S. C. R. Co.*, 30 Fed. 91; *United States v. Columbia Ins. Co.*, 2 Cranch C. C. 266, Fed. Cas. No. 14,840.

California. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

Maine. See *Corey v. Independent Ice Co.*, 106 Me. 485, 76 Atl. 930.

Massachusetts. *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377.

New Jersey. *McNeely v. Woodruff*, 13 N. J. L. 352. See also *O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321, aff'd 68 N. J. Eq. 680, 62 Atl. 408.

New York. *Ex parte Holmes*, 5 Cow. 426.

Pennsylvania. *Com. v. Fisher*, 7 Phila. 264, 2 Brewst. 394.

The president of a corporation cannot vote stock belonging to it and standing in his name as president. *Monsseaux v. Urquhart*, 19 La. Ann. 482.

⁹² *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Thomas v. International Silver Co.*, 72 N. J. Eq. 224, 73 Atl. 833.

Stock issued by a corporation to a trustee to be held by him as security for an existing indebtedness of the corporation to a third person cannot be voted by the trustee. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

⁹³ *Thomas v. International Silver Co.*, 72 N. J. Eq. 224, 73 Atl. 833.

⁹⁴ *Thomas v. International Silver Co.*, 72 N. J. Eq. 224, 73 Atl. 833.

⁹⁵ *Granite Brick Co. v. Titus*, 226 Fed. 557. See also *Burgess v. Selig-*

to whom the corporation has transferred as collateral security stock previously issued and repurchased by it, and in whose name the stock stands on the books of the company is a stockholder within the meaning of a statute requiring the corporation to obtain the written consent of a certain percentage of its stockholders in order to mortgage its property.⁹⁶

§ 1674. — Right to vote shares owned jointly. If shares are owned by two or more persons jointly, the right to vote is in them jointly, and, in order that the shares may be voted, they must agree upon the vote.⁹⁷ This applies to shares held by several executors or trustees.⁹⁸ It has been held, however, that if a will authorizes or directs that one of several executors shall vote stock belonging to the estate, and that the others shall give him proxies for the purpose, they may be compelled by the court to do so.⁹⁹

§ 1675. — Right as between life tenant and remainderman. It is sometimes provided by statute that where stock is owned by, or is transferred on the corporate books to, one for life with remainder over, the life tenant may vote it in the same manner and with the same effect as if he were the absolute owner thereof.¹

man, 107 U. S. 20, 27 L. Ed. 359; Union Sav. Ass'n v. Seligman, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630.

Of course this would not be true if the corporation has no right to issue stock as collateral security, see § 1664, *supra*.

⁹⁶ Vail v. Hamilton, 85 N. Y. 453, *aff'g* 20 Hun (N. Y.) 355.

⁹⁷ Hey v. Dolphin, 92 Hun (N. Y.) 230, 36 N. Y. Supp. 627; In re Pioneer Paper Co., 36 How. Pr. (N. Y.) 111; In re Lafferty's Estate, 154 Pa. St. 430, 26 Atl. 388; Tunis v. Hestonville, M. & F. Passenger R. Co., 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88. See also Clowes v. Miller, 60 N. J. Eq. 179, 47 Atl. 345.

⁹⁸ In re Lafferty's Estate, 154 Pa. St. 430, 26 Atl. 388; Tunis v. Hestonville, M. & F. Passenger R. Co., 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88. See § 1667, *supra*.

See also Wanneker v. Hitchcock, 38

Fed. 383, where it was held that a sufficient showing had not been made to justify the appointment of a receiver to vote stock bequeathed to cotrustees who could not agree.

The fact, however, that one of several directors has given a proxy to vote stock does not prevent another executor who is present at a meeting from voting the stock, it not appearing that there is any disagreement. Such vote is a revocation of the proxy. Schmidt v. Mitchell, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

⁹⁹ In re Lafferty's Estate, 154 Pa. St. 430, 26 Atl. 388.

¹ It is so provided in North Carolina. But this provision does not apply where a life interest in stock is bequeathed to one in trust, but in such case the statute relative to stock held by trustees applies, and the trustee has the right to vote the stock. Haywood v. Wright, 152 N. C. 421, 67 S. E. 982.

A person may make a gift of stock in remainder, reserving to himself a life estate with power to vote the stock as if no transfer had been made.²

§ 1676. — Bondholders or other creditors. The holders of bonds of a corporation or other creditors cannot be given the right to vote at corporate meetings for the election of directors, or on other questions, either by a by-law of the corporation, or by contract, even with the consent of all the stockholders, where this is inconsistent with or contrary to express provisions of the charter or statutes. Thus, bondholders cannot be given the right to vote for directors, where the constitution of the state or the charter or general law provides that the directors shall be elected by the "stockholders," and in no other way.³ But bondholders or other creditors may be given the right to vote, as an additional security, if there is nothing in the constitution, charter, or general law to prevent.⁴

Policyholders in mutual insurance companies are sometimes given the right to vote for directors.⁵

§ 1677. Effect of illegal votes or rejection of legal votes. An election or other action at a corporate meeting is not rendered invalid because of the receipt of illegal votes, or the rejection of legal votes, if the result would have been the same had they been rejected or received, as the case may be.⁶ And to set the action or election aside, the fact that

² See *In re Brandreth's Estate*, 169 N. Y. 437, 58 L. R. A. 148, 62 N. E. 563, rev'g 58 N. Y. App. Div. 575, 69 N. Y. Supp. 142.

³ *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626, aff'g 53 Ill. App. 396.

⁴ *Phillips v. Eastern R. Co.*, 138 Mass. 122; *State v. McDaniel*, 22 Ohio St. 354.

See *New England Mut. Life Ins. Co. v. Phillips*, 141 Mass. 535, 6 N. E. 534, where holders of certificates of indebtedness were given the right to vote by the statute.

A holder of bonds who is entitled to vote the same does not lose the right by an executory contract to sell the same. *State v. McDaniel*, 22 Ohio St. 354.

⁵ *Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443, rev'g 126 N. Y. App. Div. 937, 110 N. Y. Supp. 1135, which affirmed 57 N. Y. Misc. 417, 108 N. Y. Supp. 67; *In re Empire State Supreme Lodge Degree of Honor*, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, aff'd (N. Y. App. Div.), 103 N. Y. Supp. 1124 (mem. dec.). See also *Lord v. Equitable Life Assur. Society*, 109 N. Y. App. Div. 252, 96 N. Y. Supp. 10, aff'g 47 N. Y. Misc. 187, 94 N. Y. Supp. 65.

⁶ *California. Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 600, 42 Pac. 225.

Colorado. Byers v. Rollins, 13 Colo. 22, 21 Pac. 894.

the result would have been different must be affirmatively shown.⁷ But when the question raised is as to the legality of any election at all, and does not concern itself with what persons received a majority vote, the objectors are not under obligation to show that if a new election should be held a different result would be reached.⁸

If it appears that directors were elected by the receipt of illegal votes, or by the rejection of legal votes, and the result would have been different if it had not been for the illegality, they have no right to the office, and a stockholder may sue to set the election aside, and enjoin them from acting.⁹ The court cannot declare those elected who would have been elected if illegally rejected votes had been counted for them.¹⁰ But where illegal votes

Illinois. Charter Gas Engine Co. v. Charter, 47 Ill. App. 36.

Louisiana. Conant v. Millaudon, 5 La. Ann. 542.

Massachusetts. School Dist. No. 3 v. Gibbs, 2 Cush. 39; Christ Church v. Pope, 8 Gray 140; Inhabitants of First Parish in Sudbury v. Stearns, 21 Pick. 148.

New Hampshire. Bowditch v. Jackson Co., 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

New Jersey. McNeely v. Woodruff, 13 N. J. L. 352.

New York. In re Argus Co., 138 N. Y. 557, 34 N. E. 388; People v. Tuthill, 31 N. Y. 550; In re Utica Fire Alarm Tel. Co., 115 App. Div. 821, 101 N. Y. Supp. 109; In re Empire State Supreme Lodge Degree of Honor, 53 Misc. 344, 103 N. Y. Supp. 465, aff'd (App. Div.), 103 N. Y. Supp. 1124 (mem. dec.); Ex parte Murphy, 7 Cow. 153; In re Chenango County Mut. Ins. Co., 19 Wend. 635.

Pennsylvania. Deal v. Erie Coal & Coke Co., 248 Pa. 48, 93 Atl. 829; Craig v. First Presbyterian Church of Pittsburgh, 88 Pa. St. 42, 32 Am. Rep. 417.

South Carolina. State v. Lehre, 7 Rich. 234.

That certain proxies by virtue of which votes were cast were illegal is not ground for setting aside an elec-

tion, where the result would have been the same had they been rejected. Clark v. Wild, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536. And the validity of proxies will not be considered where the result would not be affected if the votes cast under them were eliminated. Dolbear v. Wilkinson, 172 Cal. 366, 156 Pac. 488; Market St. Ry. Co. v. Hellman, 109 Cal. 571, 600, 42 Pac. 225; Bartlett v. Fourton, 115 La. 26, 38 So. 882.

⁷ In re Empire State Supreme Lodge Degree of Honor, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, aff'd (N. Y. App. Div.), 103 N. Y. Supp. 1124 (mem. dec.); Ex parte Murphy, 7 Cow. (N. Y.) 153.

⁸ In re Empire State Supreme Lodge Degree of Honor, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, aff'd (N. Y. App. Div.), 103 N. Y. Supp. 1124 (mem. dec.).

⁹ In re Vernon, 1 Pennew. (Del.) 202; Humboldt Driving Park Ass'n v. Stevens, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; In re Argus Printing Co., 1 N. D. 434, 435, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

¹⁰ In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. And see Hartt v. Harvey, 32 Barb. (N. Y.) 62, 19 How. Pr. 252; People

have been received, the court may enjoin the directors claiming to have been elected thereby, and declare the election of those who received a majority of the votes which were legal.¹¹ However, "it requires a clear case to justify the court in installing into office those who have received a minority of votes, on the ground that the majority voted for ineligible candidates."¹² And generally this will not be done unless those voting for the ineligible candidates had knowledge of the facts which disqualified them and also knew that by reason of such facts they were disqualified.¹³

The receipt of illegal votes at a corporate meeting does not render the election or other action either void or voidable, at the instance or objection of stockholders who were present, if no objection was taken at the time.¹⁴

A stockholder cannot complain of failure or refusal to receive his vote at a corporate meeting unless he shows that he offered to vote, or otherwise asserted his right, and that his vote was rejected.¹⁵ An offer

v. Phillips, 1 Den. (N. Y.) 388; In re Argus Printing Co., 1 N. D. 435, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347; State v. McDaniel, 22 Ohio St. 354. See, however, In re Cape May & D. Bay Nav. Co., 51 N. J. L. 78, 16 Atl. 191. See also Tomlin v. Farmers' & Merchants' Bank, 52 Mo. App. 430, where the authorities are reviewed but the question is not decided.

¹¹ American Railway-Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377; In re St. Lawrence Steamboat Co., 44 N. J. L. 529; Downing v. Potts, 23 N. J. L. 66; Ex parte Desdoity, 1 Wend. (N. Y.) 98.

¹² Stratford v. Mallory, 70 N. J. L. 294, 58 Atl. 347, aff'g sub nom. In re Jersey City Paper Co., 69 N. J. L. 594, 55 Atl. 280. See also In re Schwartz & Gray, 77 N. J. L. 415, 72 Atl. 70.

Where the ineligibility arises out of a technical violation of statutory duty, committed under circumstances which negative any fraudulent or improper motive, and it is not reasonably to be inferred that harm will result, and where, in fact, none has resulted, the

court will merely set aside the election and order a new one. Stratford v. Mallory, 70 N. J. L. 294, 58 Atl. 347, aff'g sub nom. In re Jersey City Paper Co., 69 N. J. L. 594, 55 Atl. 280.

Under such circumstances, where a large part of the costs of the proceeding in which the election was set aside were due to the efforts of the petitioners, who received a minority of the votes, to have themselves elected, it was held that costs would not be allowed to either party since each had succeeded in part. In re Jersey City Paper Co. (N. J. L.), 59 Atl. 565.

¹³ Schmidt v. Mitchell, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; In re Election of Directors St. Lawrence Steamboat Co., 44 N. J. L. 529.

¹⁴ In re Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635. And see In re United Towns Building & Loan Ass'n, 79 N. J. L. 31, 74 Atl. 310; State v. Lehre, 7 Rich. (S. C.) 234.

¹⁵ State v. Chute, 34 Minn. 135, 24 N. W. 353.

A stockholder not voting cannot get relief from the courts if he had an opportunity, and his claim of right to vote was not excluded. Com. v. Van-

to vote would no doubt be excused if the officer having the authority to determine the right to vote should give notice that the vote will not be received. But a stockholder cannot complain if he failed to offer his vote, or assert his right to vote, upon the expression of an adverse opinion as to his right to vote by an officer having no authority to determine the question—as where such an opinion is expressed by the chairman or presiding officer, when the authority to determine the question is not in him, but in the meeting.¹⁶

VI. NUMBER OF VOTES AND CUMULATIVE VOTING

§ 1678. The voting unit—In general. At common law, since the members of a corporation were entitled to equal rights, each member was entitled to one vote and no more,¹⁷ and this is still the rule in the case of nonstock corporations.¹⁸ Furthermore, it has been held that the rule also applies to corporations having a capital stock divided into shares, and that, in the absence of express provision to the contrary, a stockholder has only one vote, however many shares he may own, and not a vote for each share.¹⁹ It is generally expressly provided, however, by statute or by by-laws, that stockholders shall have one vote for each share held by them.²⁰

dergrift, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

¹⁶ State v. Chute, 34 Minn. 135, 24 N. W. 353.

¹⁷ Illinois. Western Cottage Piano & Organ Co. v. Burrows, 144 Ill. App. 350.

Kentucky. Procter Coal Co. v. Finley, 98 Ky. 405, 33 S. W. 188.

Missouri. Gregg v. Granby Mining & Smelting Co., 164 Mo. 616, 65 S. W. 312; In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502; State v. McGann, 64 Mo. App. 225.

New Jersey. Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33.

New York. In re Rochester Dist. Tel. Co., 40 Hun 172.

Pennsylvania. Com. v. Conover, 10 Phila. 55.

England. See In re Horburg Bridge Coal, Iron & Wagon Co., 11 Ch. Div. 109.

¹⁸ In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

¹⁹ Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33. See also In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502; In re Horburg Bridge Coal, Iron & Wagon Co., 11 Ch. Div. 109.

²⁰ United States. Lucas v. Milliken, 139 Fed. 816; Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299.

Indiana. State v. Anderson, 31 Ind. App. 34, 67 N. E. 207.

Kentucky. Procter Coal Co. v. Finley, 98 Ky. 405, 33 S. W. 188.

Louisiana. State v. New Orleans, J. & G. N. R. Co., 20 La. Ann. 489.

Missouri. Gregg v. Granby Mining & Smelting Co., 164 Mo. 616, 65 S. W. 312; In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502; State v. McGann, 64 Mo. App. 225.

New York. See In re Rochester Dist. Tel. Co., 40 Hun 172.

Even in the absence of an express provision, the soundness of the view limiting stockholders to a single vote, however many shares they may own, is very doubtful. The common-law rule was adopted with respect to public corporations and private corporations not having a capital stock, and at a time when joint stock corporations were unknown, and was based upon the ground that all the members of a corporation, since they were equally interested, were entitled to an equal voice in its affairs. The rules of the common-law change as conditions change, and, by the application of common-law principles to new conditions, new common-law rules arise. It follows that a common-law rule, adopted with reference to nonstock corporations, in which all the members were equally interested, giving each member a single vote, cannot properly be applied to a new kind of corporation, not known at the time the rule was adopted, in which some members have a greater interest than others. *Cessante ratione, cessat et ipsa lex*. On the contrary, the principle of the common law that each member of a corporation in which each has an equal interest is entitled to an equal vote, if logically applied to the new kind of corporations—joint stock corporations—will give to stockholders a vote for each share. Even aside from this view, the common usage in giving a vote for each share would seem to be sufficient ground for implying an intention on the part of the legislature, in the absence of express provision, to give each share a vote.²¹ And it has been held that this is the proper method of voting

Pennsylvania. *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

A constitutional provision for cumulative voting in the election of directors necessarily gives the right to one vote for each share of stock, since that system is founded on the right to vote in that manner. *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188.

In *Orr v. Bracken County*, 81 Ky. 593, 5 Ky. L. Rep. 632, it was held that where the corporation refused to accept an amendment giving the stockholders one vote for each share of stock, an election should have been held in accordance with the provisions of the original charter which so regulated the vote as not to give the largest stockholder the right to elect.

The New Jersey Act of April 9, 1897, providing that in every library

association every stockholder shall have at least one vote for each share of stock held by him, applies to a library association, all the stockholders of which assent thereto, notwithstanding its special charter limits the voting power of shares held in blocks exceeding five by single owners. *Rankin v. Newark Library Ass'n*, 64 N. J. L. 265, 45 Atl. 622.

The fact that the by-law has never been invoked in such a case does not prevent its application on demand of a stockholder. *Rankin v. Newark Library Ass'n*, 64 N. J. L. 265, 45 Atl. 622.

As to the validity of by-laws so providing, see § 1679, *infra*.

²¹ In *re Rochester Dist. Tel. Co.*, 40 Hun (N. Y.) 172, quoted with approval in *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

on all questions in regard to the management of the corporation or its business policies, in the absence of any statute, charter provision or by-law on the subject.²²

On the other hand it has been held that in the absence of a statute or by-law otherwise providing, the chairman of an annual meeting may be selected by a viva voce vote, and that a stock vote is not required to give validity to the meeting.²³ And it has also been held that a statute permitting nonassessable stock to be made assessable "with the consent of three-fourths of its stockholders" requires the vote of three-fourths of the whole number of individuals owning stock, regardless of the number of shares owned by them, to effect the change.²⁴

§ 1679. — Effect of by-laws. By the weight of authority, a corporation may make a valid by-law changing the common-law rule, and allowing stockholders to cast one vote for each share of stock held by them, instead of each stockholder being restricted to a single vote,²⁵ unless the charter or general statutory law establishes a different rule.²⁶

See also *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188.

²² *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

Voting to organize stockholders' meetings should be by shares. *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350.

In re Baker's Appeal, 109 Pa. St. 461, it was held that the stockholders were entitled to a stock vote on the question of the acceptance of the provisions of a new state constitution, though the charter specifically provided for such a vote only in elections of directors.

In Walker v. Johnson, 17 App. Cas. (D. C.) 144, it was held that in voting upon the amendment of the by-laws of a mutual fire insurance company, where no method was provided by the charter, the vote should not be taken per capita, but that each member should be given one vote for each risk held by him, which was the method prescribed by the charter in voting for managers.

²³ *Com. v. Vandergrift*, 232 Pa. 53,

36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

²⁴ *Smith v. Iron Mountain Tunnel Co.*, 46 Mont. 13, Ann. Cas. 1914 B 551, 125 Pac. 649.

²⁵ *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188; *Weinburgh v. Union St. Ry. Advertising Co.*, 55 N. J. Eq. 640, 37 Atl. 1026; *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990. And see *State v. Tudor*, 5 Day (Conn.) 329, 5 Am. Dec. 162. See also *In re P. B. Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

A by-law providing that "at stockholders' meetings each stockholder shall cast one vote for each share of stock owned by him" applies to all voting, not only to the election of directors, but also to the election of a chairman to preside over a meeting, to voting on motion to adjourn, etc. *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188; *In re Rochester Dist. Tel. Co.*, 40 Hun (N. Y.) 172.

²⁶ *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188; *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33.

But if the charter or a general statute gives stockholders one vote for each share, a by-law cannot limit the number of votes of each stockholder to less than one for each share.²⁷

It would seem that a provision of the by-laws that the presiding officer "shall have a casting vote" at all meetings of the stockholders "cannot be given effect to enable a presiding officer who has voted on his stock at an election of officers to cast an additional vote, and thereby determine the election."²⁸

§ 1680. — Waiver. Failure to object to the method of taking and counting the vote, as, for example, that the individual shareholder instead of the share was made the voting unit, is not a waiver of the right of a stockholder to have a proper and legal count of the votes.²⁹ But generally the right to a stock vote is waived unless such a vote is demanded at the meeting.³⁰ And it has been held that even if a stock vote is demandable on the election of a chairman to preside at a meeting, a demand first made after the organization has been effected is too late.³¹

A uniform practice or usage as to the manner of voting in proceedings which are formal, or wherein complete harmony of purpose prevails, will not deprive any participant of the right to demand the enforcement of the prescribed rule of voting, provided the demand be made in season, since such a practice or usage cannot be set up to impair the obligation of an express provision of law.³²

§ 1681. Limiting number of votes. For the purpose of preventing a single individual, or a few individuals, from obtaining control of a corporation, the charter or a general statute sometimes limits the number of votes which a single stockholder may cast, and the restriction cannot be evaded by colorable transfers.³³ A general statute

²⁷ Beckett v. Houston, 32 Ind. 393.

²⁸ Lamb v. McIntire, 183 Mass. 367, 67 N. E. 320.

²⁹ In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

³⁰ Jones v. Concord & M. R. R., 67 N. H. 119, 38 Atl. 120.

³¹ Com. v. Vandergrift, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

³² Walker v. Johnson, 17 App. Cas. (D. C.) 144.

The fact that a by-law providing for

voting by shares had never been previously invoked in the organization of the meeting, and that at previous meetings the chairman had always been selected by consent or chosen by a count by the head, cannot affect the question as to the legal method of electing a chairman when the question is first raised., Procter Coal Co. v. Finley, 98 Ky. 405; 33 S. W. 188.

³³ Mack v. De Bardeleben Coal & Iron Co., 90 Ala. 396, 9 L. R. A. 650, 8 So. 150; Bartlett v. Fourton, 115

which is inconsistent with such a limitation in existing corporate charters will control where the stockholders unanimously accept its provisions,³⁴ or where power to amend or repeal the charter has been reserved.³⁵ But where no such power is reserved, the limitation cannot be removed or modified by amendment without the consent of the stockholders.³⁶

A statute restricting the voting power of a stockholder to a certain number of shares has reference to votes on his own shares only, and does not prevent a stockholder from voting his own shares to the specified number, and also voting as proxy shares owned bona fide by his wife or others.³⁷

§ 1682. Cumulative voting. Cumulative voting is where a stockholder, having a number of votes equal to the number of directors to be chosen, is allowed to cast the whole number for one person, or to distribute them as he may see fit, instead of casting one for each officer. It is intended to secure representation of minority stockholders on the board of directors. In the absence of express provision therefor, a stockholder has no right to thus cumulate his votes;³⁸ but the right is

La. 26, 38 So. 882; *Webb v. Ridgely*, 38 Md. 364; *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559. See also *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299.

That where one vote for each share is given by statute, a by-law, not adopted by unanimous consent, cannot limit the number of votes, see § 1656, *supra*.

³⁴ Where all of the stockholders have accepted a subsequent statute providing that each stockholder shall have one vote for each share of stock held by him, it will control over a provision of the corporation's special charter that each stockholder shall have one vote for each share held by him, if not more than five, and one vote for each additional five shares. *Rankin v. Newark Library Ass'n*, 64 N. J. L. 265, 45 Atl. 622, *rev'g* 64 N. J. L. 217, 43 Atl. 435.

³⁵ *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299.

³⁶ An amendment repealing a provision of a charter limiting the voting power of the state as a stockholder impairs contract obligations, and is void. *Tucker v. Russell*, 82 Fed. 263.

³⁷ *Conant v. Millaudon*, 5 La. Ann. 542.

³⁸ **Kentucky.** *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188.

Michigan. *Attorney General v. Bridgman*, 134 Mich. 379, 96 N. W. 438.

Missouri. *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 372; *State v. Greer*, 77 Mo. 188; *State v. McGann*, 64 Mo. App. 225.

Ohio. *State v. Stockley*, 45 Ohio St. 304, 13 N. E. 279.

Pennsylvania. *Com. v. Butterworth*, 160 Pa. St. 55, 28 Atl. 507; *In re Baker's Appeal*, 109 Pa. St. 461; *Hays v. Com.*, 82 Pa. St. 518.

frequently given by the charter or by-laws of a corporation, or a general statute, and in some jurisdictions it is given by a constitutional provision.³⁹ A constitutional provision allowing cumulative voting is

³⁹ **California.** *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70.

Illinois. *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509.

Kansas. *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882; *Horton v. Wilder*, 48 Kan. 222, 29 Pac. 566.

Kentucky. *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188.

Michigan. *Attorney General v. Bridgman*, 134 Mich. 379, 96 N. W. 438.

Missouri. *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872; *State v. McGann*, 64 Mo. App. 225; *Tomlin v. Farmers' & Merchants' Bank*, 52 Mo. App. 430.

North Carolina. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

Pennsylvania. *Com. v. Flannefy*, 203 Pa. 28, 52 Atl. 129; *Wright v. Com.*, 109 Pa. St. 561, 1 Atl. 794; *Pierce v. Com.*, 104 Pa. St. 150; *Hays v. Com.*, 82 Pa. St. 518.

West Virginia. *Cross v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 174, 12 S. E. 1071.

A statute providing that, in choosing directors of corporations by ballot, "each share shall entitle the owner to as many votes as there are directors to be elected, and a plurality of votes shall be necessary for a choice," does not authorize cumulative voting. *State v. Stockley*, 45 Ohio St. 304, 13 N. E. 279.

The Ohio statute has since been amended so as to permit cumulative voting for directors. *Schwartz v. State*, 61 Ohio St. 497, 56 N. E. 201, aff'g 19 Ohio Cir. Ct. 350.

Cumulative voting is permissible

where a constitutional or statutory provision declares that each shareholder may cast the whole number of his votes for one candidate, or distribute them among two or more candidates as he may prefer (*Pierce v. Com.*, 104 Pa. St. 150); or where it provides that every stockholder shall have the right to vote for the number of shares of stock owned by him for as many directors as are to be elected, or to cumulate his shares, and give all his votes to one director, or divide them among several (*Cross v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 174, 12 S. E. 1071). *Germer v. Triple-State Nat. Gas & Oil Co.*, 60 W. Va. 143, 54 S. E. 509.

A constitutional or statutory provision that at all elections of directors the system of cumulative voting shall be adopted, and directors shall not be elected in any manner, merely authorizes stockholders to cumulate their votes, and does not prevent them from voting without cumulating. And an election of directors, therefore, is not invalid because the cumulative system of voting was not followed, if it does not appear that any stockholder claimed the right to cumulate his votes. *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

In *State v. Swanger*, 190 Mo. 561, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563, 89 S. W. 872, it is said that the provision of the Missouri Constitution that each shareholder shall have the right to cast as many votes as shall equal the number of shares, "means only that every stockholder entitled to vote at any corporate election is entitled to vote his share on the cumulative plan, but does not mean that the stockholders themselves in the organization of the

self-executing, and does not require legislation to carry it into effect.⁴⁰

Where no right to alter or amend the charter has been reserved, the legislature has no power, either by an amendment to the charter, or by a general law, to allow cumulative voting unless the stockholders consent to the change.⁴¹ Nor, without their consent, can a right to vote in that manner be given by constitutional provisions subsequently adopted.⁴² The amendment must be accepted by the stockholders under

company may not voluntarily agree that certain preferred stock shall be issued and that the holders thereof shall not have the right to vote."

Where the statute and by-laws provide for cumulative voting for directors, it is proper for the presiding officer to refuse to put a motion to elect them singly. *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882.

If qualified stockholders are wrongfully denied the right to cumulate their votes, the election is illegal. See the cases above cited.

⁴⁰ *Pierce v. Com.*, 104 Pa. St. 150. See also *Cross v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 174, 12 S. E. 1071.

⁴¹ The right to vote stock on the noncumulative plan is a vested property right, and the stockholders cannot be deprived of it without their consent. *Smith v. Atchison, T. & S. F. R. Co.*, 64 Fed. 272; *State v. Greer*, 78 Mo. 188; *In re Baker's Appeal*, 109 Pa. St. 461.

A provision that charters shall be subject to alteration, suspension, or repeal, "provided, such alteration, suspension or repeal shall, in nowise conflict with any right vested in such corporation by its charter," does not constitute a reservation of power to make an amendment of the kind in question. *Smith v. Atchison, T. & S. F. R. Co.*, 64 Fed. 272.

⁴² *Gregg v. Granby Mining & Smelting Co.*, 164 Mo. 616, 65 S. W. 312.

This is particularly true where the charter provides that it shall not be

subject to alteration or repeal by the legislature. *State v. Greer*, 78 Mo. 188.

A constitutional convention has no more power to violate vested rights than the legislature. *State v. Greer*, 78 Mo. 188.

A constitutional provision for cumulative voting does not apply to corporations which came into existence before the adoption of the constitution containing it, and which have not accepted the provisions of such constitution either expressly or by taking the benefit of some legislation under it. *Com. v. Flannery*, 203 Pa. 28, 52 Atl. 129; *In re Baker's Appeal*, 109 Pa. St. 461; *Hays v. Com.*, 82 Pa. St. 518.

In In re Baker's Appeal, 109 Pa. St. 461, it is said: "If at a meeting duly called for that purpose, a majority * * * in interest of the stockholders present thereat in person or by proxy, authorizes such acceptance, [of the new constitution] then and not till then can the holders of the major part of the capital stock be stripped of their vested right to elect a full board of directors all of their own selection."

In Com. v. Flannery, 203 Pa. 28, 52 Atl. 129, it was held that by procuring an amendment of its charter after the adoption of the constitution, and thereby acquiring a benefit under it, a corporation became subject to its provisions relative to cumulative voting.

In Com. v. Butterworth, 160 Pa. St. 55, 28 Atl. 507, it was held that certain acts on the part of a corpora-

such circumstances, and it cannot be accepted by the directors.⁴³ But the corporation may be estopped to deny the right of its stockholders to vote cumulatively by accepting the benefits of a statute, enacted after its incorporation, conferring that right.⁴⁴

Where power to alter, amend or repeal the charter or general law under which the corporation is organized is reserved, a constitutional provision,⁴⁵ or a general law,⁴⁶ giving the right of cumulative voting is valid as to an existing corporation though enacted without the consent of the corporation or its members.

A resolution or by-law depriving stockholders not consenting thereto of the right given them by the constitution, statute or charter to cumulate their votes is illegal, as it violates their rights.⁴⁷

It has been held that where cumulative voting for directors is provided for, all the directors to be elected must be voted for at one time, and that a resolution providing for taking as many separate ballots as there were directors to be chosen, and that each stockholder on each of such ballots should vote for one person only, and that the person receiving the majority of votes on each ballot should be declared elected, was void as against nonconsenting stockholders.⁴⁸

As a rule the right is not given generally, but only in the election of directors or trustees.⁴⁹ Under some statutes it is given only when more than a certain percentage of the stock is owned or controlled by any one person.⁵⁰ And it is sometimes provided that cumulative voting shall be permitted only when the minority stockholders publicly an-

tion did not amount to an acceptance of the constitution so as to make cumulative voting permissible.

⁴³ *In re Baker's Appeal*, 109 Pa. St. 461.

⁴⁴ *Gregg v. Granby Mining & Smelting Co.*, 164 Mo. 616, 65 S. W. 312.

⁴⁵ *Gregg v. Granby Mining & Smelting Co.*, 164 Mo. 616, 65 S. W. 312; *Cross v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 174, 12 S. E. 1071.

⁴⁶ *Looker v. Maynard*, 179 U. S. 46, 45 L. Ed. 79, aff'g 111 Mich. 498, 56 L. R. A. 947, 69 N. W. 929; *Cross v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 174, 12 S. E. 1071.

⁴⁷ *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70; *Tomlin v. Farmers' & Merchants' Bank*, 52 Mo. App. 430.

Where the original by-laws of a corporation allowed cumulative voting, and provided that they might be amended or repealed by a two-thirds vote, it was held that cumulative voting could not be abolished by a mere majority. *Loewenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440, 28 Atl. 454.

⁴⁸ *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70.

⁴⁹ *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

⁵⁰ In North Carolina it is permissible when it appears that more than one-fourth of all the stock of the corporation is owned or controlled by one person. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

nounce in the meeting and before the balloting begins that they intend to vote in this manner.⁵¹

From the nature of things, cumulative voting is possible only where several persons are voted for at the same time. It is impossible to vote cumulative on a single proposition.⁵²

Where cumulative voting is permitted, the court will not examine into the motive governing the distribution of a stockholder's votes.⁵³

VII. PROXIES OR POWERS OF ATTORNEY TO VOTE SHARES

§ 1683. In general. At common law it was required that all votes at corporate meetings should be given in person; and this is still the rule, with respect both to nonstock and to stock corporations, in the absence of express provision to the contrary. A stockholder or member of a corporation cannot give a proxy or power of attorney to another to represent him and vote at a corporate meeting, unless the right to do so is given by the charter or a general constitutional or statutory provision, or by a valid by-law.⁵⁴ But it has been held that an excep-

⁵¹ *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

⁵² *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

⁵³ *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509.

⁵⁴ *Alabama. Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217.

California. Market St. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

District of Columbia. Seanlan v. Snow, 2 App. Cas. 137.

Iowa. McKee v. Home Savings & Trust Co., 122 Iowa 731, 98 N. W. 609.

New Hampshire. Bowditch v. Jackson Co., 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

New Jersey. In re Schwartz & Gray, 77 N. J. L. 415, 72 Atl. 70; *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33. See also *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66.

New York. People v. Twaddell, 18 Hun 427; *Philips v. Wickham*, 1 Paige 590, 27 Am. Dec. 60.

North Carolina. Harvey v. Linville Improvement Co., 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

Pennsylvania. Com. v. Detwiller, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990; *Com. v. Bringham*, 103 Pa. St. 134, 49 Am. Rep. 119; *Craig v. First Presb. Church of Pittsburgh*, 88 Pa. St. 42, 32 Am. Rep. 417; *Brown v. Com.*, 3 Grant 209.

"At common law * * * voting by proxy was not permitted in corporate meetings unless expressly warranted by the charter or a statute." *Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

"The common-law rule in respect of voting by proxy had its origin in reasons peculiarly applicable to the earlier forms of corporations, namely, municipal and charitable corporations. Membership in these was coupled with no pecuniary interest. The voting privilege was in the nature of a personal trust, committed to the discretion of the member as an individual, and hence not susceptible of exercise

tion to this rule exists in the case of stock held jointly by executors, administrators, trustees, or other persons acting in a fiduciary capacity, and that they may designate one of their number to represent their interest at a corporate meeting, since the corporation is entitled to refuse recognition of more than one person to represent any one interest.⁵⁵ And it has also been held that even where the right to vote by proxy is not expressly given, a stockholder who was in fact represented at a meeting by an authorized proxy is estopped to contend that his proxy and the proxies of other stockholders ought not to have been recognized.⁵⁶

The right to vote by proxy is now very generally given, in the case

through delegation." *Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

The court gave its approval to the following: "In *Taylor v. Griswold*, 14 N. J. L. (2 J. S. Green) 222, the supreme court, in dealing with the question of the reciprocal rights and duties of shareholders of private corporations, established the principle that the obligation and duty of incorporators to attend in person at meetings of the corporation and execute the trust or franchise reposed in or granted to them, is implied in, and forms part of, the fundamental constitution of every charter in which the contrary is not expressed. They thereupon denied the right of such corporation to authorize any stockholder to vote by any power of attorney or proxy, unless power to do so had been expressly or impliedly conferred by the legislature. This conclusion was reached on the avowed ground that by the association of the individuals in such corporation, each associate was expected to exercise his judgment upon all measures which he and his associates could take respecting the enterprise, which judgment his associates might assume would be favorable to his own interest and consequently beneficial to their interest. The power to judge and determine upon such measures could not, except

under legislative authority, be delegated to another. Since the decision of the case referred to, the legislature has conferred upon stockholders of private corporations, created by special laws or under general statutes, the power to appoint a proxy to cast their votes." *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471.

Persons holding proxies will not be enjoined from voting them at a meeting to be held in another state on the ground that there is no law in the latter state permitting voting by proxy and hence that it is not permissible there, since it is to be presumed that the officers conducting the election will be governed by the laws of the state where it is held, and if they violate those laws, the validity of the election may be tested in a proper proceeding. *Woodruff v. Dubuque & S. C. R. Co.*, 30 Fed. 91.

⁵⁵ *Scanlan v. Snow*, 2 App. Cas. (D. C.) 137.

⁵⁶ At most, measures passed by the aid of the proxies are avoidable at the suit of stockholders who objected to the participation of the proxies, or who did not participate in the meeting, and are not absolutely void so as to be open to attack by a participating or acquiescing stockholder. *Farish v. Cieneguita Copper Co.*, — Ariz. —, 100 Pac. 781.

of stock corporations, by a general statutory or constitutional provision, or by charters, or else it is provided for in the by-laws of corporations.⁵⁷

An agreement between a number of stockholders, based upon no other consideration than their mutual promises, that they will not give proxies to vote their shares, has been held to be contrary to public policy and void; especially where they also agreed not to transfer their shares without the consent of all the parties to the agreement.⁵⁸

57 United States. *Bigelow v. Calumet & H. Min. Co.*, 167 Fed. 704, aff'd 167 Fed. 721; *Worth Mfg. Co. v. Bingham*, 116 Fed. 785.

Alabama. *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723.

California. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *People's Home Sav. Bank v. Superior Court City & County of San Francisco*, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452; *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045.

Connecticut. *State v. Tudor*, 5 Day 329, 5 Am. Dec. 162.

Illinois. *People v. Crossley*, 69 Ill. 195.

New Hampshire. *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

New Jersey. *In re Schwartz & Gray*, 77 N. J. L. 415, 72 Atl. 70; *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591. See also *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66.

North Carolina. *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

Pennsylvania. *Com. v. Roydhouse*, 233 Pa. 234, 82 Atl. 74; *Com. v. Det-*

willer, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

Utah. *White v. Snell*, 35 Utah 434, 100 Pac. 927.

The power of revocation is deemed sufficient to protect the other stockholders. *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471.

As to the validity of by-laws giving a right to vote by proxy, see § 1684, *infra*.

58 Fisher v. Bush, 35 Hun (N. Y.) 641. In this case a number of stockholders of a railroad company had agreed that they would "not sell, assign, set over, pledge or give power of attorney to vote, or agree to sell, assign, transfer, set over, pledge or give power of attorney to vote," the stock held by them respectively, without the concurrent consent of all signers of the agreement, the instrument reciting that it was made for mutual protection, and to prevent the sale of the company's franchise by a majority of the members of the present board of directors, who were, or who represented, a minority of the shares of the capital stock of the company. It was held that this agreement was illegal and void, not only because it was in restraint of trade, and without a sufficient consideration — mutual promises not being sufficient consideration in the case of such contracts — but also because the provision that none of the signers should vote by proxy was contrary to public policy and illegal.

§ 1684. By-laws. By the weight of authority, a by-law may be adopted by a majority of the stockholders, so as to allow voting by proxy, instead of in person, as at common law.⁵⁹ And it has been held that a long continued custom permitting voting in that manner will have the force and effect of a by-law until regularly revoked.⁶⁰ There is authority, however, that such a by-law is void unless power to enact it is conferred by the charter, either expressly or by necessary implication.⁶¹

A by-law may undoubtedly impose reasonable restrictions on the right to vote by proxy, if it does not conflict with the charter or general statutory law, or deprive stockholders of rights thereby given them.⁶² But a by-law which deprives stockholders of a right to vote by proxy given them by the charter or general law, or unreasonably restricts the right, is void unless they consent.⁶³

59 United States. *Worth Mfg. Co. v. Bingham*, 116 Fed. 785.

California. *Market St. R. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225.

Connecticut. *State v. Tudor*, 5 Day 329, 5 Am. Dec. 162.

Illinois. *People v. Crossley*, 69 Ill. 195.

Pennsylvania. *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

See also § 517, *supra*.

"The great weight of authority in this country sustains the proposition, that where the charter of a trading corporation is silent upon this question, the power is implied to enact a by-law conferring the right to vote by proxy." *Walker v. Johnson*, 17 App. Cas. (D. C.) 144. In this case the court points out the distinction between common-law corporations and modern trading corporations, and holds that the reason for the common-law rule that voting by proxy was not permitted unless expressly authorized by the charter or a statute is not applicable in the case of trading corporations.

⁶⁰ *Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

⁶¹ *Taylor v. Griswold*, 14 N. J. L.

222, 27 Am. Dec. 33. See also *In re Schwartz & Gray*, 77 N. J. L. 415, 72 Atl. 70.

⁶² *People's Home Sav. Bank v. Superior Court City & County of San Francisco*, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452. See also *Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

⁶³ *People's Home Sav. Bank v. Superior Court City & County of San Francisco*, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452; *In re Lighthall Mfg. Co.*, 47 Hun (N. Y.) 258; *White v. New York State Agr. Society*, 45 Hun (N. Y.) 580; *Com. v. Coxe*, 1 Leg. Chron. (Pa.) 78.

If a statute allows stockholders to be represented at all elections by proxies of their own selection, a by-law providing that no proxy shall be voted by any one who is not a stockholder of the corporation is void, as in conflict with the right given by the statute. *People's Home Sav. Bank v. Superior Court City & County of San Francisco*, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452. See, to the same effect, *In re Lighthall Mfg. Co.*, 47 Hun (N. Y.) 258.

A statute giving the corporation authority to provide by by-laws for

And a resolution in the nature of an amendment of the by-laws which restricts the right to vote by proxy given by them is void where it operates unjustly, unreasonably and oppressively and so as to work the disfranchisement of a majority of the legal voters.⁶⁴

§ 1685. Express restrictions. A charter or statute allowing voting by proxy, or other statutes, may impose restrictions on the right to vote in this way, or it may limit the right to a particular class of stockholders, and exclude another class, and the right can be exercised only as authorized.⁶⁵ Thus, if a charter allows stockholders who are citizens of the United States, or residents of the state, to vote by proxy, the right cannot be exercised by alien or nonresident stockholders, as the case may be.⁶⁶ Similarly, where the statute provides that absent stockholders may vote by proxy, a proxy becomes void where the stockholder giving it attends the meeting, since then he is not an absent stockholder.⁶⁷

In New York it is provided by statute that no stockholder shall sell his vote or issue a proxy to vote for any sum of money or anything of value.⁶⁸ And this provision has been held to invalidate a proxy deliv-

“the mode of voting by proxy,” “gives to the corporation the power to regulate the exercise of the right, but no power to either qualify or limit the right, and certainly no power to so shackle the right as to result in its nullification.” *People’s Home Sav. Bank v. Superior Court City & County of San Francisco*, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452.

⁶⁴In *Walker v. Johnson*, 17 App. Cas. (D. C.) 144, resolutions that no proxies should be voted at the meeting which were dated prior to the first of the month, and that no officer of the corporation should act as proxy for a stockholder, were held to be unreasonable and oppressive as applied to the meeting at which they were adopted, where the by-laws permitted voting by proxy without any such restrictions. It is to be noted, however, that it was further held that even if such resolutions could be regarded as by-laws or amendments to the by-laws,

they were not regularly or legally adopted, and hence could not bind protesting members.

⁶⁵In *re Schwartz & Gray*, 77 N. J. L. 415, 72 Atl. 70.

And see cases cited in the following notes.

⁶⁶In *re Barker*, 6 Wend. (N. Y.) 509.

⁶⁷In *re Schwartz & Gray*, 77 N. J. L. 415, 72 Atl. 70.

That a proxy is revoked where the person giving it attends the meeting and asserts the right to vote, see § 1694, *infra*.

⁶⁸In *re Glen Salt Co.*, 17 N. Y. App. Div. 234, 45 N. Y. Supp. 568, *aff’d* 153 N. Y. 688, 48 N. E. 1104; In *re Germicide Co. of New York*, 65 Hun (N. Y.) 606, 20 N. Y. Supp. 495. The right of a stockholder to vote shares transferred to him by a former owner may be challenged by any other stockholder on the ground that the transfer is in effect merely a proxy given for a consideration, and there-

ered by a stockholder to another person as security for a debt,⁶⁹ or a transfer of stock, based on a consideration, which, though absolute in form, is merely designed to confer upon the transferee the power to vote the stock for a specified period, and is therefore in effect a proxy.⁷⁰

It is sometimes provided that no one person shall vote more than a specified percentage of the stock outstanding at the time of the meeting,⁷¹ or that no proxy shall be voted on after a specified number of years from its date,⁷² or that officers of the corporation shall not act as proxies.⁷³

§ 1686. Who may give a proxy—In general. The right to vote is inseparable from the right of ownership of stock, without the owner's consent, and therefore a proxy to vote stock, to be valid, must have been given by the person who is the legal owner of the stock and entitled to vote the same at the time it is to be voted.⁷⁴ Of course a proxy cannot be given by a dead man, and a provision in a will that certain stock owned by the testator shall be voted as a named person directs, and that the executors shall give him a proxy to vote it, does not constitute a proxy and cannot be treated as such as to objecting owners or stockholders.⁷⁵

fore void under this statute. In re Glen Salt Co., 17 N. Y. App. Div. 234, 45 N. Y. Supp. 568, aff'd 153 N. Y. 688, 48 N. E. 1104.

⁶⁹ In re Germicide Co. of New York, 65 Hun (N. Y.) 606, 20 N. Y. Supp. 495.

⁷⁰ In re Glen Salt Co., 17 N. Y. App. Div. 234, 45 N. Y. Supp. 568, aff'd 153 N. Y. 688, 48 N. E. 1104.

⁷¹ The Iowa statute provides that each member of a building and loan association shall have one vote for each share of stock owned and held by him "at any election," and may vote the same by proxy, but that "no person shall vote more than ten per cent. of the outstanding shares at the time of said election." McKee v. Home Savings & Trust Co., 122 Iowa 731, 98 N. W. 609.

The word "election," as here used, indicates "the expression of choice by vote, regardless of whether the choice to be made is as to the selec-

tion of an officer or the adoption of a proposition," and hence this limitation applies to a vote on a proposition for the voluntary liquidation of the corporation. McKee v. Home Savings & Trust Co., 122 Iowa 731, 98 N. W. 609.

Violation of such a provision is not ground for setting aside an election where it did not affect the result. Bowditch v. Jackson Co., 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

⁷² See § 1694, *infra*.

⁷³ See § 1688, *infra*.

⁷⁴ In re Mohawk & H. R. Co., 19 Wend. (N. Y.) 135; Tunis v. Hestonville, M. & F. Passenger R. Co., 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88.

As to the right of married women to give proxies, see Florida Clay Co. v. Vause, 57 Fla. 407, 49 So. 35.

⁷⁵ Tunis v. Hestonville, M. & F.

It has been held that an infant has no right to give a proxy to vote stock belonging to him.⁷⁶

A stockholder who has been enjoined from voting stock directly cannot vote it by proxy so long as the injunction stands.⁷⁷

A person who has sold his stock has no right, as against his vendee, to give a proxy to vote it to a third person, even though, as against the corporation, the vendee has no right to vote such stock because of his failure to have it transferred to him on the books of the corporation. And if, under such circumstances, he fraudulently conspires with other persons and gives them a proxy to vote the stock, and they vote it against the transferee, thereby defeating his election as president of the corporation, they are all liable to the transferee in an action for damages.⁷⁸

As we have seen in the preceding section, the right to vote by proxy may be restricted by the charter or statute to a particular class of stockholders.⁷⁹

§ 1687. — Executors and administrators. It has been held that an executor may give a proxy where it contains an express direction as to how the votes shall be cast,⁸⁰ but not a proxy which is a complete delegation of the executor's authority, and permits the person to whom it is given to vote as he sees fit.⁸¹

Several executors or administrators may give a proxy to one of their number to vote stock belonging to the estate, and this has been held to be true even where there is no provision in the statute, charter or by-laws expressly authorizing voting by proxy.⁸²

A direction in a will that stock owned by the testator shall be voted

Passenger R. Co., 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88.

⁷⁶ State v. Voight, 17 Ohio Cir. Ct. (N. S.) 447.

In New Jersey the Building and Loan Association Act expressly prevents minors being represented by proxy. In re United Towns Building & Loan Ass'n, 79 N. J. L. 31, 74 Atl. 310.

⁷⁷ Clarke v. Central Railroad & Banking Co. of Georgia, 50 Fed. 338, 15 L. R. A. 683, rev'd on other grounds 62 Fed. 328.

⁷⁸ Witham v. Cohen, 100 Ga. 670, 28 S. E. 505. In this case, it appearing that the transferee had an agreement

with stockholders for his election annually for a number of years, the damages recoverable were limited to one year's salary.

⁷⁹ See § 1685, supra.

⁸⁰ After the executor's discretion has been exercised, the purely ministerial act of recording that discretion or announcing it by way of a vote may be exercised by another. State v. Voight, 17 Ohio Cir. Ct. (N. S.) 447.

⁸¹ "The discretion lodged in an executor must be exercised by him alone and cannot be delegated." State v. Voight, 17 Ohio Cir. Ct. (N. S.) 447.

⁸² Scanlan v. Snow, 2 App. Cas. (D. C.) 137.

by one of his executors and that the other executors shall give him a proxy to vote it, is not a proxy and cannot be treated as such as against objecting owners or stockholders, and hence the named executor cannot vote the stock over the objections of his co-executors where they have never given him a proxy as directed.⁸³ But it has been held that the other executors may be compelled by the court to give him a proxy under such circumstances.⁸⁴

Although one of several executors has given a proxy to vote stock, another executor who is present at a meeting may vote the stock, where no disagreement among the executors appears; and his vote is a revocation of the proxy.⁸⁵

§ 1688. Who may act as proxy. Where the statute confers the right to vote by proxy without limitation as to the persons who may be appointed, the stockholder may appoint any person he sees fit to represent him,⁸⁶ and a by-law limiting his rights in this respect is void.⁸⁷ So one stockholder may act as proxy for another stockholder,⁸⁸ directors may act as proxies for stockholders,⁸⁹ and one person may act as proxy for more than one stockholder,⁹⁰ in the absence of a provision to the contrary.

The federal statutes in relation to national banks provide that no officer, clerk, teller or bookkeeper of such a bank shall act as proxy.⁹¹

⁸³ *Tunis v. Hestonville, M. & F. Passenger R. Co.*, 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88.

⁸⁴ *In re Lafferty's Estate*, 154 Pa. St. 430, 26 Atl. 388, the Supreme Court was equally divided on this question, and the decree of the Orphans' Court ordering the giving of a proxy therefore stood as affirmed. See also *Tunis v. Hestonville, M. & F. Passenger R. Co.*, 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88, where the court refused to decide the question.

⁸⁵ *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

⁸⁶ *People's Home Sav. Bank v. Superior Court City & County of San Francisco*, 104 Cal. 649, 29 L. R. A. 844, 43 Am. St. Rep. 147, 38 Pac. 452; *In re Lighthall Mfg. Co.*, 47 Hun (N. Y.) 258.

⁸⁷ See § 1684, *supra*.

⁸⁸ *Bowditch v. Jackson Co.*, 76 N. J. 351, L. R. A. 1917 A 1174, Ann.

Cas. 1913 A 366, 82 Atl. 1014. See also *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045.

"No reason is apparent why a corporation stockholder should not have the same legal right as other stockholders to protect its interest, both by giving and soliciting proxies for effecting a lawful concert of action." *Bigelow v. Calumet & H. Min. Co.*, 167 Fed. 704, *aff'd* 167 Fed. 721.

⁸⁹ *Woodruff v. Dubuque & S. C. R. Co.*, 30 Fed. 91. See also *White v. Snell*, 35 Utah 434, 100 Pac. 927.

⁹⁰ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. *Cas.* 1913 A 366, 82 Atl. 1014.

⁹¹ U. S. Rev. St. § 5144. *Bridgers*

§ 1689. Form and genuineness of proxies. No particular form or words are necessary to constitute a proxy, unless expressly required. All that is necessary is that the writing shall show an intention to empower the person to whom it is given to act as agent in voting the stock.⁹² An instrument assigning stock for a period of years, with authority to vote the same, but reserving to the assignors the right to draw all dividends thereon during such period and giving them the right to the possession of the stock, has been held to be no more than a proxy.⁹³ And a written agreement between purchasers of stock that they will for five years "retain the power to vote said shares in one body, and that the vote which shall be cast by said shares * * * shall be determined by ballot between them or their survivors," was held to be a proxy, authorizing the vote of all the stock to be cast in accordance with the determination of the majority.⁹⁴

v. First Nat. Bank, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

⁹² Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

"A stockholder who desires to exercise his right to vote on his stock by proxy, is undoubtedly bound to furnish his agent with such written evidence of the latter's right to act for him as will reasonably assure the inspectors that the agent is acting by the authority of his principal. But the power of attorney need not be in any prescribed form, nor be executed with any particular formality. It is sufficient that it appear on its face to confer the requisite authority, and that it be free from all reasonable grounds of suspicion of its genuineness and authenticity." In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. L. 529.

That defendants were without information as to the validity of the proxies of one seeking to vote at a stockholders' meeting constitutes no defense to an action for assault for ejecting the alleged stockholder from the meeting where no such reason was given at the time for the denial of his right, and there is nothing in the case tending to show any irregularity

in, or suspicion of them when presented. Noller v. Wright, 138 Mich. 416, 101 N. W. 553.

In Georgia Granite R. Co. v. Miller, 144 Ga. 665, 87 S. E. 897, it was held that though a proxy to vote shares owned by a corporation issued by its president and secretary was not shown to have been authorized by a vote of its directors in regular meeting, it would not be declared void at the instance of bondholders of the voting corporation, or at the instance of the company issuing the stock, in a proceeding to foreclose a deed of trust securing such bonds, in view of the manner in which the business of the voting company had been conducted, and the acquiescence of its stockholders in the exercise by its executive officers of powers and functions normally exercised by a board of directors.

That an election will not be set aside because certain proxies by virtue of which votes were cast were illegal, where the result would have been the same had they been rejected, see § 1677, *supra*.

⁹³ Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

⁹⁴ Smith v. San Francisco & N. P.

If a proxy exhibited at a meeting is apparently genuine and regular on its face, the inspectors are bound to recognize it, and have no power to try and determine the question of its genuineness, or to reject it on mere suspicion.⁹⁵ And even where the by-laws make their decision as to the sufficiency of proxies conclusive in all cases, it is not conclusive if they are shown to have been guilty of fraud.⁹⁶

In the absence of express provision to the contrary, a proxy cannot be rejected merely because it is not dated,⁹⁷ or is not acknowledged, or attested by a subscribing witness,⁹⁸ or because of a misnomer of the corporation, where the name is that given in the notice of the meeting,⁹⁹ or because it merely states the year and month, and not the day, of the election.¹

Proxies need not be under seal unless the statute so requires.²

§ 1690. Parol authority. In the absence of any provision to the contrary, authority to act as agent in voting stock at a corporate meeting may be given by parol,³ although a corporation may undoubtedly require written authority. Under a statute providing that the personal property of a wife may be disposed of by the husband and wife by parol, a married woman may, by parol, authorize her husband to vote stock owned by her.⁴

§ 1691. Power of court to compel execution of a proxy. Generally a court cannot compel a stockholder to give to another person a proxy to vote his stock in the absence of an agreement, based on a valuable consideration, to do so.⁵ But when a person in whose name stock stands

Ry. Co., 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

⁹⁵ In re St. Lawrence Steamboat Co., 44 N. J. L. 529; White v. New York State Agr. Society, 45 Hun (N. Y.) 580; In re Cecil, 36 How. Pr. (N. Y.) 477..

⁹⁶ Triesler v. Wilson, 89 Md. 169, 42 Atl. 926.

⁹⁷ Because the date is left blank. In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. L. 529.

⁹⁸ In re Cecil, 36 How. Pr. (N. Y.) 477.

"Inspectors of election cannot reject a vote offered by proxy because

the written proxy was not acknowledged or proved" by a subscribing witness. In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. L. 529.

⁹⁹ Langan v. Francklyn, 29 Abb. N. Cas. (N. Y.) 102, 20 N. Y. Supp. 404.

¹ In re Townshend, 64 Hun (N. Y.) 636, 18 N. Y. Supp. 905.

² Hankins v. Newell, 75 N. J. L. 26, 66 Atl. 929.

³ Hoene v. Pollak, 118 Ala. 617, 72 Am. St. Rep. 189, 24 So. 349.

⁴ Hoene v. Pollak, 118 Ala. 617, 72 Am. St. Rep. 189, 24 So. 349.

⁵ Dulin v. Pacific Wood & Coal Co., 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045.

on the books of a corporation has no right to vote the same—as in a case where a pledgor is entitled to vote stock standing on the books in the name of the pledgee, and particularly if the books are conclusive evidence of the right to vote as between the corporation and the stockholders—a court of equity may compel the execution of a proxy to enable the person who is entitled to vote to do so.⁶

Where a receiver is appointed in a creditors' suit, and the property consists of corporate stock, the court has power to compel the defendant to execute a proxy or power of attorney to enable the receiver to vote the stock at corporate meetings.⁷ And where a will directs one of the executors to vote stock, and the other executors to give him a proxy to enable him to do so, the other executors may be compelled to give the proxy.⁸

§ 1692. Authority of proxies and effect of representation. "Unless restricted by its terms or by some statutory provision a proxy confers on the grantee a discretion, unlimited either in character or duration, until revoked."⁹ As a rule, where a proxy is duly constituted, and the power to vote thereby conferred is unlimited, a vote by the proxy binds the stockholder to the same extent as if cast by the stockholder in person.¹⁰ And this is generally held to be true even though the power conferred is exercised against the interest of the corporation,¹¹ or of the stockholder,¹² at least unless the vote is so contrary to the stockholder's interest as to show that the proxy must have acted in bad faith.¹³

⁶ Vowell v. Thompson, 3 Cranch C. C. (U. S.) 428, Fed. Cas. No. 17,023. And see dictum in *In re Argus Printing Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. 347; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

⁷ *Atkinson v. Foster*, 27 Ill. App. 63, aff'd 134 Ill. 472, 25 N. E. 528.

⁸ See § 1687, *supra*.

⁹ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

¹⁰ *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854; *Baker v. Seattle-Tacoma*

Power Co., 61 Wash. 578, Ann. Cas. 1912 C 859, 112 Pac. 647.

¹¹ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

¹² *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

¹³ In *Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854, it is said, in relation to the duties of one holding a proxy, "It is unquestionably the duty of an agent to act for the interest of his principal to the best of the agent's judgment and belief, and if his acts are so

But the person to whom the proxy runs is the stockholder's agent, and must vote in accordance with the instructions given him, either openly or tacitly, by the latter.¹⁴ If the proxy or power of attorney authorizes the agent to vote on a certain question only, he cannot vote on other questions, and if he does so, and his act is not ratified, his vote is illegal, and cannot be given effect.¹⁵

The fact that a person who holds general proxies for certain stockholders asks them to send him special proxies to represent them at a certain meeting and notifies them that if they do not respond he will assume that they authorize him to represent them under the general proxies will not justify the court in assuming that by failure to respond they gave consent, but rather will it be presumed that the special proxies were not given because the stockholders to whom application was made did not desire to be represented at that meeting.¹⁶

A proxy to vote in the ordinary concerns of the corporation—and proxies are to be thus construed unless their terms are special—is no authority to vote for the reorganization of the corporation,¹⁷ or for its consolidation with another corporation,¹⁸ or for a sale of all of its property,¹⁹ or for a voluntary liquidation of its affairs.²⁰ And it has been held that third persons cannot predicate any rights upon such an act by a proxy, since they are bound to know the extent of his authority in this regard.²¹ It has been said, however, that “a stockholder is or-

clearly against such interest as to show that he acted otherwise, his act is void, and the principal is not bound, except to an innocent party.” The court held, however, that the plaintiff, who was a member of a mutual life insurance association, was bound by the act of his proxy in voting in favor of increased assessments on members, on the theory that increase was necessary to the continued existence of the company, and that therefore the vote was not so contrary to the plaintiff's interest as to show that the proxy acted fraudulently.

¹⁴ *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

¹⁵ *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553 (where proxies who were authorized to vote for directors only voted to ratify a sale of the property of the corporation by the directors).

Proxies to vote at an election of directors may vote on motions to take a ballot and adjourn the meeting. *Forsyth v. Brown*, 33 Wkly. Notes Cas. (Pa.) 72.

¹⁶ *McKee v. Home Savings & Trust Co.*, 122 Iowa 731, 98 N. W. 609.

¹⁷ A proxy to vote at an annual meeting, though giving the holder “all the power that I would possess if personally present at such meetings,” does not authorize him to vote in favor of the reorganization of the corporation. *Farish v. Cieneguita Copper Co.* (Ariz.), 100 Pac. 781.

¹⁸ *Smith v. Smith*, 3 Desauss. (S. C.) 557.

¹⁹ *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578.

²⁰ *McKee v. Home Savings & Trust Co.*, 122 Iowa 731, 98 N. W. 609.

²¹ *Farish v. Cieneguita Copper Co.* (Ariz.), 100 Pac. 781.

dinarily bound by the action of a meeting in which he is represented by proxy, whether it be extraordinary or not, provided that it is not forbidden by the charter or some general law.”²²

A proxy to represent a stockholder and to vote his stock at a meeting of the stockholders, only authorizes the holder to represent the stockholder as a stockholder, and to do for him those things which pertain to the authority of stockholders as such. It does not authorize him to represent the stockholder in his capacity as a creditor of the corporation, or to vote to release a mortgage securing the stockholder as a creditor, and his action in so doing is not binding on the stockholder unless ratified.²³

A general proxy contemplates action by the person to whom it is given only with reference to matters which could be submitted to the stockholders under the existing statutes, articles and by-laws; and does not authorize the person to whom it is given to vote on a question submitted to the stockholders under a statute enacted after it was given.²⁴ And of course it does not authorize him to vote in favor of acts or contracts which are illegal or contrary to public policy, since the stockholder himself could not do so.²⁵

A stockholder is bound by the action taken at a meeting at which he is represented by proxy to the same extent as if he had been personally present,²⁶ and may be estopped by false representations of his proxy as to what action was taken.²⁷ He is also bound by the error of the holder of the proxy the same as if the error were com-

²² Crook v. International Trust Co. of Maryland, 32 App. Cas. (D. C.) 490.

²³ Moore v. Ensley, 112 Ala. 228, 20 So. 744.

²⁴ McKee v. Home Savings & Trust Co., 122 Iowa 731, 98 N. W. 609. In this case the member of a savings and loan company gave a proxy which read as follows: “In order to obtain representation, I hereby appoint — to vote in my place and stead as proxy, and authorize him, during my absence, to vote in all matters which may come before any meeting of the stockholders. I reserve the right to revoke this appointment at any time.” The court held that this proxy did not enable the party intrusted therewith to vote the stock on the question of going into

voluntary liquidation under statutory enactments passed thereafter, and limited the right to vote under the proxy to matters which might have been submitted under the articles and by-laws as they then existed.

²⁵ Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 So. 723.

²⁶ Crook v. International Trust Co. of Maryland, 32 App. Cas. (D. C.) 490.

²⁷ If in fact no action is taken at such meeting, but a false statement is made that it has been, and another party is misled thereby to his detriment, the parties making the same, in person or by proxy, may be estopped. Crook v. International Trust Co. of Maryland, 32 App. Cas. (D. C.) 490.

mitted by himself.²⁸ And he is estopped by the vote of his proxy as respects any irregularities in the call or proceedings of the meeting which he could have waived if personally present.²⁹

As a rule the stockholder is chargeable with notice of what takes place at a meeting at which he is represented by proxy.³⁰ But one who has been induced by fraud to subscribe for stock is not affected with knowledge of the fraud by the disclosure of facts in regard thereto at a stockholders' meeting for which the perpetrator of the fraud held proxies from him, and at which he was not personally present.³¹ Knowledge acquired by the agent before the proxy was given will not be imputed to the stockholder, since the agent is under no obligation to communicate to his principal information so acquired.³² And stockholders by giving proxies to directors and trustees to vote at a meeting do not become charged with knowledge of facts known to the latter which they are concealing from the stockholders, especially where such facts are not stated at such meeting.³³

The mere fact that a person votes his own stock in favor of a proposition does not indicate that he intends to, or does, express the consent of other stockholders whom he represents to the exercise of the power thereby attempted to be conferred upon the corporation, even if he has the power to consent on their behalf.³⁴

§ 1693. Ratification of unauthorized vote. Where a person assumes to vote for a stockholder as proxy, without authority,³⁵ or if

²⁸ So he will be deemed bound by the error of the holder of the proxy in failing to specify on his ballot the number of votes cast for each individual voted for. In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

²⁹ Columbia Nat. Bank of Tacoma v. Matthews, 85 Fed. 934, rev'g 79 Fed. 558. See also Synnott v. Cumberland Bldg. Loan Ass'n, 117 Fed. 379.

So a stockholder who was represented at a meeting by proxy cannot complain of a failure to give the required notice of the meeting. See § 1641, *supra*.

³⁰ Thames v. Central City Ins. Co., 49 Ala. 577; Crook v. International Trust Co. of Maryland, 32 App. Cas. (D. C.) 490.

A stockholder who is represented by

a proxy at a meeting at which it is voted to make a call upon stock, and at which there is a general agreement to consider the call as made, is deemed to have actual notice of the call, and will be held to have waived formal notice thereof. Crook v. International Trust Co. of Maryland, 32 App. Cas. (D. C.) 490.

³¹ Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168.

³² Moore v. Ensley, 112 Ala. 228, 20 So. 744.

³³ Tooker v. National Sugar Refining Co. of New Jersey, 80 N. J. Eq. 305, 84 Atl. 10.

³⁴ Steiner v. Steiner Land & Lumber Co., 120 Ala. 128, 26 So. 494.

³⁵ Where a married woman, knowing that her husband had, in her be-

one to whom a proxy is given acts in excess of the authority actually conferred,³⁶ his act may be afterwards ratified; and a ratification will be implied from subsequent conduct inconsistent with an intention to repudiate the act as unauthorized.

The fact that an alternate appointed in a proxy to vote in the absence of the principal attorney votes, although the latter is present, will not invalidate the election, where no objection is taken at the time, and the owner of the stock afterwards formally ratifies his action.³⁷

The burden of alleging and proving ratification by acquiescence is upon the party who relies upon it.³⁸

Knowledge of all the material facts necessary to intelligent action is an essential element of ratification either by affirmative action or acquiescence.³⁹ Nor can one be deemed guilty of laches in failing to repudiate the unauthorized acts of his representative until he has knowledge of the action taken,⁴⁰ or could have acquired such knowledge by the exercise of reasonable diligence.⁴¹ But as soon as he acquires such knowledge, or is chargeable with it, he must exercise the most active diligence in repudiating the action of which he complains, or he will be deemed to have consented to it, and his right to relief will be barred.⁴²

half, voted shares owned by her in favor of a transfer by the corporation of all its assets for the stock of another corporation, to be given to the stockholders of the former, received her share of the stock and disposed of a part of it, this was held a ratification of her husband's act in voting her stock. *Hoene v. Pollak*, 118 Ala. 617, 72 Am. St. Rep. 189, 24 So. 349.

³⁶ *Moore v. Ensley*, 112 Ala. 228, 20 So. 744.

³⁷ *Com. v. Roydhouse*, 233 Pa. 234, 82 Atl. 74.

³⁸ *Moore v. Ensley*, 112 Ala. 228, 20 So. 744.

³⁹ *Moore v. Ensley*, 112 Ala. 228, 20 So. 744.

⁴⁰ Stockholders whose proxies vote in favor of a reorganization, although not authorized to do so, are not guilty of laches until they know of the attempted reorganization. *Farish v.*

Cieneguita Copper Co. (Ariz.), 100 Pac. 781.

⁴¹ If he could have acquired such knowledge by the exercise of reasonable diligence, knowledge will be imputed to him. *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379.

⁴² *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379.

Where the corporation accepts the benefits of a trusteeship of its property, neither the corporation nor minority stockholders suing in its behalf can attack it on the ground that a proxy upon which the majority of the stock was voted at the meeting of the stockholders at which the trusteeship was authorized was irregular or unauthorized. *Kessler & Co. v. Ensley Co.*, 141 Fed. 130, aff'd 148 Fed. 1019.

In *Moore v. Ensley*, 112 Ala. 228, 20 So. 744, it was held that a delay of thirty-five or forty days in bringing suit did not constitute laches.

§ 1694. Revocation or termination of power. One who has given a proxy or power of attorney to vote stock owned by him may revoke the same at any time, unless it is coupled with an interest, even though it may in terms be irrevocable.⁴³ And in at least one state it is provided by statute that every proxy shall be revocable at the pleasure of the person executing it.⁴⁴ Indeed, according to the weight

A suit instituted by a stockholder "on behalf of himself and other stockholders similarly situated," to set aside an attempted reorganization brings into litigation the substance of the rights of such other stockholders in their interest as well as his, and hence the time elapsing between the institution of such suit and their appearance in it as interveners cannot be counted against them as evidence of laches. *Farish v. Cieneguita Copper Co.* (Ariz.), 100 Pac. 781.

⁴³ **United States.** *Tucker v. Russell*, 82 Fed. 263. See also *Woodruff v. Dubuque & S. C. R. Co.*, 30 Fed. 91.

Georgia. *Witham v. Cohen*, 100 Ga. 670, 28 S. E. 505.

Indiana. See *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

Kentucky. *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

New Jersey. See *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471.

North Carolina. *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770; *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 874; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

North Dakota. *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809.

See also Chap. 40.

"There is no such thing as an irrevocable proxy to vote stock not

coupled with any interest in the stock itself other than the right to vote it. A proxy, though stated to be irrevocable, may be revoked at any time." *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315.

A proxy executed by a majority of the directors of a corporation to vote stock of another corporation which it owns is rendered invalid where it is revoked by a part of such majority sufficient to reduce the remaining signers a minority. In *re Delaware River & A. R. Co.*, 76 N. J. L. 163, 68 Atl. 1104.

In *Sullivan v. Parkes*, 69 N. Y. App. Div. 221, 74 N. Y. Supp. 787, it was held that, where the holders of the majority of the stock gave irrevocable proxies to two persons jointly under an agreement whereby the latter were to vote the same as, in their discretion, might seem for the best interests of the parties, and which provided that in case they could not agree as to how it should be voted, they should select a third person to decide the question, and they disagreed and failed to appoint an arbitrator, the owner of a part of the stock would not be enjoined from voting it.

Where the revocation of a proxy to which a ballot is attached is duly presented to the judges of the election, or is shown to have been in the hands of the person holding the proxy, or to have been known to him, the ballot attached to such proxy should not be counted. *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281.

⁴⁴ It is so provided in New York. *Sullivan v. Parkes*, 69 N. Y. App. Div.

of authority, an irrevocable proxy or power of attorney to vote stock, if not coupled with an interest, is contrary to public policy.⁴⁵ A provision in a proxy given by one of several executors that it shall remain in force until revoked by him in a certain way does not prevent its revocation by a coexecutor.⁴⁶

Revocation of a proxy need not be in the form or manner provided in the proxy. It may be revoked orally, or by conduct. Appearing and asserting the right to vote at a meeting revokes a proxy previously given,⁴⁷ especially where the statute limits the right to give proxies to absent stockholders.⁴⁸ And the sale of the stock revokes a proxy previously given by the vendor.⁴⁹ Where the same person gives two or more proxies, the one last given is to be deemed a revocation of all former ones.⁵⁰ If two such proxies, with inconsistent ballots attached are presented to the judges of election, and it can-

221, 74 N. Y. Supp. 787; *In re Germeide Co. of New York*, 65 Hun (N. Y.) 606, 20 N. Y. Supp. 495.

It has been held that this provision does not apply to a power of attorney, irrevocable for ten years, executed by joint owners of stock to one of their number, to vote on the stock, since it is not of the ordinary character, and none of the joint owners could have voted on the stock without the consent of the others. *Hey v. Dolphin*, 92 Hun (N. Y.) 230, 36 N. Y. Supp. 627.

⁴⁵ *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66; *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

An agreement whereby stockholders give an irrevocable power of attorney to vote their stock, and which provides that the parties thereto shall not sell their stock without having first offered it to the rest of their associates, but that any one of the parties

shall be at liberty to withdraw at any time on those terms is not contrary to public policy. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, Fed. Cas. No 2,025. See also § 1696 and § 1709, *infra*.

⁴⁶ *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

⁴⁷ *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571; *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591; *Com. v. Patterson*, 158 Pa. St. 476, 27 Atl. 998.

⁴⁸ *In re Schwartz & Gray*, 77 N. J. L. 415, 72 Atl. 70. See also *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

⁴⁹ *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

⁵⁰ As where a member gives two proxies to cast his vote for each of two opposing sets of candidates for directors. *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281. See also *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

not be determined from an inspection of the proxies themselves which of them was the last one given, both ballots should be rejected.⁵¹

It is sometimes provided by statute that no proxy shall be voted on after a certain length of time from its date,⁵² or that no person shall vote at any meeting by virtue of any power of attorney not executed within a certain length of time prior to such meeting;⁵³ or that no such power of attorney shall be used at more than one annual meeting of the corporation.⁵⁴

A proxy or power of attorney to vote stock is generally irrevocable, however, if so in terms, when it is based upon a consideration, or coupled with an interest, and is not contrary to public policy, as where it is given, for the purpose of additional security, to creditors of the corporation, or to a trustee for their benefit, or is given to a person having rights under an executory contract for the sale of stock, or the like.⁵⁵ And this has been held to be true even if it is not

⁵¹ *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281.

⁵² *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770; *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894; *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

The Pennsylvania statute providing that proxies dated more than two months prior to a meeting or election shall not confer the right to vote refers only to formal proxies, and does not apply to a voting trust agreement. *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

The New Jersey statute relating to elections provides that no proxy shall be voted on after three years from its date. *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66; *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591.

This provision applies only to elections, and there is nothing to prevent a stockholder from giving a proxy to vote for him in respect to other matters to run as long as he may please. *Chapman v. Bates*, 61 N. J. Eq. 658,

88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591.

⁵³ The Connecticut statutes so provide in relation to banks and railroad companies. *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32.

⁵⁴ The Connecticut statutes so provide in relation to banks and railroad companies. *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32.

⁵⁵ *Alabama*. *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723.

California. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

New Jersey. *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591. See also *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66.

New York. *Hey v. Dolphin*, 92 Hun 230, 36 N. Y. Supp. 627.

Pennsylvania. *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103; *Shelmerdine v. Welsh*, 20 Phila. 199.

An agreement by the joint owners of certain stock whereby one of their number is appointed as proxy to vote

stated in the instrument itself that the proxy shall not be subject to revocation.⁵⁶

The transfer by a stockholder of his voting power to a trustee under an agreement for the security of creditors of the corporation does not constitute the stockholder a surety of the corporation, so that a modification in the agreement by the trustee will terminate the latter's authority to vote the stock, and reinvest the stockholder with the voting power.⁵⁷

§ 1695. Presumptions. When the validity of an election is attacked, it will be presumed, in the absence of evidence to the contrary, that proxies presented and voted were regularly executed and given by persons entitled to vote.⁵⁸ But it will not be presumed that the husband of a married woman stockholder had authority to represent her at a stockholders' meeting.⁵⁹

VIII. COMBINATIONS AND POOLING AGREEMENTS AMONG STOCKHOLDERS

§ 1696. In general. It is not in violation of any rule or principle of law nor contrary to public policy for stockholders who own a ma-

it, and which provides that such proxy shall be irrevocable for ten years unless both parties consent to its revocation sooner, is valid. *Hey v. Dolphin*, 92 Hun (N. Y.) 230, 32 N. Y. Supp. 627. And the same is true of an agreement whereby the joint owners of stock deposit it in trust and provide that it is to be voted as directed by one of them until it is divided between them on a certain date. *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345.

Even when there is a consideration for a proxy, it may be revoked if it is about to be used for a fraudulent purpose. *Reed v. Bank of Newburgh*, 6 Paige (N. Y.) 337.

⁵⁶ "A power of attorney may become irrevocable whenever the object is to create an interest; and this is so even if it is not stated in the instrument itself to be irrevocable. While the general rule is that a principal may revoke the authority of his agent at his mere pleasure, an exception to this rule is when the principal has expressly stipulated that the

authority shall be irrevocable and the agent has an interest in its execution. But where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, there, unless there is an expressed stipulation that it shall be revocable, it is, from its very nature and character, in contemplation of the law, irrevocable, whether it is expressed to be so upon the face of the instrument conferring the authority or not." *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591. And see *Hey v. Dolphin*, 92 Hun (N. Y.) 230, 32 N. Y. Supp. 627, to the same effect.

⁵⁷ *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723.

⁵⁸ *People v. Crossley*, 69 Ill. 195; *White v. New York State Agr. Society*, 45 Hun (N. Y.) 580.

⁵⁹ *Steele v. Gold Fissure Gold Min. Co.*, 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

jority of the stock of a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and for this purpose to appoint one or more proxies who shall vote in such a way as will carry out their plan.⁶⁰ Nor is it against public policy or unlawful per se for stockholders to agree or combine for the election of directors or other officers, so as to secure or retain control of the corporation,⁶¹ at least where the object

⁶⁰ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

⁶¹ *Alabama*. *Beitman v. Steiner Bros.*, 98 Ala. 241, 13 So. 87; *Moses v. Scott*, 84 Ala. 608, 4 So. 742.

California. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

Idaho. *Weber v. Della Mountain Min. Co.*, 14 Idaho 404, 94 Pac. 441.

Illinois. *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g on other grounds 190 Ill. App. 315; *Venner v. Chicago City Ry. Co.*, 258 Ill. 523, 101 N. E. 949; *Kantzler v. Benzinger*, 214 Ill. 589, 73 N. E. 874, rev'g 112 Ill. App. 293; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24.

Massachusetts. *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

New Hampshire. *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

New Jersey. *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847.

New York. *Brown v. Britton*, 41 App. Div. 57, 58 N. Y. Supp. 353; *Hey v. Dolphin*, 92 Hun 230, 36 N. Y. Supp. 627; *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, aff'd 86 N. Y. 618.

North Carolina. *Bridgers v. First*

Nat. Bank, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

Ohio. *Griffith v. Jewett*, 15 Cinc. L. Bul. 419.

Pennsylvania. *Rigg v. Reading & S. W. St. Ry. Co.*, 191 Pa. St. 298, 43 Atl. 212.

Texas. *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795.

Utah. *White v. Snell*, 35 Utah 434, 100 Pac. 927.

Vermont. *Thompson-Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

Virginia. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

Washington. *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908.

See further Chap. 40, *infra*.

"Each member has the clear to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct or gainsay his discretion. And it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote when cast is but the expressed wish of the stockholder, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleases." *Moses v. Scott*, 84 Ala. 608, 4 So. 742, quoted with approval in *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56

is to carry out a particular policy with a view to promote the best interests of all of the stockholders⁶² and the agreement is fair to all

Am. St. Rep. 119, 47 Pac. 582; *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159.

"The stockholders can control the affairs of a corporation only through the election of directors, and at every such election there is necessarily a combination of shares upon the persons elected. Such combinations may be made at the time of the meeting, but there is no reason why stockholders may not agree beforehand to vote for certain persons as directors, and often they must do so in order to elect the persons desired." *Venner v. Chicago City Ry. Co.*, 258 Ill. 523, 101 N. E. 949.

"If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon." *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471, quoted with approval in *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159; *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

An agreement whereby stock is deposited with a depositary who is to vote it as directed by a stockholders' committee, and from which any stockholder may recede at any time and demand the return of his stock, does not constitute a voting trust and is valid. *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933.

"The depositary is a proxy required to vote the stock as directed by the committee, and he and the committee both derive their power from the

shareholders by the same instrument, and, in the end, effectuate their wishes." *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933.

A contract by the owners of a majority of the stock of a corporation to elect its directors so as to secure the management of its property, to ballot among themselves for directors and officers if they cannot agree, to cast their vote as a unit in accordance with the decision of the majority so as to control the election, and not to buy or sell stock except for their joint benefit, is not dishonest, violative of the rights of others, or in contravention of public policy, but is valid and binding. *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24.

A syndicate agreement whereby the subscribers agree to enter into a pooling contract whereby all the syndicate stock shall be voted at each annual meeting for a period of not less than three years for such directors as shall be named by a committee of five subscribers, with power in the majority to fill any vacancy in the committee, is valid. *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

A pooling agreement cannot be declared void unless the parties thereto are parties to or represented in the suit. *Ryan v. Seaboard & R. R. Co.*, 89 Fed. 397.

As to the validity of voting trusts, see Chap. 40, *infra*.

⁶² *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847. See § 1698, *infra*.

"One or more stockholders in a corporation may agree to stand together in carrying out an honest business

the stockholders alike.⁶³ And they may do this either by themselves or through their proxies,⁶⁴ or they may unite in the appointment of a single proxy to effect their purpose.⁶⁵

According to the weight of authority the validity and legality of such combinations and agreements depend rather upon the objects thereby sought to be attained and the acts which are done under them, and the other circumstances.⁶⁶

Of course such combinations or agreements are invalid if in contravention of statutes providing that no proxy shall be voted on after a certain length of time from its date,⁶⁷ or that no proxy shall be used

policy consistent with what they believe to be to the best interests of all the stockholders." *Rigg v. Reading & S. W. St. Ry. Co.*, 191 Pa. St. 298, 43 Atl. 212.

That such an agreement or combination is void if it contemplates a fraud upon other stockholders or creditors of the corporation, see § 1698 and § 1714, *infra*.

⁶³ *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908.

That such an agreement or combination is void if it contemplates a fraud upon other stockholders or creditors, see § 1698 and § 1714, *infra*.

⁶⁴ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Venner v. Chicago City Ry. Co.*, 258 Ill. 523, 101 N. E. 949; *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014; *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770. See also *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471.

As to the right to vote by proxy generally, see § 1683, *supra*.

⁶⁵ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Venner v. Chicago City Ry. Co.*, 258 Ill. 523, 101 N. E. 949.

As to the validity of voting trusts, see Chap. 40, *infra*.

⁶⁶ *California*. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

Illinois. *Venner v. Chicago City Ry. Co.*, 258 Ill. 523, 101 N. E. 949.

New Hampshire. *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

New Jersey. *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, *aff'd* 60 N. J. Eq. 17, 46 Atl. 591; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847.

New York. See *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506, *aff'd* 86 N. Y. 618.

Vermont. *Thompson-Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

Virginia. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

⁶⁷ *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, *modifying* 65 N. J. Eq. 36, 55 Atl. 66; *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

As to the validity and effect of such provisions, see § 1685, *supra*.

at more than one annual meeting,⁶⁸ or if they operate as an illegal restraint on the alienation of the stock.⁶⁹

§ 1697. Separation of voting power from ownership of stock. According to some authorities it is contrary to public policy to permit or contract for a separation of the voting power of corporate stock from its ownership,⁷⁰ as for example to sell or give away the voting power by means of proxies in such a way that the stockholder has no control over it, and the stock may be voted contrary to his wishes.⁷¹ So it has been held that any agreement, the purpose and effect of which is to permit the affairs of the corporation to be managed by the determination of persons other than its stockholders,⁷² or by a minor-

⁶⁸ Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

As to the validity and effect of such provisions, see § 1685, *supra*.

⁶⁹ A provision of a voting trust agreement that, during the continuation of the trust the stockholders may sell their stock, but not the right to vote it, and that the sale shall be subject to the trust, is a restraint on the alienation of property and hence is contrary to the principles of the common law and will not be enforced in equity. *Moses v. Scott*, 84 Ala. 608, 4 So. 742. See Chap. 40, *infra*.

As to restraints on the alienation of stock generally, see the chapter on Stock and Stockholders.

⁷⁰ **Connecticut.** Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

Georgia. *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487.

Illinois. *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315.

New Jersey. *Thomas Maddock Sons' Co. v. Biardot*, 81 N. J. Eq. 233, 87 Atl. 66; *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66; *Kreissl v. Distilling Co.*, 61 N. J. Eq. 5, 47 Atl. 471; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75.

North Carolina. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

A court of equity will not specifically enforce a contract whereby one person is given the right to vote the stock of another without purchasing it, where the sole purpose is to enable the former to secure control of the corporation through the use of such stock. *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809.

⁷¹ *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571. See also *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933; *In re Lafferty's Estate*, 154 Pa. St. 430, 26 Atl. 388.

⁷² *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66.

"It is against the settled rules governing the control of corporations that an irrevocable power of voting or directing the votes on stock should be vested in a person who is neither interested in the stock nor a representative of persons interested." *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345.

A combination, either by way of a voting trust or the giving of proxies

ity of its own stockholders,⁷³ or any combination or device by which a number of stockholders combine to place the voting of their shares in the irrevocable power of another,⁷⁴ is contrary to public policy

or powers of attorney, whereby stockholders confide to others the formulation and execution of a plan for the management of the affairs of the corporation and exclude themselves by acts made and attempted to be made irrevocable for a fixed period from the exercise of judgment thereon, is contrary to public policy. *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471. See also *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014. See § 1707, *infra*.

A corporation was organized by two parties who placed certain of the stock in the hands of a trustee until it should be divided between them, agreeing that one of them was to have the right to direct the vote of the stock until divided, at a date specified. The one so authorized transferred his interest with the consent of the plaintiff to the defendant, and it was held that the agreement could not operate so as to give him any right to direct how the stock should be voted after he had transferred his entire interest in it. *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345.

⁷³ *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809. See § 1715, *infra*.

In *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188, it was held that the evidence was insufficient to show the existence of any clearly defined or well understood contract by the majority stockholders giving the control to the minority, even if such a contract could be enforced.

⁷⁴ *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487; *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770; *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894; *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489. See § 1717, *infra*.

"It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates, is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs; saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will, in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And

and void, and a party to such an agreement may withdraw therefrom or revoke the power thereby conferred at any time, even though by its terms it is irrevocable, or is to run for a specified term.⁷⁵ It is on this theory that voting trusts have frequently been held to be revocable or void.⁷⁶

Reasons given in support of this rule are that the holders of a majority of the stock in a corporation have the right to control its management, and that every person who becomes an owner of stock has a right to believe that the corporation will, and to insist that it

this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow stockholder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud, and the seeking of individual gains at the sacrifice of the general welfare, as is possible. This I take it is the duty that one stockholder in a corporation owes to his fellow stockholder; and he cannot be allowed to disburden himself of it in this way. He may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow stockholders." *Shepaug Voting Trust Cases*, 60 Conn. 553, 579, 24 Atl. 32, quoted with approval in *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75. See § 1715, *infra*.

"An irrevocable voting trust or any

other irrevocable grant (uncoupled with an interest), assuming to confer upon the donee the power to vote at corporate elections for the choice of directors, is unlawful and void." *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66, quoted with approval in *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

⁷⁵ *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489; *Griffith v. Jewett*, 15 Cinc. L. Bul. (Ohio) 419. See § 1717, *infra*.

"A stockholder may ordinarily withdraw from a combination to control the majority of the stock of a corporation and a contract not to transfer his shares to the opposition or vote against the combination, although it is expressly agreed that the contract shall be irrevocable." *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315.

That a proxy may be revoked at any time though it is in terms irrevocable, see § 1694, *supra*.

⁷⁶ See § 1707 and § 1717, *infra*.

shall, be managed by the majority; ⁷⁷ that the power to vote is inherently attached to and inseparable from the real ownership of each share,⁷⁸ and can only be delegated by proxy with power of revocation;⁷⁹ that each stockholder must be free to cast his vote, whether in person or by proxy, for what he deems for the best interests of the corporation;⁸⁰ and that each stockholder has the right to demand that every other stockholder, if he desires to do so, shall have the right to exercise at each annual meeting his own judgment as to the best interest of all the stockholders, untrammelled by dictation and unfettered by the obligation of any contract.⁸¹ And it has also been said in support of it that it is the duty of the stockholders to use their power as stockholders for the welfare of the corporation and the best interests of the stockholders, and this duty they cannot evade; and that, while they may refuse to exercise the right to vote and participate in stockholders' meetings, they cannot deprive themselves of the power to do so.⁸²

⁷⁷ *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315. See § 1715, *infra*.

⁷⁸ *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

"The right to vote is an incident of the ownership of the stock, and cannot exist apart from it." *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Griffith v. Jewett*, 15 Cine. L. Bul. (Ohio) 419.

⁷⁹ *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

That all proxies are revocable unless based upon a consideration or coupled with an interest, see § 1694.

⁸⁰ *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas.

935, 61 S. E. 487; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489. See § 1707, *infra*.

⁸¹ *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809. See § 1707, *infra*.

All the stockholders are entitled to the benefit of the free exercise of judgment by each stockholder. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894; *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

⁸² *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487; *Luthy v. Ream*, 270 Ill. 170, 110 N. E. 373, rev'g 190 Ill. App. 315; *White v.*

On the other hand some courts have held that it is neither illegal nor contrary to public policy to separate the voting power of the stock from its ownership,⁸³ at least where there is "a property interest to conserve, some definite policy in the interest of the corporation to be carried out, some beneficial interest of the stockholders to be served, or some purpose not unlawful of an advantageous character to the stockholders to be effectuated."⁸⁴ And it has been said that the cases in which the contrary rule has been laid down involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised.⁸⁵

Thomas Inflatable Tire Co., 52 N. J. Eq. 178, 28 Atl. 75. See § 1717, *infra*.

⁸³ Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582. See § 1707, *infra*.

Agreements providing for the separation of the voting power from the stockholder are not per se, at all times and under all circumstances, contrary to public policy and void. *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 93, 12 So. 723.

In the absence of any express statute forbidding it, the voting power may be vested in one person while the ownership of the stock is in another. *White v. Snell*, 35 Utah 434, 100 Pac. 927.

"We know of no rule of law which prevents one person from authorizing another to vote his stock. The code provides that this may be done." *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908.

Where the purposes to be subserved are lawful, "stockholders may, in the absence of constitutional or statutory restrictions, suspend for a time the right to vote their stock and vest it in others who have a beneficial interest in it or the corporate business—as corporate creditors or a trustee for them." *Thompson-Starrett Co. v. E.*

B. Ellis Granite Co., 86 Vt. 282, 84 Atl. 1017.

An agreement whereby the majority stockholders turn over the control of the stock to the minority stockholders, who are also directors, for a certain length of time, appoint them their attorneys in fact to vote the stock, and authorize them to collect dividends and apply the same to their own use, etc., in consideration of their promise to pay said majority stockholders a specified sum monthly, and to pay all assessments on the stock, etc., is not contrary to public policy, but is valid and binding as between the parties. *White v. Snell*, 35 Utah 434, 100 Pac. 927.

⁸⁴ *Boyers v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103, holding that the restrictions therein indicated sprung from the fact that the general policy of the law prohibits the separation of the voting power from the beneficial interest.

⁸⁵ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582. See also *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014. See § 1707, *infra*.

In *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 93, 118, 12 So. 723, it is said: "We * * * find generally

As shown in a previous section, stockholders may vote by proxy when permitted to do so by the statute or charter or valid provisions of the by-laws,⁸⁶ and while the giving of an ordinary proxy may, in a sense, be regarded as a separation of the voting power from the ownership of the stock,⁸⁷ it has been pointed out that it does not in fact involve such a separation, since, where a proxy is given, the property right remains in the stockholder, and the person to whom it is given is but his temporary agent, whose power may be revoked at any time.⁸⁸

As we have seen, irrevocable proxies are generally regarded as valid when coupled with an interest or based upon a consideration,⁸⁹ and this is also true of other irrevocable transfers of the voting power.⁹⁰

that the agreements declared void by the courts, where the power to vote was separated from the stockholder, and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful, such as the courts would not have sanctioned if the principal had voted, and not a proxy."

⁸⁶ See § 1683, *supra*.

⁸⁷ See *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723; *Smith v. California & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908. See § 1707, *infra*.

⁸⁸ "He who holds the proxy is but the temporary agent of the stockholder. A proxy confers only a power upon the stockholder's deputy, and not a right. The right still inheres in the stockholder. And proxies, by the very terms of the act, are limited to three years in duration, and are revocable even within that time." *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66.

⁸⁹ See § 1694, *supra*.

⁹⁰ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345; *White v. Thomas Inflatable*

Tire Co., 52 N. J. Eq. 178, 28 Atl. 75; *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103; *Thompson-Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017. See also *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, modifying 65 N. J. Eq. 36, 55 Atl. 66; *Hey v. Dolphin*, 92 Hun (N. Y.) 230, 32 N. Y. Supp. 627. See also § 1717, *infra*.

Where three persons about to purchase certain stock agreed that they would combine it and vote it as a unit for five years in such manner as might be determined by ballot between them, it was held that it might be assumed that neither of the parties would have entered into the transaction or agreed upon the purchase of the stock except upon the conditions named, and that it must therefore be held that each contributed his money to the purchase of the stock upon the promise made to him by the others, and hence that there was a sufficient consideration for the agreement granting the right to vote the stock, and that it was in the nature of a power coupled with an interest, and, being given for a sufficient consideration, could not be revoked at the pleasure of either. *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582. The court distinguishes

It has been said that agreements of this character are generally sustained if coupled with an interest, but that, if not coupled with an interest, they are regarded as in the nature of a revocable power.⁹¹

It has been held that an agreement giving to persons who have undertaken to purchase all the stock of a corporation the right to manage it and to elect its officers and directors prior to the payment of the purchase price and the transfer of the stock to them is not contrary to public policy, where the rights of third persons are not injuriously affected thereby.⁹² And it has also been held that an agreement by several persons who are about to purchase stock that the stock shall be voted as a unit for a term of years at all meetings for the election of directors, and that the persons for whom it shall be voted shall be determined by such purchasers, or their survivors, by ballot, and that, if any of such stock shall be sold, an agreement shall be exacted from the vendees that it shall continue to be voted pursuant to the agreement, is valid and binding, and that none of

this case from those in which voting trusts have been held to be revocable where the only consideration supporting them is the mutual promises of the several stockholders.

In *Hall v. Merrill Trust Co.*, 106 Me. 465, 138 Am. St. Rep. 355, 76 Atl. 926, it was held that an agreement whereby stock was transferred to a trustee for the purpose of preventing a certain faction from getting control of the stock, and which provided that new certificates were to be issued to the trustee, that the stock was to be voted as certain named stockholders or a majority of them should direct, and was to be sold at such time and such price as such named stockholders should direct, did not create a voting trust with an incidental provision for the sale of the stock, but rather a power of sale with an incidental provision for voting, and was valid and irrevocable.

In *Com. v. Roydhouse*, 233 Pa. 234, 82 Atl. 74, a voting trust agreement was held not to create any beneficial interest in the trustee and hence to

create merely a revocable power.

That mutual promises are not a sufficient consideration to support a voting trust, see *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770. See also *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159, where a voting trust agreement was held to be supported by a sufficient consideration.

And see Chap. 40, *infra*.

⁹¹ *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103. And see § 1717, *infra*.

⁹² An agreement whereby certain persons are to purchase all the stock of a corporation, and which provides that the certificates are to be deposited in escrow until full payment is made, but that purchasers are in the meantime to manage the corporation, elect officers and directors, and operate the property, is not against public policy, it not appearing that the rights of third persons will be injuriously affected thereby. *Borland v. Prindle, Weedon & Co.*, 144 Fed. 718. And see § 1709, *infra*.

the parties can withdraw from the agreement or prevent a majority of the parties from determining how the stock shall be voted.⁹³

§ 1698. Agreements or combinations in fraud of other stockholders or creditors. It may be laid down as an undoubted general principle that any contract on the part of a stockholder or stockholders of a corporation, or between stockholders, to vote their shares in a particular way, or not to vote in a particular way, is illegal and void if the agreement contemplates a fraud upon other stockholders, or upon the creditors of the corporation,⁹⁴ or, what amounts to the same thing, where its object is not the benefit of all the stockholders equally but rather to obtain some unfair advantage to the parties to it.⁹⁵

⁹³Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582. It was held in this case that there was a sufficient consideration for this agreement, in that the parties in their agreement to purchase the stock had stipulated for such a voting agreement, that it was immaterial that the voting agreement was not executed until after their bid for the stock was made, where it was executed before the purchase was completed by paying the purchase money, and that separate certificates were issued to the several parties.

⁹⁴Venner v. Chicago City Ry. Co., 258 Ill. 523, 101 N. E. 949; Keady v. United Rys. Co., 57 Ore. 325, 108 Pac. 197, 100 Pac. 658. See also Bowditch v. Jackson Co., 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014. And see § 1714, *infra*.

The combination is lawful "until such time as the action of such stockholders becomes wrongful or unlawful or fraudulent, at which point the courts may take jurisdiction and act for the protection of the minority." Weber v. Della Mountain Min. Co., 14 Idaho 404, 94 Pac. 441.

An agreement, by a shareholder in a company which was being compulsorily wound up, that, in consideration of a

pecuniary equivalent, he would endeavor to postpone the making of a call, and would support the claim of a particular creditor, was held illegal and void, as in fraud of other stockholders and creditors, and contrary to the policy of the winding-up acts. Elliott v. Richardson, L. R. 5 C. P. 744.

In Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24, it was held that an agreement between the owners of a majority of the stock that they would elect the directors and manage the business could not be avoided by one of the parties thereto on the ground that it was in fraud of the minority stockholders, where the latter did not complain.

⁹⁵Venner v. Chicago City Ry. Co., 258 Ill. 523, 101 N. E. 949; Teich v. Kaufman, 174 Ill. App. 306; Keady v. United Rys. Co., 57 Ore. 325, 108 Pac. 197, 100 Pac. 658. See also Havemeyer v. Havemeyer, 43 N. Y. Super. Ct. 464, *aff'd* 86 N. Y. 618. And see § 1714, *infra*.

A combination among stockholders is contrary to public policy if they reserve to themselves any benefit to be derived therefrom to the exclusion of other stockholders who do not come into the combination. Gray v. Bloomington & N. Ry., 120 Ill. App. 159;

Each shareholder in the corporation has a right to rely upon the judgment of all the other shareholders in the election of directors or officers, and any agreement which puts it out of the power of a stockholder to exercise such discretion is contrary to public policy.⁹⁶ So any agreement by a stockholder to sell his vote, or to vote in a certain way, for a consideration personal to himself, is contrary to public policy and void.⁹⁷ And the same is true of any agreement by or between a part of the stockholders,⁹⁸ particularly where they own a majority of the stock, by which they undertake to secure the election or

Bowditch v. Jackson Co., 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471.

A combination formed for the purpose of exploiting the business of the corporation to the prejudice of the minority stockholders and for the benefit merely of the persons who for the time being may have control of the corporate affairs is contrary to public policy. *White v. Snell*, 35 Utah 434, 100 Pac. 927.

A pooling contract created for the purpose of enabling the directors or a majority of them to carry out a secret agreement under which they are to take to themselves the profits arising out of the transactions which the agreement is formed to promote and out of contracts which they make as directors, is void. *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32.

⁹⁶ *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72; *Jones v. Williams*, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486. And see § 1707, *infra*.

In *Guernsey v. Cook*, 120 Mass. 501, the court said in reference to such a contract, "It was the purpose and effect of the contract to influence the defendant, in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promisee was placed under direct inducement to disregard

his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interest of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates."

⁹⁷ *Dieckmann v. Robyn*, 162 Mo. App. 67, 141 S. W. 717.

An agreement to pay a stockholder a sum of money if he would vote in favor of the purchase of certain property by the corporation and induce others to do so is void. *Dieckmann v. Robyn*, 162 Mo. App. 67, 141 S. W. 717.

"The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree, for the same consideration, to cast the vote himself; and an agreement with others to appoint a proxy upon the same consideration would be equally invalid." *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

⁹⁸ *Funkhouser v. Capps* (Tex. Civ. App.), 174 S. W. 897; *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795. And see § 1714, *infra*.

"As a general rule, a contract by a director or a majority stockholder of a corporation whereby he undertakes, in consideration of a private benefit or advantage accruing to him-

appointment of certain of their number or of others to lucrative corporate offices.

self, to secure the appointment of another to a lucrative office or a position of profit in the corporation, is against common honesty, and therefore against public policy." *Gilchrist v. Hatch* (Ind. App.), 100 N. E. 473.

The following agreements have been held to be contrary to public policy and void:

An agreement by an officer and director of a corporation, who had subscribed for a majority of its stock as trustee, to keep a person permanently employed as an officer of the company at not less than a stated salary. *West v. Camden*, 135 U. S. 507, 34 L. Ed. 254.

An agreement between two factions of the shareholders of a railroad corporation to the effect that one of such factions owning half of the stock shall permanently have the right to name a majority of the directors of the company and thus manage and control its affairs. *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487.

An agreement between stockholders that for five years all of them should be elected directors, that their stock should be voted as a unit, and that as directors they should secure salaried positions for certain of their number. *Teich v. Kaufman*, 174 Ill. App. 306.

A contract whereby a stockholder, in consideration of a sum of money to be paid to him by another stockholder, agrees to vote for a certain person as manager of the corporation and for an increase of the salaries of the manager and other officers. *Woodruff v. Wentworth*, 133 Mass. 309.

A contract whereby certain stockholders agree, in consideration of the purchase of a part of their stock at a price named, to secure to the purchaser a corporate office at a specified salary.

Guernsey v. Cook, 120 Mass. 501. See also *Noyes v. Marsh*, 123 Mass. 286.

An agreement between two stockholders who together own a majority of the stock to invariably vote their stock on the same side, to vote for the directors and officers then in office unless both agree not to so vote, in case of a vacancy not to vote for any candidate unless both favor his election, not to vote for any change of any kind, etc., or any change of salaries, or any dividend, unless both are willing to do so, and that neither party will sell any of his stock, or buy any other shares at a higher price than the holder paid for them, and that if either has his salary increased the other is to have an increase of a similar amount. *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770.

An agreement under which an irrevocable proxy is given, by which the directors who shall be elected shall employ the person giving the proxy at a fixed salary during its existence. *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847.

An arrangement whereby the holders of a majority of the stock pool their stock under an agreement, to last ten years, that the directors are to be divided between them. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

A contract by the owner of stock to allow another to control its voting power, based upon the promise of the latter to secure for the owner an office in the corporation, even though such promise constitutes only a part of the consideration for the contract. *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809.

An agreement by which the president and teller arrange with a third party to secure the co-operation of

But a contract to which all of the stockholders consent cannot be

other stockholders or control of a sufficient amount of stock to secure the election of a board of directors satisfactory to such president and teller and who will retain such officers in their respective offices, each of said officers to pay one-half the expense of securing necessary votes. *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795.

A contract by the holders of the majority of the stock of a newspaper corporation providing for the pooling of their stock, that one of them is to have a lucrative position with the company, that they are to secure and assume the absolute editorial and business management of the paper, and that they are to settle all differences among themselves. *Funkhouser v. Capps* (Tex. Civ. App.), 174 S. W. 897.

Where three directors, controlling a majority of the stock of a corporation with a capital stock of only one hundred and twenty-five thousand dollars, agreed to vote, as stockholders and directors, for each other, or such persons as they should respectively nominate to the offices of president, treasurer, and auditor, respectively, so long as each should remain a stockholder and desire such office, and to vote an increase of two thousand, five hundred dollars to the annual salary of each of said officers, the agreement was held *prima facie* illegal. *Snow v. Church*, 13 N. Y. App. Div. 108, 42 N. Y. Supp. 1072.

An agreement whereby two stockholders deposit a part of their stock with the corporation to be sold by it and the proceeds applied to the payment of its debts and current expenses, in consideration whereof said stockholders are to be trustees and to hold certain corporate offices until the business of the corporation is in successful operation is void both because it is

contrary to public policy and because it violates the provisions of a statute requiring trustees to be elected annually by the stockholders. *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302.

A contract whereby the defendant agrees to form a corporation to take over his business, that he will cause such corporation to employ the plaintiff at a stated salary, and that after a certain time he will cause a certain amount of stock to be transferred to the plaintiff, is contrary to public policy in that it requires the defendant to undertake the control of the proposed corporation for the purpose of carrying out the private agreement of the parties, whether for the good of the corporation and of the public or not. *Rush v. Aunsbaugh*, 179 Ala. 542, 60 So. 802.

A contract whereby the plaintiff agreed to convey certain real estate to the defendant in payment for certain corporate stock, and whereby the defendant, who still held a majority of the stock, agreed as a part of the consideration of the contract, to so manipulate the affairs of the corporation by the election of directors as to procure the election of the plaintiff to a lucrative office in the corporation, and to retain him in such office as long as the plaintiff and defendant could agree, is against public policy. *Gilechrist v. Hatch* (Ind. App.), 100 N. E. 473. This case was later transferred to the Supreme Court (183 Ind. 371, 106 N. E. 694), which held that, conceding that the contract was against public policy, the plaintiff was entitled to a rescission of the contract and of a conveyance of the real estate made pursuant thereto, on the ground that he was induced to enter into it by fraud, and hence that the parties were not in *pari delicto*.

regarded as in fraud of their rights.⁹⁹ And a person who is a party

A promoter's contract between stockholders placing upon the corporate trustees the duty to elect certain persons as officers at similar salaries is illegal and will not be specifically enforced. *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

In *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72, a combination by the owners of the majority of the stock of four newspaper companies to control the management and policies of the papers, and which provided for the employment of one of their number as business manager at a stated salary and that he should be allowed to purchase stock at less than its actual value, was held contrary to public policy.

An agreement between two of the three stockholders and directors of a corporation, that a purchaser of stock shall be employed as business manager for a term of years, and for the repurchase of his stock at a stated price if he desires to retire at the end of the term, is contrary to public policy and illegal, unless assented to by all of the stockholders. *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724.

An agreement between the seller and buyer of stock that the latter shall have the management of the company at a stated salary, shall be made vice president and general manager, and shall have an equal representation with the seller on the board of directors, is void, it not appearing that the latter owned all, or even a majority of the stock. *Fennessy v. Ross*, 90 N. Y. App. Div. 298, 35 N. Y. Supp. 868.

In *Bonta v. Gridley*, 77 N. Y. App. Div. 33, 78 N. Y. Supp. 961, 97 N. Y. App. Div. 643, 90 N. Y. Supp. 1089, aff'd 185 N. Y. 614, 78 N. E. 1100, it was held that an agreement between

certain stockholders of a bank and a third person that the latter should purchase stock in the bank, that he should be elected cashier and should continue to hold that office for five years unless he sooner resigned, and that said stockholder should purchase his stock at a certain price whenever he ceased to be cashier was valid, and that in any event after the contract had been fully performed by the third person for four years and the said stockholders had had the benefit of such performance, they could not set up its invalidity in order to escape liability for failure to repurchase such stock in accordance with their agreement.

This rule does not invalidate an agreement by one who owns the majority of the stock to sell the same and which requires him to resign as president and director and to endeavor to procure the other directors to resign so that the vendee may obtain control of the corporation. *Barnes v. Brown*, 80 N. Y. 527.

In *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 62 L. R. A. (N. S.) 63, 114 Pac. 908, it was held that the plaintiff had no right to rescind a provision of a pooling agreement entered into between himself and another stockholder to the effect that the plaintiff should be retained on the board of trustees of the corporation during the life of the agreement and should be appointed as salesman for the corporation at a stated salary, and that he should secure the resignation of three trustees and the vacancies so created should be filled by the other party to the agreement and his associates, it appearing that the contract had been entered into in good faith and for legal purposes, and had been acted upon.

⁹⁹ See *Woodruff v. Wentworth*, 133 Mass. 309; *Guernsey v. Cook*, 120

to a contract cannot complain that it injures his interests by divesting the parties thereto of the control over their stock.¹

IX. REVIEW AND CONTROL OF ELECTIONS BY COURTS

§ 1699. Quo warranto and mandamus. At common law, and in some jurisdictions by statute, quo warranto will lie to determine the right to a corporate office, where it is claimed that the person occupying the office has not been legally elected.²

If the validity of an election has been determined, and the right to an office adjudicated, or if there is no question as to the right, mandamus will lie to seat the person entitled.³ Mandamus will also lie to compel the inspectors of election to cast up and certify the vote in the manner prescribed by law.⁴ But it has been held that the attorney general cannot maintain mandamus proceedings to deter-

Mass. 501; *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724.

"Where all the parties interested are parties to the contract, or have knowledge of the terms of the contract, and have expressly or impliedly agreed thereto, there can be no possible fraud upon them." *Keady v. United Rys. Co.*, 57 Ore. 325, 108 Pac. 197, 100 Pac. 658.

A contract by stockholders to vote in favor of the sale of corporate property for certain sums of money to be paid to them by the purchaser is not contrary to public policy as in fraud of any stockholder, where all the stockholders are parties to it. *Keady v. United Rys. Co.*, 57 Ore. 325, 108 Pac. 197, 100 Pac. 658.

Where the owners of all of the stock of a corporation agree to sell a majority of it, a provision in the contract that the vendors are to hold certain corporate offices for five years at a specified salary, is binding on the vendees and enforceable against them, especially where the contract provides for the payment of all existing creditors, which is done. *Kantzler v. Benzinger*, 214 Ill. 589, 73 N. E. 874, rev'g 112 Ill. App. 293.

A provision in an agreement be-

tween all the parties about to form a corporation, and who are to contribute the entire capital, vesting the management in one of them is not contrary to public policy, especially where it is further provided that the corporation is to be managed in good faith and with economy. *Lorillard v. Clyde*, 86 N. Y. 384.

Such a contract cannot be deemed void as against the other stockholders where all of the stockholders and directors approve and ratify it. *Jones v. Williams*, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486.

Knowledge on the part of the stockholders of the illegal contract is essential to its ratification by them, and such knowledge must affirmatively appear before a court of equity will enforce the contract on the ground that it has been ratified. *Teich v. Kaufman*, 174 Ill. App. 306.

¹ *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638, aff'g 60 N. J. Eq. 17, 46 Atl. 591.

² See Chap. 42 and chapter on Quo Warranto, *infra*.

³ See chapter on Mandamus, *infra*.

⁴ *State v. McGann*, 64 Mo. App. 225.

mine who are entitled to vote at stockholders' meetings or elections of a private corporation, where no public interests are involved.⁵

§ 1700. Jurisdiction in equity generally. By the weight of authority, a court of equity has no jurisdiction to determine the legality of an election and remove or seat officers, when there is an adequate remedy by quo warranto or under a statute, unless such jurisdiction has been conferred by statute.⁶ A court of equity, however, has jurisdiction to inquire into the validity of an election, and to declare it void, when necessary to the complete adjudication of a cause over which it has jurisdiction on independent grounds,⁷ as where an injunction is necessary to prevent a waste or misappropriation of the

⁵ *Attorney General v. Albion Academy & Normal Institute*, 52 Wis. 469, 9 N. W. 391.

⁶ *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *New England Mut. Life Ins. Co. v. Phillips*, 141 Mass. 535, 6 N. E. 534; *Barna v. Kirczow*, 71 N. J. Eq. 196, 63 Atl. 611; *Kean v. Union Water Co.*, 52 N. J. Eq. 813, 46 Am. St. Rep. 538, 31 Atl. 282; *Deal v. Miller*, 245 Pa. 1, 90 Atl. 1070. See also Chap. 42, *infra*.

⁷ *Alabama*. *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

Connecticut. See *Sheehy v. Barry*, 87 Conn. 656, 89 Atl. 259.

District of Columbia. *Walker v. Johnson*, 17 App. Cas. 144.

Illinois. *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509; *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350; *Blinn v. Riggs*, 110 Ill. App. 37; *Garmire v. American Min. Co.*, 93 Ill. App. 331.

Iowa. *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801.

Nebraska. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997; *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568.

New Jersey. *Johnston v. Jones*, 23 N. J. Eq. 216. See also *Barna v.*

Kirczow, 71 N. J. Eq. 196, 63 Atl. 611. *Oregon*. *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

Pennsylvania. *Deal v. Miller*, 245 Pa. 1, 90 Atl. 1070.

Texas. *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

"The court will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and the grant of relief depends upon its decision." *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217, quoted with approval in *Crow v. Florence Lee & Coal Co.*, 143 Ala. 541, 39 So. 401; *Elliott v. Sibley*, 101 Ala. 344, 13 So. 500.

"Where there are other elements in the case which make it proper that a court of equity intervene 'then the mere fact that the questions presented make it necessary, * * * to determine which of two sets of officers are the lawful officers of a private corporation will not deter the court of equity from acting.'" *West Side Hospital of Chicago v. Steele*, 124 Ill. App. 534.

corporate funds,⁸ or destruction of the corporate business,⁹ or irreparable injury to the corporation and its stockholders,¹⁰ or unwarranted interference with its management and business affairs to its manifest detriment,¹¹ or where a fraud is being perpetrated and cannot be prevented except by a court of equity,¹² or where there has been a breach of trust,¹³ or where an accounting is proper,¹⁴ or in a suit to enjoin the voting of stock illegally issued,¹⁵ or where the validity of the election is involved in a suit to have an issue of stock declared fictitious and void,¹⁶ or in a suit to enjoin directors, claimed to have been illegally elected, from effecting an illegal consolidation with another corporation.¹⁷

The courts may review the decision of the chairman, inspectors, or judges of election, or of the chairman of a meeting for other purposes, that a particular officer has been elected, or that a resolution has been carried, or the like,¹⁸ or as to the right of particular persons to vote.¹⁹

Where minority stockholders prevent the holding of an annual meeting for the election of directors by refusing to attend, a court of

⁸ See *Sheehy v. Barry*, 87 Conn. 656, 89 Atl. 259; *First Bapt. Soc. in Brookfield v. Dexter*, 193 Mass. 187, 79 N. E. 342.

⁹ *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350.

¹⁰ *Blinn v. Riggs*, 110 Ill. App. 37.

¹¹ *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

¹² *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568; *Johnston v. Jones*, 23 N. J. Eq. 216.

“Where a palpable fraud has been practiced in the election, and usurpers are about to take possession of the property, in violation of all justice, courts of equity will sometimes interfere to prevent them from doing so.” *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801.

Equity has jurisdiction also where the majority of the stockholders adjourned the annual meeting before the election of directors so as to prevent the minority from electing a director and so that the old board could elect

the corporate officers. *West Side Hospital of Chicago v. Steele*, 124 Ill. App. 534.

¹³ *Johnston v. Jones*, 23 N. J. Eq. 216.

¹⁴ *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509.

¹⁵ *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

¹⁶ Equity cannot determine the validity of an election of directors in such a suit where the validity of the stock in no way depends upon the legality of the election, as where the stock was issued long after the election was held. *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401.

¹⁷ *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

¹⁸ *Young v. South African & Australian E. & D. Syndicate*, [1896] 2 Ch. Div. 268.

¹⁹ *State v. Chute*, 34 Minn. 135, 24 N. W. 353; *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

equity has power to determine whether a by-law requiring more than a majority of the stock to constitute a quorum is inconsistent with the statutes on the subject, and if it is found to be so, to order an election to be held at which a majority shall constitute a quorum.²⁰

In a suit involving the question whether a certain person was legally elected a trustee to hold the property of a church, the chancellor must decide the issues involved in the light of the evidence presented, and has no right to hold a new election in court.²¹

§ 1701. Restraining holding or postponement of elections. If an election is about to be held illegally or fraudulently, a court of equity may enjoin the holding of the same at the suit of a stockholder.²² And it may also enjoin the holding of an election *pendente lite* when necessary to preserve the status quo until the final determination of

²⁰ *Lutz v. Webster*, 249 Pa. 226, 94 Atl. 834.

²¹ *Mazaika v. Krauczunas*, 229 Pa. 47, 31 L. R. A. (N. S.) 686, 77 Atl. 1102.

²² *United States. Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025. See also *Bartlett v. Gates*, 118 Fed. 66.

District of Columbia. *Walker v. Johnson*, 17 App. Cas. 144.

Michigan. *Chiera v. Wayne Circuit Judge*, 97 Mich. 638, 57 N. W. 193.

New Jersey. *Archer v. American Water Works Co.*, 50 N. J. Eq. 33, 24 Atl. 508.

New York. *Walker v. Devereaux*, 4 Paige 229.

The holding of an election for an additional director will be enjoined where an attempted increase in the number of directors is illegal. *Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855, aff'g 145 N. Y. App. Div. 916, 130 N. Y. Supp. 20.

A court of equity may enjoin the holding of an election except under its supervision where it appears that there is reason to apprehend that a fair and just election will be prevented by fraudulent means, and that dis-

order, violence and possible bloodshed will result. *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829, 246 Pa. 552, 92 Atl. 701.

In *Merrifield v. Burrows*, 153 Ill. App. 523, the court enjoined the continuation of a stockholders' meeting and the holding of any other meetings until the further order of the court, and appointed a receiver for the corporation, on the ground that it was necessary to preserve the property of the corporation and to protect the interests of those who owned half of the shares with a large equitable and financial interest in the other half from those who held the title to the latter half.

In *Cannon v. Trask*, L. R. 20 Eq. 669, directors were enjoined from calling an annual meeting at an unusually early date, where it was alleged that they did so for the purpose of preventing certain stockholders from voting certain stock which had been transferred to them, but which if the meeting were held at the time fixed, would not have been registered in their names for a sufficient length of time to enable them to vote it.

a pending suit.²³ But a temporary injunction will not be granted where no demand has been made for permanent relief.²⁴

After the holding of an election has been enjoined until the further order of the court, an election held by a minority of the stockholders is void, though they were not parties to the suit in which the injunction was granted, and the injunction was not served on them.²⁵

The fraudulent postponing of an election by the directors may also be enjoined.²⁶

§ 1702. Injunction against voting or to prevent denial of right. A court of equity may enjoin persons not entitled to vote from voting, and the corporation from receiving their votes.²⁷ But an injunction

²³ In a suit by a corporation against its president for an accounting and to have any indebtedness found due from him to the corporation declared to be a lien on his stock, the court will enjoin the holding of an election of directors pendente lite, where it is alleged that the election was called to enable the president, through his control of a majority of the stock, to elect a board which would be subservient to him, and which would defeat the further prosecution of the suit in good faith and prevent the corporation from obtaining an accounting. *Coxe v. Huntsville Gaslight Co.*, 129 Ala. 496, 29 So. 867. See also *State v. Kennan*, 35 Wash. 52, 76 Pac. 516.

²⁴ *Gillette v. Noyes*, 92 N. Y. App. Div. 313, 86 N. Y. Supp. 1062.

So an injunction will be refused where it appears that it is sought merely to assist the plaintiff at the election, without regard to future title to the stock. *Gillette v. Noyes*, 92 N. Y. App. Div. 313, 86 N. Y. Supp. 1062.

²⁵ *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829.

²⁶ *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 467.

²⁷ **United States.** *Clarke v. Central Railroad & Banking Co. of Georgia*, 50 Fed. 338, 15 L. R. A. 683.

Alabama. *George v. Central Railroad & Banking Co.*, 101 Ala. 607, 14

So. 752; *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108.

Maryland. *Webb v. Ridgely*, 38 Md. 364.

New Jersey. *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44.

New York. *Butler v. Standard Mills Flour Co.*, 146 App. Div. 735, 131 N. Y. Supp. 451; *Ayer v. Seymour*, 15 Daly 249, 5 N. Y. Supp. 650; *Milbank v. New York, L. E. & W. R. Co.*, 64 How. Pr. 20.

Washington. *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765. See also *State v. Kennan*, 35 Wash. 52, 76 Pac. 516.

Wisconsin. *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756; *Reed v. Jones*, 6 Wis. 680.

An assignee of stock, who is the real owner of it, may file a bill to enjoin the corporation from voting shares of its own stock, though his stock has not been transferred to him on the books of the company. *O'Connor v. International Silver Co.*, 68 N. J. Eq. 67, 59 Atl. 321, aff'd 68 N. J. Eq. 680, 62 Atl. 408.

Where the court finds that under a contract the plaintiff owns half of the stock of a corporation, the other stockholders may be enjoined from casting more than one-half of the total vote.

will not be granted to restrain a stockholder from voting his stock merely on allegation or proof of an intent to cause the election of a board of directors who, by their action or nonaction, may injure or prejudice the interests of the minority stockholders;²⁸ nor to restrain the majority from voting on the ground that if they secure control they will obtain a contract from the corporation which will enable them to profit unduly at its expense.²⁹

An injunction will not be granted where it would operate to ille-

Stewart v. Pierce, 116 Iowa 733, 89 N. W. 234.

A preliminary injunction restraining a stockholder from voting his stock is not one which suspends the general and ordinary business of the corporation within the meaning of a statute prohibiting court commissioners from granting injunctions of the latter character, *Reed v. Jones*, 6 Wis. 680.

Where the title of the assignee of stock is superior to that of one who purchases it at an execution sale, and the latter voted the stock in favor of a dissolution of the corporation, and without his vote the requisite majority in favor of a dissolution would not have been obtained, it was held that an injunction would issue to restrain the filing of the certificate of dissolution with the secretary of state, in order to give the assignee of the stock an opportunity to vote on the question of dissolution. *Flostroy v. William B. Corby Coal Co.*, 80 N. J. Eq. 547, 85 Atl. 578.

Where the corporation issues stock to a person in payment for land under an agreement whereby he is to surrender a proportionate amount of the stock to it in case it is found that he does not own all of the land, he will not be enjoined at the instance of another stockholder from voting a part of such stock on the ground that he does not own all of the land, where the company has taken no steps to cancel the excess stock or to have it declared

void, and where there is no showing that the complainant would be irreparably injured even if the defendant voted it. *Reed v. Jones*, 6 Wis. 680.

And see *In re Rochester Dist. Tel. Co.*, 40 Hun (N. Y.) 172, where it was said that the practice of procuring an injunction restraining a portion of the stock of a corporation from voting at a stockholders' meeting is not to be commended, and should be tolerated only when the right to an injunction is clear.

That a corporation may be enjoined from voting shares of its own stock, see § 1672, *supra*.

As to enjoining another corporation from voting stock, see § 1673, *supra*.

²⁸ *Oelbermann v. New York & N. R. Co.*, 77 Hun (N. Y.) 332, 29 N. Y. Supp. 545; *Lersner v. Adair Match Co.*, 137 N. Y. Supp. 565. In the latter case it was held that a stockholder who had been removed as president of the board of directors would not be restrained from voting his stock at a meeting called at his instance, on the theory that he might vote to decrease the number of directors, oust the incumbent directors, and elect others subservient to him who would reinstate him as president, and ratify his past acts and dealings with the company and so relieve him from the necessity of accounting for his official acts as president, especially where he repudiated any intention of having himself so released.

²⁹ *Lucas v. Milliken*, 139 Fed. 816.

gally separate the voting power of the stock from its ownership;³⁰ nor where it would not change the result.³¹ Nor will an injunction be granted on the eve of an election on an ex parte application by a minority stockholder where the result of the injunction will be to place control in the hands of minority stockholders by restraining the majority from voting on their holdings.³²

Under some circumstances a person may be enjoined from voting stock pending a determination of the title thereto and the right to vote it.³³ But a preliminary injunction will not be granted to restrain the vendor of stock from voting it pending the determination of a suit for specific performance of the contract of sale where the right to specific performance is doubtful and there is no danger of irreparable damage to the plaintiff or of any injury which cannot be compensated in damages, the defendant being solvent; nor where its effect will be, not to preserve the status quo, but to deprive the defendant of the possession of the stock and his right to vote it, to which he is entitled until the controversy is determined.³⁴ Nor will a stockholder be enjoined from voting his stock pendente lite in a suit brought against him by the corporation to set aside the sale of such stock to him on the ground of fraud.³⁵ Nor will an injunction be

³⁰ *Thomas Maddock Sons' Co. v. Biardot*, 81 N. J. Eq. 233, 87 Atl. 66.

³¹ A preliminary injunction will not be granted to restrain defendants from voting proxies held by them at an election on the ground that there has been a separation of the voting power from the ownership of the stock, where they have other proxies, against which nothing is alleged, for more than a majority of the stock, so that the granting of the injunction could not affect the result of the election. *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

³² *Lucas v. Milliken*, 139 Fed. 816.

An injunction to restrain the holders of certain stock of a corporation from voting at an election to be held within three days after the filing of the bill was refused, because granting it might change the result of the election, and deprive those holding the legal title to the majority of the stock of the control of its affairs without

an opportunity for a hearing. *Hilles v. Parrish*, 14 N. J. Eq. 380.

³³ *Harper v. Smith*, 93 N. Y. App. Div. 608, 87 N. Y. Supp. 516.

Two persons owned all the stock of a corporation. The majority stockholder died and a legal controversy arose between his executors, and one thereof was enjoined, temporarily, from voting the stock. The court held that until the controversy was settled the minority stockholder should be granted an injunction restraining the majority stockholder from voting the stock. The court held, however, that the rights of the majority stock should be protected, until settlement of the controversy, by enjoining any meeting for the election of corporate officers. *Villamil v. Hirsch*, 143 Fed. 654, 138 Fed. 690.

³⁴ *Lucas v. Milliken*, 139 Fed. 816.

³⁵ *Maine Products Co. v. National Gum & Mica Co.*, 115 N. Y. App. Div. 114, 100 N. Y. Supp. 712; *Maine Prod-*

granted to prevent the holder of stock from voting it in a particular way on the ground that it will affect the value of the stock so as to prevent the complainant from exercising his option to purchase it, where he may protect his rights by exercising such option.³⁶

Persons holding proxies will not be enjoined from voting them at a meeting to be held in another state on the ground that there is no law in the latter state permitting voting by proxy and hence that it is not permissible there, since it is to be presumed that the officers conducting the election will be governed by the laws of the state where it is held, and if they violate those laws the validity of the election may be tested in proper proceedings.³⁷

The stockholder is a necessary party to a suit to enjoin him from voting his stock.³⁸ And if he is not joined the court will not grant or continue a temporary restraining order precluding him from voting until he may be impleaded in a forum having jurisdiction to determine his right to hold and vote the shares in question and his right to do so is there determined.³⁹ But a person who is a party may be enjoined from voting as proxy for a stockholder who is not a party.⁴⁰

ucts Co. v. Alexander, 115 N. Y. App. Div. 112, 100 N. Y. Supp. 711.

³⁶ Clowes v. Miller, 60 N. J. Eq. 179, 47 Atl. 345.

³⁷ Woodruff v. Dubuque & S. C. R. Co., 30 Fed. 91.

³⁸ Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147; Brown v. Pacific Mail Steamship Co., 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2,025; Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530; Jones v. Nassau Suburban Home Co., 53 N. Y. Misc. 63, 103 N. Y. Supp. 1089.

The rule that a corporation represents its shareholders in the defense of all suits which involve corporate rights or functions does not dispense with the necessity for making a stockholder a party to a suit against the corporation to enjoin the voting of his stock, since his right to vote it is not a question which concerns the corporation, as such, or its functions. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

In a suit to enjoin the voting of

stock in one corporation owned by another, the former company cannot be regarded as representing the latter so as to make it unnecessary to join the latter as a party, although the latter owns a majority of the stock of the former, and a majority of the boards of directors of both corporations are the same persons. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

That a person holding the stock in question as trustee files an affidavit in the suit as a witness does not constitute an appearance by him as a party so as to give the court jurisdiction to determine his right or that of his beneficiary to vote, where neither he nor the beneficiary is made a party. Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

³⁹ Talbot J. Taylor & Co. v. Southern Pac. Co., 122 Fed. 147.

⁴⁰ Brown v. Pacific Mail Steamship Co., 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2,025.

One who has been induced to subscribe for stock of a corporation by the assurance of a stockholder of the corporation would not engage in a particular business does not thereby acquire a right to sue to enjoin such stockholder from voting that the corporation engage in such business.⁴¹

And a person who is a stockholder in two corporations cannot sue to enjoin the owner of a controlling interest in one of the corporations from voting at a stockholders' meeting that such corporation engage in a certain business, on the ground that engaging in such business will be an illegal interference with the rights of the other corporation.⁴²

A court of equity may enjoin a corporation from denying the right to vote to a stockholder who is entitled to vote.⁴³

§ 1703. Supervision of elections. A court of equity may appoint a master to supervise an election of directors of a private corporation, when it appears that, through fraud, violence, or other unlawful conduct on the part of a portion of the stockholders or members, a fair and honest election cannot be held without the court's interposition,⁴⁴ as, for example, where the members of the corporation are

⁴¹ *Converse v. Hood*, 149 Mass. 471, 4 L. R. A. 521, 21 N. E. 878.

⁴² *Converse v. Hood*, 149 Mass. 471, 4 L. R. A. 521, 21 N. E. 878.

⁴³ *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2,025.

A stockholder having the right to vote, but who is not permitted to do so, is entitled to equitable relief. *Granite Brick Co. v. Titus*, 226 Fed. 557.

⁴⁴ *King v. Barnes*, 51 Hun (N. Y.) 550, 4 N. Y. Supp. 247, aff'd 113 N. Y. 655, 21 N. E. 184; *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829; *Tunis v. Hestonville, M. & F. Passenger R. Co.*, 149 Pa. St. 70, 15 L. R. A. 665, 24 Atl. 88.

An equity rule discontinuing the office of master in chancery, "except in proceedings where decrees or interlocutory orders are to be executed, or their execution supervised by an officer of the court," does not prevent the

appointment of a master to supervise an election ordered by the court, where no question then pending is referred to him, though he may thereafter be called upon incidentally to determine questions as to the right of certain persons to vote. *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829. But it does prevent the appointment of a master where there is no decree nor interlocutory order pending in the court to be executed, and the court has not even ordered the election in question, but the same is about to take place as a matter of course, in accordance with the charter or by-laws of the company. And this is true even though the parties consent to the appointment. *Yetter v. Delaware Valley R. Co.*, 206 Pa. 485, 56 Atl. 57.

A decree appointing a master is not a final decree from which an appeal may be taken. *National Transit Co. v. United States Pipe Line Co.*, 180 Pa. 224, 225, 36 Atl. 724.

in conflict and it is evident that the person who would naturally preside at the meeting would favor one faction at the expense of another.⁴⁵ But the court will not so act except in a clear case, and it will not appoint a master for such purpose, where it appears that the corporation has already appointed reputable and disinterested judges.⁴⁶

§ 1704. Statutory remedies. Statutes have been enacted in a number of states⁴⁷ expressly conferring jurisdiction on certain courts summarily to review and determine the validity of corporate elections on the application of any person aggrieved, and giving them power to establish the election, or to order a new election, or to grant such

⁴⁵ *Bartlett v. Gates*, 118 Fed. 66. See this case for form of an order appointing a master.

⁴⁶ *Dick v. Lehigh Valley R. Co.*, 4 Pa. Dist. Ct. 56. See also *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

⁴⁷ **California.** The statute provides that, upon the application of any person aggrieved by an election, the superior court of the county in which such election is held must proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one or direct such other relief in the premises as accords with right and justice. Civ. Code, § 315. The sufficiency of the complaint in such a proceeding may be tested by a general demurrer. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012. A complaint in such a proceeding was held to be sufficient as against a demurrer attacking it on the ground that it did not state a cause of action, that there was a misjoinder of causes of action, and that it was ambiguous and uncertain. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376. The power conferred by this provision is an equitable one. *Dulin v. Pacific Wood & Coal*

Co., 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045. Where a certain person is legally elected a director the court cannot declare a defeated candidate elected, nor will it order a new election because of a verbal agreement that the defeated candidate should be elected president, to which office only directors were eligible, where he had in his own hands enough votes to have elected himself and another person directors by cumulative voting, but refrained from doing so on account of such agreement. *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045.

Delaware. The Act of 1883, which is substantially the same as the New York statute (*infra*) has been held not to apply to corporations organized under the general corporation law of 1899, as amended. *In re Powell*, 5 Pennw. 7, 58 Atl. 831.

Missouri. The statute authorizes any person aggrieved by an election or any proceeding concerning an election of directors or officers, to apply to the circuit court for redress, giving reasonable notice of his intended application to the party to be affected thereby. The court is required to proceed forthwith, in a summary way, to hear the proofs and allegations of

other relief as right and justice may require. The object of such

the parties, or otherwise to inquire into the cause of complaint, and thereupon to make such order and grant such relief as the circumstances and justice of the case shall seem to require. Rev. St. 1909, §§ 3007-3010; *Gregg v. Granby Min. Co.*, 164 Mo. 616, 65 S. W. 312; *State v. McGann*, 64 Mo. App. 225; *Tomlin v. Farmers' & Merchants' Bank*, 52 Mo. App. 430.

New Jersey. The statute provides for a summary investigation by the supreme court of any corporate election or any proceeding, act or matter in or touching the same, and gives the court authority either to establish the election, or to order a new election, or to make such order and give such relief in the premises as right and justice may require. *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347, aff'g sub nom. *In re Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280; *In re Schwartz & Gray* (N. J. L.), 72 Atl. 70; *In re Delaware River & A. R. Co.* (N. J. Eq.), 68 Atl. 1104. This statute leaves the court free to deal with a particular case not necessarily in accordance with strict legal rules but according to the substantial rights and equities of the matter. *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347, aff'g sub nom. *In re Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280.

New York. The statute provides that the supreme court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation, or any proceeding, act or matter touching the same, upon notice thereof, to the adverse party, or to those to be affected thereby, forthwith and in a summary way, hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election, or order a new election, or make such

order and give such relief as right and justice may require. *In re Westchester Trust Co.*, 186 N. Y. 215, 78 N. E. 875; *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388; *In re Election of Directors of New York & Westchester Town Site Co.*, 145 App. Div. 623, 130 N. Y. Supp. 414; *In re Scheel*, 134 App. Div. 442, 119 N. Y. Supp. 295; *New York Electrical Workers' Union v. Sullivan*, 122 App. Div. 764, 107 N. Y. Supp. 886; *In re Keller*, 116 App. Div. 58, 101 N. Y. Supp. 133; *In re Utica Fire Alarm Tel. Co.*, 115 App. Div. 821, 101 N. Y. Supp. 109; *In re Empire State Supreme Lodge of Degree of Honor*, 53 Misc. 344, 103 N. Y. Supp. 465, aff'd 103 N. Y. Supp. 1124 (mem. dec.); *Strong v. Smith*, 15 Hun 222. In such a proceeding the fact that the name of a person appears on the books of the corporation as a stockholder is not conclusive on the court, and does not prevent inquiry as to whether he is one in fact so as to be eligible to an office. *In re Ringler & Co.*, 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593, rev'g on other grounds 145 App. Div. 361, 130 N. Y. Supp. 62, which modified 70 Misc. 581, 127 N. Y. Supp. 938. And the court may go behind entries in the transfer books for the purpose of determining whether a particular transaction was a sale or a pledge of stock when necessary to determine which party to such transaction had the right to vote. *Strong v. Smith*, 15 Hun 222.

North Carolina. Similar authority is given to judges of the superior court. *Pell's Revisal* 1908, § 1189. If a vote as to some measure, or in an election of officers, has been illegally announced because of the illegal admission or rejection of certain votes, the court may declare the correct result. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

statutes is to provide a summary mode of redressing a wrong done at the election.⁴⁸

The New York statute has been held to apply to all corporations, including such as have no capital stock,⁴⁹ while the New Jersey statute has been held to apply to all stock corporations but to be confined in its operation to corporations of that character.⁵⁰

In Missouri it has been held that the statutory remedy is not exclusive, and does not preclude a resort to mandamus to compel inspectors to cast up and certify the votes cast at an election in the manner provided by law.⁵¹

Where the remedy is given to persons aggrieved, it is open to all persons who were entitled to vote at the election in question.⁵² And it has been held that it is confined to such persons.⁵³ But there is

⁴⁸ Strong v. Smith, 15 Hun (N. Y.) 222.

⁴⁹ This provision is not confined in its operation to stock corporations, but under it the court may review an election of an insurance company organized upon the co-operative or assessment plan. In re Empire State Supreme Lodge of Degree of Honor, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, aff'd 103 N. Y. Supp. 1124 (mem. dec.).

The remedy to review the election of directors of a religious corporation is by a proceeding under this section, and mandamus is not an appropriate remedy for that purpose. People v. African Wesleyan M. E. Church, 156 N. Y. App. Div. 386, 141 N. Y. Supp. 394.

⁵⁰ The language of this provision "is broad enough to embrace all corporations in which there are shares of capital stock held by individuals as private property, the ownership of which may be registered in the corporate books, and will entitle the holder to vote for directors of the corporation." It therefore applies to a library association having capital stock of that character, although it was not organized for pecuniary profit. Rankin v. Newark Library Ass'n, 64

N. J. L. 265, 45 Atl. 622, rev'g on other grounds 64 N. J. L. 217, 43 Atl. 435. And it also applies to building and loan associations. In re United Towns Building & Loan Ass'n, 79 N. J. L. 31, 74 Atl. 310.

But it does not apply to incorporated religious societies which have neither stock nor stockholders and in which the right to vote at an election of officers does not depend upon the ownership of stock evidenced upon stock books. In re Bethany Church, 60 N. J. L. 88, 36 Atl. 701, aff'd sub nom. James v. Keyes, 60 N. J. L. 592, 40 Atl. 1131.

⁵¹ State v. McGann, 64 Mo. App. 225.

⁵² Policy holders in a mutual insurance company, having a right to vote for directors, are legally aggrieved by an illegal election of directors. In re Empire State Supreme Lodge of Degree of Honor, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, aff'd 103 N. Y. Supp. 1124 (mem. dec.).

⁵³ "The provisions of the statute were only intended for the benefit of a person aggrieved by or complaining of an election, or of a proceeding, act, or matter relating to the same. A stockholder cannot be aggrieved by an election in which neither he nor his

authority to the effect that a stockholder may maintain such a proceeding though he was not entitled to vote at the election in question because his stock had not then stood in his name for the length of time required by the statute.⁵⁴

The fact that other persons are joined as petitioners with aggrieved stockholders without authority does not affect the right of the latter to have their petition heard.⁵⁵

The provisions of the statute govern as to the giving of notice.⁵⁶ In New York notice need not be given to all the stockholders or members of the corporation, but it is sufficient if it is given to the corporation and to the members of the board of directors who are claimed to have been illegally elected.⁵⁷

Under the New York statute the court has power to determine any question relating to the election, including such as are merely incidental thereto when they are necessarily involved in the controversy.⁵⁸ But it has been held that the proceeding is not an action and that it is inappropriate for determining equitable claims, or questions not necessarily involved in the controversy,⁵⁹ or the validity of transactions under which persons claim the right to vote.⁶⁰

assignor had a right to participate. It must be shown that he or his assignor was either deprived of that right, or opposed the action taken, or refrained from exercising the right on the assumption that the proceedings would be conducted legally, and, instead of being so conducted, they were taken illegally." Hence a person cannot intervene in such a proceeding where it is not shown that either he or his assignor was a stockholder in the corporation at the time of the election in question. *In re Scheel*, 134 N. Y. App. Div. 442, 119 N. Y. Supp. 295.

⁵⁴ *Wright v. Central California Water Co.*, 67 Cal. 532, 8 Pac. 70.

⁵⁵ *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388.

⁵⁶ The Delaware statute requires notice to be given to the corporation of an application to set aside an election of directors. Where the notice is given, the court will not issue a rule to show cause why the prayer of the petition should be granted, but will fix

a time for hearing on the return day of the application. *In re Vernon*, 1 Pennew. (Del.) 202, 40 Atl. 60.

⁵⁷ *In re Empire State Supreme Lodge Degree of Honor*, 53 N. Y. Misc. 344, 103 N. Y. Supp. 465, *aff'd* 103 N. Y. Supp. 1124 (mem. dec.).

⁵⁸ The court has ample power under this section to determine any question relating to the election, including such as are merely incidental thereto, when they are necessarily involved in the controversy. *In re Utica Fire Alarm Tel. Co.*, 115 N. Y. App. Div. 821, 101 N. Y. Supp. 109.

⁵⁹ In such a proceeding the court will not determine the question whether the equitable title to stock standing in the name of certain directors is in the corporation. *In re Utica Fire Alarm Tel. Co.*, 115 N. Y. App. Div. 821, 101 N. Y. Supp. 109.

⁶⁰ Where a new election is ordered, the court has no right to enjoin from voting persons who upon the face of the records contained in the stock

A new election of directors will not be ordered in such a proceeding where, owing to the lapse of time, it is presumed that the terms of those declared elected have expired and new ones have been chosen.⁶¹

books have the right to vote thereat. It cannot determine the validity of transactions under which they claim the right to so vote. In re Election of Directors of New York & Westchester Town Site Co., 145 N. Y. App. Div. 630, 130 N. Y. Supp. 419.

⁶¹ A new election will not be ordered under such circumstances even though a motion to set aside the ballot should have been declared carried. In re P. B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S. W. 502.

CHAPTER 40

VOTING TRUSTS

- § 1705. Definition and general considerations.
- § 1706. Form, manner of creating and execution of agreement.
- § 1707. Validity—In general.
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- § 1717. Revocability.
- § 1718. Trustees.
- § 1719. Effect upon rights of stockholders.
- § 1720. Character of certificates issued under trust agreement.
- § 1721. Remedies.

§ 1705. Definition and general considerations. In a preceding chapter there has been some discussion of the validity and effect of combinations and pooling agreements among stockholders, including agreements whereby the voting power is separated from the ownership of the stock and those in fraud of stockholders or creditors.¹ This chapter deals with contracts which confer upon representatives of a group of stockholders of a corporation the collective voting power of the group, such arrangement being commonly known as a voting trust.

A voting trust may be comprehensively defined as one created by an agreement between a group of the stockholders of a corporation and the trustee, or by a group of identical agreements between individual stockholders and a common trustee, whereby it is provided that for a term of years, or for a period contingent upon a certain event, or until the agreement is terminated, control over the stock owned by such stockholders, either for certain purposes or for all, shall be lodged in the trustee, either with or without a reservation to the owners or persons designated by them of the power to direct how such control shall be used.² A mere deposit of shares of stock in the

¹ See §§ 1696-1698, *supra*.

one "created by a transfer of shares

² Webster defines a voting trust as in a corporation by shareholders to

hands of a depository with directions to vote in the manner in which he is instructed by a committee appointed by the stockholders and subject to their control, is not a voting trust, it not appearing that the ownership of the stock and the voting power were separated by the agreement under which the committee was appointed and the stock deposited.³

Such trusts assume various forms, dependent upon the situation of the parties and the objects sought to be attained, but the essential feature of the true voting trust is the delegation of group voting power for the purpose of controlling corporate management. Thereby such an arrangement is distinguishable, on the one hand, from those resulting from agreements wherein the right to vote stock is incidentally taken from the real owner, as where stock is pledged as security for individual debt, or is transferred or deposited for purposes of

trustees, to hold and vote on them for a specified period, in order to secure a certain line of corporate action." Bouvier applies the term to "the accumulation in a single hand or in a few hands of shares of corporate stock belonging to several or many owners in order thereby to control the business of the company." The courts do not seem to have attempted a definition. In *Hall v. Merrill Trust Co.*, 106 Me. 465, 138 Am. St. Rep. 355, 76 Atl. 926, it was held that the instrument there under consideration created a power of sale with incidental voting powers, but not a voting trust agreement.

³ *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933, in which case the court said: "It was, at most, a convenient method by which distant and widely-separated shareholders became enabled, indirectly, to participate in the control and management of the company, and from which each could recede at any time, and demand the return of his stock, without violating any term of the agreement. The depository is a proxy required to vote the stock as directed by the committee; and he and the committee both derive their powers from

the shareholders by the same instrument, and, in the end, effectuate their wishes. Such an arrangement differs widely from an agreement whereby the stock is placed in the hands of trustees, who are invested with the power of voting it as their interests may dictate, irrespective of the wishes or direction of the owners." And see *Green v. Higham*, 161 Mo. 333, 61 S. W. 798, where it was held that an agreement on the part of the owner of a majority of the stock of a corporation, in consideration of the purchase of a part of his stock by the remaining stockholders, parties to the agreement, to pool his stock with theirs until such time as the stock paid a dividend, the members of the pool in the meantime to share equally in all benefits accruing under the pool, and also in royalties paid to the vendor by another company and in the proceeds of any sales of stock made by the parties, if not technically a "pool," was nevertheless a valid contract, although it contained no provision that the stock should be held by a trustee for the benefit of the parties and gave no person a power of attorney to hold or dispose of the stock.

sale, and on the other hand from ordinary stock pooling agreements wherein the owner retains all of his powers over the shares owned by him, merely undertaking to use such powers in conformance to the common purpose. And while the creation of a voting trust is sometimes attended by the giving of a proxy or power of attorney to the trustee, the relationship thereby established is not in any sense analogous to that existing between a stockholder and his designated agent for attending a certain meeting and voting his stock thereat. In the latter case the beneficial owner always remains the legal owner of the stock, while in the former the trustee usually becomes, if the agreement is valid, the legal owner and entitled to exercise all the rights of ownership, subject to the terms of the trust agreement, and is always answerable to the beneficial owner only as any trustee is responsible to his cestui que trust. Agreements respecting the pledge or sale of stock, proxies and powers of attorney and pooling agreements involving no transfer of stock are treated in detail elsewhere in this work.⁴ It is generally held that a trust by which the right of voting the stock is conferred on the trustee is an active, rather than a passive, trust.⁵

§ 1706. Form, manner of creating and execution of agreement.

There is no uniform type of voting trust agreement, but they vary greatly in their form and subject-matter according to the object to be accomplished and the method considered most suitable and adequate for its accomplishment. They may be entered into either with regard to stock owned at the time the agreement is formed or as to stock to be purchased in an existing corporation or in one which is to be created. The simplest form is merely an assignment by a trust instrument of the collective voting power of the majority in interest of the stockholders to one of their number or to another selected

⁴ See Chap. 39, supra, and the chapter on Stock and Stockholders.

⁵ *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

With regard to the character of a voting trust as an active trust or a passive trust, *Keith, P.*, in *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412, after classifying the elements of the right of property as "the legal title to the property, the beneficial in-

terest in it, and the right of control over it," said: "If the analysis of the elements of property * * * be sound—and we think it cannot be controverted—then the right to vote the stock is, in itself and of itself, a valuable right of property, and such a trust becomes by virtue of that right an active and not a passive or dry trust." See also § 1656.

As to the character of the trust as affecting its revocability, see § 1717.

recipient. In an agreement of this character, one contract, to which all concerned are parties, usually evidences the purposes of the arrangement and the powers and duties of the trustee.

While not so frequent as the contract type of agreement, there are instances in which the voting trust was brought into existence by the articles of incorporation themselves.⁶ Such a trust has also been created by the provisions of a will.⁷

In some jurisdictions voting trust agreements have been authorized by statute.⁸ In at least one notable instance such a trust has been brought into existence in direct compliance with a mandate of court.⁹ As bearing indirectly upon this question it may also be noted that a federal court has laid down the rule that the Bankruptcy Act does not empower the court to compel dissenting creditors of a bankrupt corporation to accept stock in a new corporation to be created by other creditors by way of reorganization of the business of the bankrupt, where such stock is to be placed in a voting trust for a term of years and made subject to the lien of a large mortgage.¹⁰ In some of the agreements there is interposed a committee, selected by the subscribing stockholders, which, though not *eo nomine* a party to

⁶ See *Consumers' Gas Trust Co. v. Quinby*, 137 Fed. 882; *Lebus v. Stansifer*, 154 Ky. 444, 157 S. W. 727; *Hafer v. New York, L. E. & W. R. Co.*, 9 Ohio Dec. 470, 14 Wkly. L. Bul. 68.

⁷ In upholding a provision in a will directing that stock in a corporation which the testator directed to be created should be voted by the executors and trustees as directed by certain persons designated in the will to serve as directors of the corporation, the court said, in *Elger v. Boyle*, 69 N. Y. Misc. 273, 126 N. Y. Supp. 946, "The power to vote stock incidental to ownership of the stock itself may not be taken from the holder in invitum; but he may certainly qualify his ownership by his own consent that another may vote for him, as in the familiar instance of a vote by proxy, or may accept the ownership with a condition which involves that consent, as here. These trustees became possessed of the stock, not as their own

asset, but solely by virtue of the will and of the conditions which the will imposed. One condition involved their consent to a restriction of their voting power, and no rule of law or of public policy is offended by giving effect to that consent."

⁸ See *New York Gen. Corp. Law*, § 25. See *Lord v. Equitable Life Assur. Co.*, 57 N. Y. Misc. 417, 108 N. Y. Supp. 67; *Maryland Code*, art. 23, § 102.

To insure publicity, the statutes of those states which authorize voting trust agreements to be formed contain provisions for public filing of trust agreements. *Maryland Code*, art. 23, § 102; *New York Gen. Corp. Law*, § 25.

⁹ The decree by the United States District Court for the Southern District of New York, dissolving the New Haven Railway system in October, 1914.

¹⁰ In *re Northampton Portland Cement Co.*, 185 Fed. 542.

the agreement, is endowed thereby with such powers and charged with such duties as the stockholders see fit to specify. In some cases the committee is merely the mouthpiece of the stockholders, in others, it is given wide discretionary powers in carrying out the objects of the agreement.¹¹

The form and wording of such instruments and the manner of their creation have, however, been given slight consideration in the decisions except in so far as they serve as a guide to determining the objects to be accomplished and the manner of their accomplishment, which are the chief tests employed by the courts in ascertaining their validity or invalidity.

An agreement for a voting trust may be entered into by an agent where he does not exceed his authority.¹²

Upon the broad general principle that no claimed agreement will be enforced or rights under it secured unless there has been a full meeting of the minds of the parties as to the subject-matter of the contract, some alleged voting trust agreements have been denied binding force because they have never been fully consummated. Thus stockholders of a corporation who subscribed for stock prior to its incorporation were entitled to vote for directors of such corporation despite a provision of the articles of incorporation that while shares of stock should be issued to the subscribers as beneficial owners thereof, the right to vote thereon should be vested in those who should, from time to time, become directors of another corporation, where the sole agreement of the subscribers related to the amount of stock taken and the method of paying therefor, it being neither alleged nor shown that the stockholders had knowledge of such a provision.¹³

¹¹ As illustrating agreements in which committees are employed, see *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *Sullivan v. Parkes*, 69 N. Y. App. Div. 221, 74 N. Y. Supp. 787; *Elger v. Boyle*, 69 N. Y. Misc. 273, 126 N. Y. Supp. 946; *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933.

¹² An agent given unlimited power, full and complete, to do anything the principal could do if present and to perform any and all acts in all matters on his principal's behalf may transfer in trust stock of his principal in a railroad corporation in pur-

suance of an agreement to extend the charter and to secure aid from a county for the construction of the road. *Greene v. Nash*, 85 Me. 148, 26 Atl. 1114.

¹³ *Lebus v. Stansifer*, 154 Ky. 444, 157 S. W. 727.

It is immaterial that an agreement for voting stock which it was being arranged to purchase was reduced to writing and executed after the bid was made where it was executed before the purchase was completed. *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

§ 1707. Validity—In general. In considering the cases and the comments of the textwriters upon them, the change of opinion which has taken place concerning the true nature and validity of such contracts is noticeable. In the early stages of the development of the plan, there was a strong sentiment against them which found expression in the opinions of judges and in the not always temperate language of commentators upon the law, but experience has demonstrated their usefulness, and the hostility evinced towards them has diminished by degrees.¹⁴ In spite of this change, however, it must be recognized that there are two lines of decisions, one sustaining and the other denying the validity of these trusts.¹⁵ Those decisions which uphold the validity of voting trusts usually base their holdings upon the right of the owner of property to make such use of his property as he may see fit, as long as this use is confined to the limits imposed by law, and take the view that therefore, in the absence of a prohibitory statute, the owner of shares of corporate stock may exercise the powers conferred by such stock either alone or in combination with others and either in person or through the medium of a trustee, always provided that the purposes for which and the manner in which the power is exercised are lawful.¹⁶ Decisions of this class recognize "the general inherent right, resulting from the ownership of stock in a corporation, to exercise the elective power such ownership confers, and to exercise it wisely or unwisely, alone, or pursuant to an agreement with other stockholders."¹⁷ A further basis for this view is "the general rule, sanc-

¹⁴ "We think we are safe in saying that experience has shown that, so far from exercising an injurious influence upon trade, voting trusts have added efficiency, economy, and stability to the administration of corporate affairs." *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

¹⁵ See § 1696.

¹⁶ "The propositions that 'it is as legitimate for a majority of stockholders to combine as for other people,' and that the combination is unlawful only if 'the gain was to be at the expense of the corporation, or in some way was to work a wrong to the other stockholders' * * * are

generally recognized as sound law * * * ." *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

¹⁷ *Memphis & C. R. Co. v. Woods*, 88 Ala. 630, 7 L. R. A. 605, 16 Am. St. Rep. 81, 7 So. 108. And see § 1696, *supra*.

There is nothing "per se illegal in an agreement entered into by and between certain stockholders in a joint stock company, by which they promise to vote together as a unit, in all matters pertaining to the government of the corporation. Each member has the clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can

tioned by the policy of the law, that those who have the largest interest in corporations may control them, as they have the greatest interest that they shall be well managed.”¹⁸ Accordingly, it has been held that stockholders who own a majority of the stock of a corporation may elect themselves directors or appoint themselves its agents, or form and carry into effect policies of management as freely as if the business were their own, and so long as they act honestly, and do not devote the corporate assets or business to their own private gain or to the prejudice of other stockholders, no one can question their acts, which are purely *intra vires*.¹⁹ And even those decisions in which the particular agreements under consideration at the time have been held to be invalid have usually recognized that there may be valid voting trusts.²⁰ It is held, however, that a corporation own-

control his conduct, or gainsay his discretion. And it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote when cast is but the expressed wish of the stockholder, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleases.” *Moses v. Scott*, 84 Ala. 608, 4 So. 742.

¹⁸ *Barnes v. Brown*, 80 N. Y. 537, quoted in *Hey v. Dolphin*, 92 Hun (N. Y.) 230, 36 N. Y. Supp. 627. To the same effect, see the following decisions:

Idaho. *Weber v. Della Mountain Min. Co.*, 14 Idaho 404, 94 Pac. 441.

Illinois. *Luthy v. Ream*, 270 Ill. 170, Ann. Cas. 1917 B 368, 110 N. E. 373, rev'g 190 Ill. App. 315; *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *Teich v. Kaufman*, 174 Ill. App. 306 (holding that the courts have frequently upheld agreements of stockholders “to elect one another as directors, acquire control and management of the company, and secure options on one another's stock”).

Massachusetts. *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

New York. *Scruggs v. Cotterill*, 67 App. Div. 583, 73 N. Y. Supp. 882.

Texas. *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795.

Washington. *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908.

¹⁹ *White v. Snell*, 35 Utah 434, 100 Pac. 927.

²⁰ *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

In *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847, the court, while holding the particular agreement involved void as against public policy, expressly stated that “this conclusion does not reach so far as to necessarily forbid all pooling or combining of stock where the object is to carry out a particular policy with a view to promote the best interest of all the stockholders.” Quoted in *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638.

Even though a voting trust be invalid *qua* voting trust, it may, in a proper case, serve the purpose of a proxy, it seems. *Lord v. Equitable Life Assur. Co.*, 57 N. Y. Misc. 417, 108 N. Y. Supp. 67.

ing shares of its own stock cannot put them into a voting trust, nor can it stand behind any of its shareholders who put their shares into one and identify itself with their interests by binding itself to assume the expenses incident to the attainment of their purpose.²¹

It is sometimes stated that such agreements are invalid because they effect a separation of the voting power from the beneficial interest, contrary to the policy of the law,²² the view being taken that the power to vote the stock of a corporation is inherently attached to and inseparable from the ownership thereof and only delegable by a proxy subject to revocation,²³ but the fact that the voting trust agreement has this effect has been held insufficient to render it invalid where it is in other respects lawful.²⁴ The question of the effect of this

In *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770, the court though stating its view to be that the general effect of voting trust agreements is "vicious and in contravention of a sound public policy," added, "It cannot be, nor is it intended to be, denied that those stockholders, be they few or many, owning the majority of the stock of a corporation, can agree after full consideration to maintain a certain business policy of the corporation or a certain management, and in giving the right of voting by proxy our statute recognizes this. To accomplish this, they can give proxies that can last for three years, but these proxies are revocable at the will of the principal, and they cannot be made irrevocable, and the sale of the stock is itself a revocation of the proxy."

²¹ *Clark v. National Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930.

²² See § 1697, *supra*.

"We concede the weight of authority to be that the general policy of the law prohibits the separation of the voting power from the beneficial interest, and, to justify such a separation, there must be a property interest to conserve, some definite policy in the interest of the corporation to be carried out, some beneficial inter-

est of the stockholders to be served, or some purpose not unlawful of an advantageous character to the stockholders to be effectuated." *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

"The right to vote is, I think, a property right, and a very valuable right; and I see no reason why the owner of such a right, having the legal title to the stock, has not also a beneficial interest in the stock itself. * * * I think that the legal owner of stock, even though his only beneficial interest is the right to vote thereon, must be held to have a beneficial interest in the stock itself." *Swayze, J.*, in *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773.

²³ *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

²⁴ In *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723, it was held that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its ownership, the court saying, "The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground that there has been a separation of the voting power from the stockholder, but because of the unlawful purpose for which the proxy was appointed, or

separation of the voting power and the beneficial ownership upon the validity of the agreement is further considered in a subsequent section relative to the validity of such agreements as dependent upon the nature and extent of the power vested in the trustee.²⁵

In determining the legality or illegality of such an agreement with regard to the manner of its performance, where the agreement is executory, the question is not whether it would be possible to carry out the contract in a way which would invalidate the contract in it, but

the unlawful end attempted to be effected by the exercise of the voting power."

"Neither is it illegal or against public policy to separate the voting power of the stock from its ownership. The statute authorizes the stockholder to vote by proxy * * *. The right to appear by proxy implies, of itself, that the voting power may be separated from the ownership of the stock; and, unless the authority of the proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being the agent of the stockholder, he is required to exercise this discretion in behalf of his principal; but he is at liberty to use his own discretion as to the means by which his principal's interest will be best subserved. The cases in which it has been said that the stockholder could not divest himself of the voting power of his stock, and that it should not be separated from the ownership of the stock, were cases which involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised. The proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid; but the authority to exercise a discretion differs from an authority to perform a particular act.

Under an appointment without words of limitation, the proxy may act against the interests of the stockholder, or even against the interests of the corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person; while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power and the attempt to authorize the exercise of an unlawful power. The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the expiration of the term. * * *

We have been cited to no instance where the purpose of a proxy given upon a sufficient consideration was lawful, and the person by whom the proxy was created continued to be the owner of the stock, in which the agreement has been held invalid." *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

²⁵ See § 1715, *infra*. See also § 1697, *supra*.

whether it would be impossible to carry out the contract in a way which might have been lawfully specified in it.²⁶

It is apparent that the decisions upon the question of the validity or invalidity of voting trusts are controlled by varying considerations. In some of them the nature of irrevocable proxies is the controlling factor; others turn upon the statute law of the state in which they are rendered; another class rests upon the fraudulent or otherwise objectionable character of the object to be attained; a further class condemns such a trust as being contrary to public policy and for that cause null and void.²⁷

§ 1708. — Motives and intention. The motives and intention of those executing the provisions of the trust will not be allowed to establish the validity of the agreement, the controlling question being what the agreement permits to be done, not what those exercising the power under it intend to do.²⁸ Thus it has been held that the fact that the voting trustees deny any intention of voting the stock or of causing it to be voted for a certain purpose to which objection is made by one seeking to compel the issuance of a certificate for stock which he has purchased from a subscriber to the agreement, and the fact the trustees are advised by counsel that they have no power to vote the stock for such purpose or to cause it to be so voted without the consent of all the holders of the certificates issued under the trust agreement, are not sufficient grounds for refusing to compel the issuance of the stock certificate.²⁹ But apparently the purpose

²⁶ *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809; *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

²⁷ And see §§ 1696, 1697, *supra*.

²⁸ "In the instant case the motives of Morel and those acting with him [the faction controlling under the terms of a voting trust] may be for the promotion of the prosperity of the corporation and the welfare of the majority of its stockholders, but in passing judicially upon the question as to the validity of the contract set up by them, and under the terms of which they claim the right to indefinitely control the affairs of the corporation, we must look alone to what

such contract permits to be done, if the parties, or any of them, choose to press the privileges which it confers." *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487.

²⁹ *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894. In making this ruling, the court quoted from *Griffith v. Jewett*, 9 Ohio Dec. 627, 15 Cinc. L. Bul. 419, as follows: "We are dealing with the rights of property, and it is no answer to one's demand for the possession and control of his own property to say that he withholds it and does not intend to use it for an illegal purpose. The law gives to every one, not under disability, the control of his own property,

which determines the validity or invalidity of a voting trust agreement is the purpose which the instrument itself discloses.³⁰

§ 1709. — Public policy as affecting validity—In general. One of the most frequent and most indefinite arguments advanced against voting trust agreements is that they are repugnant to public policy, a general statement covering a great variety of reasons for invalidity. While it must be conceded that no court will enforce an agreement that conflicts with the policy of the law applicable to its jurisdiction, nor aid a party to such an agreement to secure any rights thereunder, it frequently becomes a matter of some difficulty to determine what precise rule of such policy has been offended. In some jurisdictions, voting trust agreements have been held void per se, because contrary to public policy, without any attempt to specify a more definite reason, but as a rule such decisions are supported by reference to some definite rule of public policy which it is conceived has been infringed.

Frequently it has been urged against the validity of voting trust agreements that they are opposed to public policy as disclosed by the statutes of the state,³¹ and this view has found sup-

and imposes upon him the duty of making lawful use of it."

³⁰ "The conclusion [that a particular trust agreement is invalid] does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with a view to upholding the best interests of all the stockholders. The propriety of the object validates the means, and must affirmatively appear." *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75, quoted in *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159, 186.

The statement in a sworn answer to a bill for injunction, that the defendant has no intention of using the powers conferred by a voting trust for a purpose which complainant claims the agreement does not authorize, is conclusive where no evidence is introduced to contradict such part of the answer. *Dady v. Georgia & A. Ry.*, 112 Fed. 838.

As to the purpose of the trust agreement as affecting its validity, see § 1711 et seq.

³¹ See § 1696, supra.

"In *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32, and *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773, * * * the courts treat the question of public policy indicated by the statutes of the respective states as the basis of their reasoning and the foundation upon which their conclusions rest. This seems to be the sounder rule because the public policy which should prevail in the management and control of corporations is primarily a legislative rather than a judicial question." *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

In justification of its view that agreements which deprive stockholders of their right to vote, the North Carolina court, in *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S.

port in those jurisdictions in which such agreements are looked upon with disfavor.³² Thus it has been held in North Carolina that an agreement between majority stockholders to pool their stock for ten years and to divide the directors between them is void as against public policy.³³ But in those jurisdictions in which voting trusts are favored, or at least sustained, the courts hold that such agreements are in no wise in contravention of public policy where they are formed for a lawful purpose and are to be executed in a lawful manner.³⁴

E. 894, quoted from *Guernsey v. Cook*, 120 Mass. 501, the statement that "A sale by a stockholder of the power to vote upon his shares is illegal for very much the same reason that a sale of his vote by a citizen at the polls, or by a director of a corporation at a meeting of the board, is illegal."

³² See *Bostwick v. Chapman* (Sheppaug Voting Trust Cases), 60 Conn. 553, 24 Atl. 32; *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

³³ *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892, following *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

So, too, an agreement between stockholders which takes away from the stockholders all right to vote for a period of three years from the first installation of the corporation's plant and provides that the decision of the voting committee as to any of the facts or conditions of the agreement shall be conclusive and shall bind the parties in interest, its purpose being not to protect the bondholders but to enable the subscribing stockholders to control the corporation, is against public policy and void, as it separates the beneficial ownership of the stock from the legal. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894, following *Harvey v. Linville Improvement Co.*, 118 N. C. 693, 32 L. R. A. 265, 54 Am. St. Rep. 749, 24 S. E. 489.

In the same jurisdiction it has been

said: "We can see * * * less justification for these voting trust agreements where the purpose is to obtain the control of the majority of the stock of a banking institution." *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770, in which case it was held that a voting trust agreement among holders of stock in a national bank was invalid.

Where the view has been taken, as in North Carolina, that such agreements are void as against public policy, the same end cannot be accomplished by giving proxies which are in terms irrevocable, as the law allows the stockholder to revoke such a proxy at any time. *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

In connection with the North Carolina decisions it should be noted that by the statute of that state (Revisal of 1905, § 1184) a proxy is good for three years only. See *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

³⁴ *United States*. *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. 525.

Alabama. *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723.

Illinois. *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

New Hampshire. *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

New Jersey. *Kreissl v. Distilling*

§ 1710. — Statutory provisions. In some of the decisions the question upon which the validity of voting trust agreements has

Co. of America, 61 N. J. Eq. 5, 47 Atl. 471.

New York. San Remo Copper Min. Co. v. Moneuse, 149 App. Div. 26, 133 N. Y. Supp. 509; Elger v. Boyle, 69 Misc. 273, 126 N. Y. Supp. 946.

Pennsylvania. Boyer v. Nesbitt, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

Utah. White v. Snell, 35 Utah 434, 100 Pac. 927.

Virginia. Carnegie Trust Co. v. Security Life Ins. Co. of America, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

"It is not in violation of any rule or principle of law for stockholders who own a majority of the stock in a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and for this purpose to appoint one or more proxies, who shall vote in such a way as shall carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect; and they may do this either by themselves or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. If they are in accord as to the ultimate purpose, it is but reasonable that the will of the majority should prevail as to the mode by which it may be accomplished. It would not be an illegal agreement if articles of partnership should provide that stock in a

corporation owned by the partnership, though standing in the individual names of the partners, should be voted by one of its members; and it is no more against public policy for such an agreement to be entered into between stockholders whose interests in the stock are separate than where their interests are joint. Viewed from considerations of public policy merely, it is immaterial whether such an agreement is made by the members of an existing partnership, which owns the shares, or in pursuance of an agreement by two or more persons to form a partnership for their purchase, or to purchase them for their joint account, or as one of the terms of an agreement for their purchase by persons who contemplate no relation to each other, other than that of owning stock in the same corporation. Such agreement would in any case be outside of the corporation, and disconnected with the interest of every other stockholder, and in either case the same rules would control. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or is of such a character that it will not be enforced, will depend upon the object with which it is made, or the acts that are done under it, and will be governed by other rules of law." Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

An irrevocable power of attorney or proxy, given by an owner of stock in a corporation, to vote upon such stock and to continue for a period of four years, reserving certain privileges to such owner in regard to the manner of dealing in the stock and withdrawing from such ownership, is not contrary to public policy or open to ob-

turned has been whether or not they were in conflict with the statutory provisions regulating the control and management of corporations.³⁵ It has been held that such agreements are not in conflict with statutory provisions conferring upon stockholders the right to vote at corporate meetings in person or by proxy,³⁶ nor with a statute requiring annual elections.³⁷ Municipal legislation authorizing the object sought to be attained by a voting trust renders nugatory any plea that such object is offensive to public policy. Thus a voting trust agreement will not be declared invalid because through its operation there has been effected practical consolidation of a traction company, a majority of whose stockholders participated therein, with other like corporations owned by the same shareholders, where no

jection. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2,025.

³⁵ *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

The public policy which controls the internal management of the corporation would seem to be that disclosed by the statutes of the state under the laws of which the corporation was created. *San Remo Copper Min. Co. v. Moneuse*, 149 N. Y. App. Div. 26, 133 N. Y. Supp. 509.

³⁶ Thus a statutory provision securing to each stockholder one vote at all meetings for each share of stock held by him and appearing by the books of the company to be in his ownership, but permitting the making of a different provision by the certificate of incorporation or by-laws, and a statutory provision giving each stockholder, at elections, one vote in person or proxy for each share held by him, in the absence of contrary provisions in the charter, certificate of incorporation or by-laws, and limiting the right to vote on a proxy to three years from its date, are not to be construed as rendering invalid an irrevocable proxy, subject to the time limit as to its use at elections, nor to restrict the power of a stockholder to give another rights in or powers over his

stock to the same extent that he might give them in other property. *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638.

The creation of a voting trust which is, in other respects, free from illegal features, is not prohibited by statutory provisions giving to each stockholder the right to vote in person or by proxy, conferring on persons holding stock in a representative or fiduciary capacity the right to vote it in conformity with the terms of the instrument under which it is held, providing that the right to vote shall be in the pledgor in the absence of a written agreement to the contrary and that shares of stock belonging to the corporation shall not be voted. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

³⁷ An agreement whereunder the business management of a corporation is placed in the hands of three persons selected by the majority stockholders, such stock being voted by voting trustees, is not invalidated by statutory provisions requiring annual elections by stockholders. *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

positive statute has been violated thereby and where the municipality has, by ordinance, indicated its approval of such merger.³⁸ On the other hand, the view has been taken that such agreements are in conflict with both the letter and spirit³⁹ of statutory provisions which

³⁸ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

³⁹ "I base my view that an irrevocable voting trust, or any other irrevocable grant, uncoupled with an interest, assuming to confer upon the donee the power to vote at corporate elections for the choice of directors, is unlawful and void, first, upon the plain letter of our general corporation act (P. L. 1896, p. 277); and, secondly, upon the reason, spirit, and manifest policy of the act. And first as to the letter of the law: Section 12 of the act declares that the business of every corporation shall be managed by its directors, who are to be chosen annually by the stockholders, and shall hold office for one year, and until others are chosen and qualified in their stead, but, by so providing in its certificate of incorporation, the directors may be classified in respect to their terms of office, provided that no class shall be elected for a shorter period than one year or for a longer period than five years, and that the term of office of at least one class shall expire in each year. Section 36 declares that, unless otherwise provided in the charter, certificate, or by-laws of the corporation, at every election each stockholder, whether resident or nonresident, shall be entitled to one vote, in person or by proxy, for each share of the capital stock held by him, but no proxy shall be voted on after three years from its date. And section 17 provides that absent stockholders may vote at all meetings by proxy in writing. From these express provisions it results, I think, according to the plainest principles of inter-

pretation, that any other scheme of corporate management and any other kind or method of voting are impliedly excluded. 'Expressio unius est exclusio alterius.' When the act says that the directors and managers of the company shall be elected by the stockholders, it means that those who are not stockholders shall not participate in such election. When it says that the directors shall be chosen annually, unless by unanimous consent expressed in the certificate of incorporation, they be classified, in which case they may be elected for not longer than five years, but with the proviso that the terms of office of one class shall expire each year, it prohibits any scheme for placing managers in control of the business of the company who are without annual accountability to the stockholders. When the act says that, in electing directors, each stockholder shall be entitled to one vote for each share of stock held by him, it means at the same time that a person holding only 10 shares or 50 shares shall not have a voting power proportionate to 1,000 shares or 5,000 shares. When it says that absent stockholders may vote by proxy, it means that no substitute for an absent stockholder, other than his proxy, may be admitted to vote in his stead. A proxy, *ex vi termini*, is revocable, unless it be coupled with an interest. A proxy is presumably voicing the judgment and will of his principal. An irrevocable assignment of the voting power, or, what amounts to the same thing, an act that irrevocably delegates the voting power to one who has no interest in the stock,

provide for and regulate the method of voting at corporate meetings

upon trust that he will vote according to his own judgment, discretion, and will, is an attempt to constitute a substitute voter who is not actuated by any interest in the welfare of the company. The difference is fundamental. * * * As to the reason, spirit, and policy of the act: The argument for the separation of the voting power from the property interest in the stock to be voted upon rests, at bottom, upon the erroneous notion that the stockholder's vote or right to vote is a chose in action, or a property right, separate and distinct from the property that is represented by the stock itself, just as if the voting privilege were a substantial fruit of stock ownership, in the same sense that dividends are. But what is a vote? The Century Dictionary defines it as 'the formal expression of a will, preference, wish, or choice in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a person to fill a certain situation or office, or in passing laws, rules, regulations,' etc. A vote, therefore, by the very definition, is but the formal expression of the will of those interested in the question to be voted upon. The right to vote is a privilege, a franchise, to be exercised in respect of the property right to which it is annexed. All the clauses of the corporation act that touch upon the subject seem to me to show a plain purpose and policy that the management of the corporation is to be controlled by the self-interest of its proprietors, voiced at the annual stockholders' meetings, in the election of directors to manage the business. The whole of the act, and especially the provisions to the effect that any lawful business may be conducted by such a company; that the shares of capital stock

shall represent money or money's worth equal to the par value of the shares; that the directors are to be elected by the stockholders, and are themselves to be stockholders; that the executive officers are to be chosen either by the directors or stockholders; that the stockholders shall have one vote for each share of capital stock held by them, etc.—are eloquent to the same effect. Without multiplying references, it is plain, from every section and line of the act, that the stockholder's vote has no other reason for existence, except that the stockholders, who compose the company, who are in truth the company, whose capital is embarked in its enterprises, who are the proprietors of its assets and entitled to its gains and profits, are entitled at the same time, and for that reason and no other, to manage its concerns and business through the formal expression of their will, each in proportion to his interest, at the annual stockholders' meetings. The judgment of the parties interested, actuated by their interest and guided by the experience of the company from time to time and from year to year, is to dominate the management of the company; that judgment being ascertained by formal expression, according to the majority in interest for the time being, at yearly elections. * * * I conclude, therefore, that by the letter of the corporation act, and also according to its spirit and common sense, the power to vote at corporate meetings is conferred as a personal privilege upon the stockholders, as such, in order to enable the owners and proprietors of the business to control its administration; that this privilege is inseparably annexed to stock ownership, and cannot be divorced from it; that the exceptions to this policy pointed out in the corpora-

and the manner in which officers shall be chosen.⁴⁰ It has also been

tion act are only apparent, not real, exceptions, are few in number, and arise ex necessitate rei, and because of the impracticability of allowing two persons to severally vote upon a single share, from which it results that as between pledgor and pledgee, cestui que trust and trustee, the voice of one or the other of these parties is alone to be heard." Per Pitney, J., in *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773.

⁴⁰ In *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487, it was held that an agreement between two factions of the shareholders of a domestic railroad company, to the effect that one of such factions, owning half of the corporate stock, should have the right indefinitely to name a majority and thus manage and control its affairs, was against public policy and void. In so holding, the court, after quoting Ga. Civ. Code of 1895, § 2163, which provides that the board of directors shall select from one of their number a president, and may elect one or more vice presidents and may appoint a secretary, a treasurer and such other officers and agents as they may deem necessary, said: "Therefore, if the Morel faction has the right, by virtue of the agreement, to have elected a majority of the directors of the company favorable to the interests of that faction, and willing to carry out its policies in the management of the corporate affairs, and the members of the Hilton faction are bound by the agreement to so vote their stock as to enable the Morel faction to exercise such right, then the last-named faction may indefinitely control the entire management of the company, and accordingly name all its officers and agents, fix their compensation, and choose any of them from among

the shareholders identified with such faction, even though it may own, as is now the case, only a minority of the corporate shares. * * * Our conclusion is that the contract * * * is against public policy, and therefore void because it indefinitely deprives the owners of the stock constituting the Hilton faction, though they may have a majority of the stock, of the power to exercise their right, as well as their duty to the stockholders, present or future, and to the public, to so vote in the election of directors for the company as will in their judgment promote its prosperity and best enable it to perform its duties to the public, and because it gives the shareholders of the Morel faction, even though they may own but a small minority of the stock, the right to indefinitely control the affairs of the corporation, including the right to fix the compensation of its officers and agents, and to fill any of such positions from among their own members."

In holding invalid a voting trust agreement of the holders of stock in a national bank, the court said, in *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770, "The 'voting trust agreement' presented in the present case is in contravention of a wise public policy, opposed, in our opinion, to a proper construction of the federal statutes governing the management of national banks, and is invalid. * * * This agreement confers upon the trustees and their successors the uncontrolled power of management of the bank for 15 years; the unrestricted power of filling vacancies in their number; it accomplishes the complete separation of the legal and equitable ownership of the stock; it confers an irrevocable grant of representation by proxy for the term; its sole considera-

held that a voting trust agreement dependent for its power of control upon the centralization of a number of irrevocable proxies, which in its operation runs counter to a provision of the corporate charter that "no person shall vote at any meeting of the stockholders * * * by virtue of any power of attorney not executed within one year next preceding such meeting," is necessarily invalid. Indeed, in the case in which this particular charter provision was under consideration the court held that the voting trust agreement in question was invalid although created by an actual transfer of the stock to the trustee and not by the granting of proxies, on the ground that the agreement was manifestly an attempt to evade the inhibitory charter provisions above quoted.⁴¹

tion is the mutual promises of the subscribers; it is uncoupled with any interest; and by it the subscribing stockholders owning a majority of the stock of the bank strip themselves of their power to vote and to participate in the annual meetings of the stockholders at which directors are elected, and to formulate and determine the policy of the bank. Those who are attempted to be intrusted with these large powers are the president, vice president, and cashier—persons forbidden by section 5144 Rev. St., 5 Fed. St. Ann. p. 104 (U. S. Comp. St. 1901, p. 3463), to act as proxies—and the avowed purpose, to quote the words of the agreement, is that 'we and each of us desire to have, for a period of 15 years from and after the date of this instrument, the continuance of the conditions above set out, and to assure ourselves and each other that these conditions and this régime will not be disturbed or affected by the act of any of us, except as hereinafter provided (to wit, unanimous consent.)' The surrender of their duties by the stockholders to their proxies is complete. No limitation is placed upon the trustees named in selecting other trustees to fill any vacancy that may occur, no

stipulation that the subscribers to the agreement shall be consulted, no power reserved in them to be used except by unanimous consent." The court also took the view that such an agreement was in contravention of U. S. Rev. St. §§ 5146, 5147, 5 Fed. St. Ann. pp. 104, 105, which prescribe that a director must be the owner in good faith of at least ten shares of stock and that the stock shall not be in any way pledged or hypothecated, and that three-fourths of the directors must have resided at least one year in the state wherein the bank is located, and must be residents therein during their continuance in office.

An agreement looking to the control of a majority of the stock of a corporation which provides that the subscribers shall control the management and policy of the corporation and that one of them shall receive a lucrative office therein is in violation of a statute which provides that the directors shall choose one of their number president and shall appoint the officers and have general management of the corporation's affairs. *Funkhouser v. Capps*, — Tex. Civ. App. —, 174 S. W. 897.

⁴¹ *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32.

§ 1711. — **As dependent upon purpose—In general.** The touchstone of the validity of voting trust agreements is primarily the purpose for which the agreement is formed. If its object is to advance in a lawful manner the interests of all of the stockholders, usually the agreement is held valid. If its purpose is to benefit the stockholders forming it at the expense of the other stockholders or of the corporation, or if it is in the furtherance of an unlawful or fraudulent design, it will not be sustained.⁴²

§ 1712. — **Control of policy and management.** Pursuant to the general rule stated above, an agreement which has for its purpose the establishing or perpetuation of a policy or management deemed by the subscribing stockholders to be to the best interests of the corporation will be upheld.⁴³

⁴² *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471. And see § 1698, *supra*.

"We have examined case after case, and find generally that the agreements declared void by the courts, where the power to vote was separated from the stockholder, and vested in third persons, were under circumstances which showed that the purpose to be accomplished was unlawful—such as the courts would not sanction if the principal had voted, and not a proxy." *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723.

"Such agreements are not illegal per se. Their validity depends upon the purposes they are designed to subserve. Where these purposes are lawful, stockholders may, in the absence of constitutional or statutory restriction, suspend for a time the right to vote their stock and vest it in others who have a beneficial interest in it or the corporate business—as corporate creditors or a trustee for them." *Thompson-Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

"It is as legitimate for a majority of stockholders to combine as for other people. The fact that they expect 'gain and advantage' * * * to accrue to them does not make the combination unlawful. That expectation and intent would have that effect only if the gain was to be at the expense of the corporation or in some way was intended to work a wrong on the other stockholders. * * * If stockholders want to make their power felt they must unite. There is no reason why a majority should not agree to keep together." *Brightman v. Bates*, 175 Mass. 505, 55 N. E. 809, quoted in *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

As to motives and intention as affecting the validity of the agreement, see § 1708.

⁴³ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949. See also *General Inv. Co. v. Bethlehem Steel Corporation* (N. J. Ch.), 100 Atl. 347.

"The right of the stockholders in a corporation to create a voting trust for a lawful purpose, to wit, the protection and promotion of the best interests of the company, has been approved * * *. Here the purpose for the creation of the special com-

In accordance with this view, an agreement for the purpose of the

mittee to control the affairs of the corporation until the claims of the creditors had been satisfied, according to the arrangement entered into, was perfectly proper and legitimate." *Ecker v. Kentucky Refining Co.*, 144 Ky. 264, 138 S. W. 264.

An agreement placing in the hands of trustees the voting power of stock for a period of 25 years, for the purpose of promoting and protecting the value of the stock, and to secure the satisfactory management of the corporation is not invalid as against public policy in the absence of any showing of oppression, immorality, fraud or bad faith underlying it. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

An agreement was entered into between certain persons owning the majority of the stock in a corporation and certain others, at the time directors thereof. It recited that the stockholders were desirous of placing the management and control of the stock in the hands of such directors and that the latter were desirous of assuming the duty. The agreement constituted such directors attorneys in fact to vote the stock at all meetings, authorizing them to collect all dividends, to apply them to their own use and benefit and to do all things that the grantors of the power might do as owners of the stock, the agreement to be in force for a period of about two and one-half years. The stockholders reserved the right to sell the stock at any time, subject, however, to the rights reserved to the directors for the time aforesaid. In consideration of the powers granted them, the directors agreed to pay the stockholders \$25 a month and, in addition thereto, to pay all assessments levied against the stock during the period of the

agreement and to pay the proportion represented by the stock of any indebtedness created or incurred during the period of the agreement. In an action by the stockholders against the directors, brought after the termination of the agreement, to recover rental for the stock and also the proportion of an indebtedness alleged to have been incurred during the operation of the agreement, in which the defendants interposed the defense that the agreement was void as against public policy, the court said, in *White v. Snell*, 35 Utah 434, 100 Pac. 927: "As between the parties to such an agreement, in the absence of an express statute to the contrary, we can conceive of no good reason, either in law or in equity, why such an agreement is not binding and enforceable. We are aware of no decision by any court which has held that, in the absence of an express statute forbidding it, the voting power of the stock may not be vested in one person while the ownership thereof is in another.

* * * As we have seen, our statute expressly authorizes any stockholder to vote his stock by an agent or proxy. If this is permitted, why may not several stockholders, or any number, agree for a consideration to permit other persons to vote the stock in their stead? And, if the stockholders entering into such an agreement hold the majority of the stock, why may they not agree that the persons in whom the voting of the stock is vested may also determine the business policy of the corporation * * *? It is elementary that the stockholders who own the majority of the stock may elect themselves directors, or appoint themselves as agents of the corporation, may determine upon and carry into effect certain policies and, in short, may conduct the corporate

voting of the stock for the sale of all of the corporate assets is valid.⁴⁴

business in the same manner as they would conduct their own. And so long as they act honestly, and are not devoting the corporate assets or business to their own private gain, or to the prejudice of other stockholders, no one can question their acts, which are purely *intra vires*. * * * If the majority of the stockholders may thus directly determine the policy of the corporation, and may elect all officers, and may have the officers of their choice, appoint all the agents of the corporation, and through them effectuate the policies determined upon, why may they not permit certain persons to vote the stock as the majority may lawfully do, and in so doing permit such persons to do in the premises what the owners of the stock might lawfully do? * * * where such a combination is formed for the purpose of exploiting the business of the corporation to the prejudice of the minority stockholders, and for the benefit merely of the persons who, for the time being, may have control of the corporate affairs, or if the combination is formed for the purpose of limiting the products of the corporation so as to be in restraint of trade, it might be held to be against public policy, and for that reason void." *White v. Snell*, 35 Utah 434, 100 Pac. 927.

An agreement for the purpose of continuing the business policy of a company for the benefit of the stockholders and the company was entered into in writing between such of the stockholders as chose to come in, being a majority, and the three stockholders who were, at the time, directing the business of the company. This agreement, which defined the rights of the stockholders on the one hand

and the powers and duties of the trustees constituted by it, on the other, named the three directing stockholders as trustees. Under it each of the contracting shareholders transferred his stock to the voting trustees who received therefor certificates in their individual names and issued trust certificates to the shareholders, defining the rights and interests of the contracting parties, the trustees, therefore, holding the legal title and being charged with the duty and clothed with the power of managing and controlling the business along the lines pursued at the time the agreement was made. It was held that the agreement was not invalid as against public policy. *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

In *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847, after holding invalid the particular agreement involved, the court said: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders."

⁴⁴ An agreement among the holders of the three-fourths of the stock in a corporation to transfer it to certain trustees for one year with direction to them to vote it for the sale of the corporate assets according to a specified plan for winding up the corporation, but as to other matters leaving them free to exercise their own discretion in voting, except that they shall not so vote as substantially to change the corporate business otherwise than as specifically authorized, is valid. *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

§ 1713. — — **Control of elections.** As the chief, if not the only, method of preserving and controlling the policy and management of the corporation is through the election of friendly directors, agreements having such an end in view are generally sustained, in the absence of other grounds of illegality.⁴⁵ As was said in an Illinois decision: "The stockholders can control the affairs of a corporation only through the election of directors, and at every such election there is necessarily a combination of shares upon the persons elected.

⁴⁵ "As to the arrangement for the trustees uniting to elect their candidates, the decisions of other states show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together." *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

"It is lawful and legitimate for one stockholder to combine his holdings with the holdings of one or more other stockholders for the purpose of the election of officers and controlling the management and business affairs of a corporation, and this is true until such time as the action of such stockholders becomes wrongful or unlawful or fraudulent, at which point the courts may take jurisdiction and act for the protection of the minority." *Weber v. Della Mountain Min. Co.*, 14 Idaho 404, 94 Pac. 441.

In an action brought in New York by a West Virginia corporation to recover damages for the breach of a contract to furnish money to redeem plaintiff's property, which had been sold under foreclosure, the agreement being that plaintiff would deliver to defendant about four-fifths of the capital stock and that upon the delivery of the stock the secretary and treasurer of plaintiff would resign and the board of directors would appoint such persons to those offices as defendant

should nominate and that a new board of directors would be elected, in ruling against defendant's contention that such an agreement was contrary to the public policy of the state as shown by section 30 of the Stock Corporation Law providing that the board of directors shall appoint the corporate officers, the court said: "It is perhaps a sufficient answer to this suggestion to note that plaintiff is a West Virginia corporation, and controlled, so far as its internal management is concerned, by the statutes of that state. * * * But, apart from this, the provision * * * is not a vital part of the contract, but merely an incidental provision, inserted for defendant's benefit, and of which he need not have availed himself, if he had not desired to do so. He was about to become, if he carried out his agreement, the owner of an overwhelming proportion of the capital stock, which would give him, without any special agreement, the absolute control of the corporation, with power to elect a board of directors, and in effect to dictate who should be its officers and employees. It certainly did not destroy the validity of the contract that by one of its terms defendant was to be invested with this power of control at once, upon acquiring the stock, instead of waiting for the next annual meeting." *San Remo Copper Min. Co. v. Moneuse*, 149 N. Y. App. Div. 26, 133 N. Y. Supp. 509.

Such combination may be made at the time of the meeting, but there is no reason why stockholders may not agree beforehand to vote for certain persons as directors, and often they must do so in order to elect the persons desired. There is nothing in the law to prevent the owners of a majority of the stock from giving proxies to the same person. Unless restricted by its terms or by some statutory provision, a proxy confers on the grantee a discretion, unlimited either in character or in duration, until revoked. A majority of the stockholders may therefore, by uniting in the same proxy, confer upon an agent unlimited discretion to vote their stock, and there is no policy of the law to prevent their transferring the stock to a trustee with the like unrestricted power."⁴⁶ Thus an agreement among the subscribers to a syndicate formed to purchase the controlling interest in the stock of a company that, after the purchase of the stock, they will enter into a further agreement whereby all the syndicate stock shall be voted at each annual meeting for a period of not less than three years for such board of directors as shall be named by a committee of five of the subscribers, with power to a majority of them to fill any vacancy in the committee is valid.⁴⁷ In like manner a contract by

⁴⁶ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

In *Hey v. Dolphin*, 92 Hun (N. Y.) 230, 36 N. Y. Supp. 627, it appeared that the parties were jointly interested in certain shares of stock which had been issued to them in a single certificate, and it was agreed between them that the stock should not be sold, or in any manner disposed of, or the certificates surrendered, for a period of ten years, without their joint consent in writing, but should remain as first issued, "for the purpose of enabling the said parties of the first part to prevent the control and management of the said company from passing over to persons who might be less qualified, or less disposed to make the business of the said company a success and its stock valuable." By the same agreement one of the parties was appointed a proxy to vote the whole of said shares at all elections, and the proxy was made irrevocable for ten years, unless sooner

revoked by joint consent. In an action brought for the purpose of having the agreement declared void, and to compel the issuance to the plaintiff of certificates for one-half of the shares, the court held that the agreement was not void nor against public policy, saying: "The object and purpose of the arrangement as stated in the contracts is not of itself vicious, but rather the contrary. This is not a case where, as in some of the cases cited by the respondent, there is a combination of stockholders for the special benefit of some party, or where the power to cast the vote is in a party having no beneficial interest. The arrangement purported to be for the benefit of all the stockholders, and the attorney was one of the parties beneficially interested. * * * It will hardly be claimed that a majority of the stockholders may not combine to control an election of directors."

⁴⁷ *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

the owners of more than one-half of the shares of stock of a corporation to elect the directors of the corporation so as to secure the management of its property, to ballot among themselves for directors and officers if they could not agree, to cast their vote as a unit as the majority should decide, so as to control the election, and not to buy or sell stock except for their joint benefit, is not dishonest, violative of the rights of others, or in contravention of public policy, so long as no fraud is committed or wrong done to other stockholders.⁴⁸ This view that an agreement formed for the purpose of securing or retaining control of the corporation is for a legitimate purpose does not, of course, obtain in those jurisdictions in which such agreements are held contrary to the public policy of the state.⁴⁹

⁴⁸ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

In upholding against an attack by a party thereto, the validity of an agreement among certain persons owning the majority of the shares in a corporation that they would elect the directors and determine the officers and management, balloting among themselves in case they could not agree, the court said, in *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24, "There was no fraud in the agreement, which has been so bitterly assailed in the argument. There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons, owning a majority of the stock, had the unquestioned right to combine, and thus secure the board of directors and the management of the property. Corporations are governed by the republican principle, that the whole are bound by the acts of the majority, when the acts conform to the law of their creation. The co-operation, then, of these parties, in the election of the officers of the company, and their agreement not to buy or sell stock, except for their joint benefit, cannot properly be characterized as dishonest and violative of the rights of others, and in contravention

of public policy. If one man owned a majority of the stock, he surely had the right to select the agents for its honest management. These three persons had formed a partnership for mining, under the lease of the company. They knew they must make large expenditures of money. Incompetent and unfriendly directors and officers might involve them in much trouble, heavy expense and useless litigation. * * * It is strange that a man can not, for honest purposes, unite with others in the protection and security of his property and rights without liability to the charge of fraud and iniquity."

⁴⁹ See § 1709.

In holding invalid a voting trust agreement among stockholders in a national bank, it was said in *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770, "It is urged upon us that this voting trust agreement ought to be sustained because it was intended to prevent the control of a majority of the stock of the bank from passing into the hands of a stockholder who, to many of the stockholders, seems to be 'persona non grata,' and who is buying up the stock and paying for it much more than its market or even book value. It is clear that the con-

§ 1714. — — **Purposes of personal profit.** As has been seen in the statement of the general rule, in order that the agreement may be valid, the purpose for which it is entered into must not be for the benefit of the subscribers at the expense of the other stockholders or the corporation.⁵⁰ It is therefore undeniable that a voting trust agreement is contrary to public policy and void if the purpose of the agreement is to enable a majority of the stockholders to conduct the business of the corporation in their own interest, or in the interest of another corporation, or otherwise in fraud of the rights of minority stockholders.⁵¹ "The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree, for the same consideration to cast the vote himself."⁵² In accordance with this rule an agreement is invalid where its object is not the benefit of all of the stockholders equally, but brings some unfair advantage to the parties to it only, as where one of the parties is to have a certain office at a certain salary, or the parties to the agreement are to receive the profits to be made out of certain contracts to be entered into by the management under their direction, or the stock of the corporation is to be voted or its affairs managed by the determination of persons other than its stockholders or by a minority of its own stockholders.⁵³

trol of the stock cannot be acquired by this person unless some of the subscribers to the present agreement are willing to sell their stock to him. Some, it seems, have done so; and this agreement prevents the transfer of the absolute and unconditional title. We are by this argument asked to sustain this agreement to prevent a man who has invested a large sum of money in the purchase of this stock, who has that direct interest in the success of the bank which an investment of his own money necessarily creates, and who shall be denied the full use of his property by being deprived of an incident or privilege inseparably connected with it; and this to be done in favor of three trustees whose only interest in the stock of the other subscribers is to vote it at the annual or special meetings of the stockholders, to perform a trust

uncoupled with an interest. While it may be in exceptional cases that some good may be accomplished by such agreements, yet, in our opinion, the general effect is vicious and in contravention of a sound public policy."

⁵⁰ See § 1707. And see § 1698, *supra*, and § 1753, *infra*.

⁵¹ *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32.

⁵² *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

⁵³ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949. See also *Kreissl v. Distilling Co.*, 61 N. J. Eq. 5, 47 Atl. 471; *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014; *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770; *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795;

§ 1715. — As dependent upon nature and extent of power conferred. It has been noted in a preceding section that one of the

White v. Snell, 35 Utah 434, 100 Pac. 927.

An agreement by the purchaser of stock to give other stockholders his irrevocable proxy, for the purpose of securing and maintaining control of the company, is invalid where the agreement provided that the directors elected thereunder should employ the giver of the proxy at a fixed salary during its existence. Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847.

An agreement between the president and teller of a bank who owned stock therein to obtain sufficient stock to control the election of directors, to elect certain directors and to retain themselves in office, is illegal. Withers v. Edmonds, 26 Tex. Civ. App. 189, 62 S. W. 795.

A contract to allow another to control the voting of stock, based upon the promise of the one who is to control such stock to secure for the owner of the stock an office in the corporation, is illegal and the contract is void although the promise to secure the office constitutes only a part of the consideration for the agreement. Gage v. Fisher, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809. See also Funkhouser v. Capps, — Tex. Civ. App. —, 174 S. W. 897.

Under a statute denominating as unlawful that which is contrary to an express provision of law, contrary to the policy of express law or otherwise contrary to good morals, an agreement whereby the owners of stock in a corporation transfer the same to the company in consideration of their appointment as trustees and officers of the company, is void. Glass v. Basin & Bay State Min. Co., 31 Mont. 21, 77 Pac. 302.

Where sole owners of all stock and

corporate property transferred the control of same to others for consideration payable partly in the future, the contract was not invalid as against public policy because the consideration included retention in office for a given time at an agreed salary, and such owners could recover the full salary for the term when they were prematurely ousted. Kantzler v. Bensing, 214 Ill. 589, 73 N. E. 874, rev'g 112 Ill. App. 293.

An agreement wherein the owner of a majority of the stock of an insolvent corporation transferred the same to one who undertook the reorganization of the company, authorizing him to place it in a ten-year pool, resigned his office as president and undertook to secure the resignation of a majority of the board of trustees of the corporation so that the reorganizers could at once fill the vacancies and so control the corporation, and stipulating that he should remain on the board and should be employed by the corporation as sales manager, in consideration of all of which the reorganizers undertook to advance funds sufficient to take care of certain pressing obligations, will not be rescinded at the suit of such owner, because of the unlawful stipulations inserted for his benefit, where the former of these was waived by him and the employment has been terminated, and where it is made to appear that the agreement is untainted by fraud and that in reliance upon the pooling agreement stock has been purchased by parties who would not have bought such stock otherwise. Winsor v. Commonwealth Coal Co., 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908.

objections urged against voting trust agreements is that they effect a separation between the beneficial ownership of the stock and the voting power, contrary to the policy of the law.⁵⁴ Further in this connection, one of the elements entering into the determination of the validity of the agreement involved has been, in some decisions, whether the trustee in his exercise of the powers is made a free agent or whether he merely gives expression to the will of the stockholders. Upon the theory that each stockholder is entitled to the benefit of the judgment of every other stockholder in the formulation of the policy of the corporation and in the choice of its management, some agreements by which absolute control of the stock which they represent has been vested in the trustees, unrestrained by any control or direction of the subscribing stockholders, have been held invalid.⁵⁵

⁵⁴ See § 1707, *supra*. See also § 1697, *supra*.

⁵⁵ See § 1697, *supra*.

In *Bostwick v. Chapman* (Shepaug Voting Trust Cases), 60 Conn. 553, 576, 24 Atl. 32, it appeared that a large majority of the stock of a corporation was standing in the name of a trustee in pursuance of an agreement entered into by the original owners of the stock to the effect that the trustee should vote upon it as directed by three certain persons named. Trust certificates were issued which were negotiable, and a majority of them came into the hands of the complainants. Upon a bill filed in equity by them, the court enjoined the trustee from voting, except as directed by the holders of the trust certificates, and also held that the stock should be distributed by the trustee among the holders of the trust certificates. In the course of its opinion the court uses this language: "It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates is objectionable. I think it against the policy of our law for a

stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs, saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall control the property and the management of the corporation; and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow stockholder, to so use such power and means as the law and his ownership

The principle to be deduced from the cases is, according to the Illinois court, "that the holders of the majority of the shares of stock in a corporation may control its management, and every person who becomes an owner of stock has a right to believe that the corporation will, and to insist that it shall, be managed by the majority; that the power to vote is inherently attached to and inseparable from the real ownership of each share, and can only be delegated by proxy,

of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers, and officers, so far as may be, upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud and the seeking of individual gains at the sacrifice of the general welfare as is possible. This, I take it, is the duty that one stockholder in a corporation owes to his fellow stockholders, and he cannot be allowed to disburden himself of it in this way. He may shirk it, perhaps, by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow stockholders." Quoted in *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75, and in *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487.

"While the decisions upon the first question [the legality of a voting trust agreement] are not entirely in accord, yet substantially all of them recognize that an agreement to vote stock in a certain way may be valid. The rule is well stated in the case chiefly relied upon by the plaintiffs, 'If the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to

direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their co-stockholders, must be dependent upon the purposes for which the trust was created and the powers that were conferred. If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to intrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves, by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan to the exclusion of other stockholders who do not come into the combination, then in my judgment such combination and the acts done to effectuate it are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation.' *Kreissl v. Distilling Co.*,

with power of revocation; that each stockholder must be free to cast his vote, whether by himself or by proxy, for the best interest of the corporation, and that each stockholder has the right to demand that every other stockholder, if he desires to do so, shall have the right to exercise at each annual meeting his own judgment as to the best interest of all the stockholders, untrammelled by dictation and unfettered by the obligation of any contract.”⁵⁶

61 N. J. Eq. 5, 14, 47 Atl. 471, 475. An examination of the cases generally will disclose that in nearly all of them where the agreement was held invalid there were stipulations or covenants which infringed this rule.” *Bowditch v. Jackson Co.*, 76 N. H. 351, L. R. A. 1917 A 1174, Ann. Cas. 1913 A 366, 82 Atl. 1014.

In holding illegal an agreement which had the effect of placing the legal title of the majority of the stock in an owner of less than one per cent. of the stock and which gave him the power to vote the stock for ten years upon all questions and at every meeting of the stockholders according to his own discretion, uncontrolled by the stockholders in any way and without any power on their part to interfere, the court said, in *Luthy v. Ream*, 270 Ill. 170, Ann. Cas. 1917 B 368, 110 N. E. 373, rev’g 190 Ill. App. 315: “The voting power of the stock is absolutely separated from its ownership for a term of years, so that the real owners of the property are during that time entirely divested of its management and control or of any participation therein. Our law contemplates that corporations shall be controlled by a majority of the stockholders acting through directors elected by them in person or by proxy * * *. The power to vote for directors can be exercised only by stockholders in person or by proxy, and they cannot be deprived or deprive themselves of this power. Stockholders cannot evade the duty imposed upon them by law of using their power

as stockholders for the welfare of the corporation and the general interest of its stockholders.”

Where it appears in a suit to terminate a voting trust that by the voting trust agreement the management of the affairs of the corporation owning the stock placed in the trust has been virtually turned over to voting trustees who have but little personal interest therein or in the success of the corporation, the stock in which was the subject of the agreement, slight evidence will be sufficient to justify a finding that the execution of the voting trust agreement was procured by fraud. *Knickerbocker Inv. Co. v. Voorhees*, 100 N. Y. App. Div. 414, 91 N. Y. Supp. 816.

⁵⁶ *Luthy v. Ream*, 270 Ill. 170, Ann. Cas. 1917 B 368, 110 N. E. 373, rev’g 190 Ill. App. 315. To the same effect, see *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 61 S. E. 487. And see § 1697, supra.

In *Griffith v. Jewett*, 15 Cinc. L. Bul. (Ohio) 419, decided by the superior court of Cincinnati, the holders of a majority of trust certificates, which, by the contract, were to be voted according to the directions of certain individuals, demanded of the trustee to vote as they should direct, and the court used this language: “If such demand be not complied with the party holding the entire beneficial interest in the stock cannot cast the vote thereof, while it may be voted upon by one having no interest in it or in the company; and so it may come to pass that the ownership of a majority

But where the powers conferred on the trustee are to be exercised by it under the direction of a majority of the subscribing stockholders, it is valid.⁵⁷ By an agreement which provides that the trustees holding the stock shall vote for directors according to the direction of a committee selected by the beneficial owners of the stock, the stockholders cannot be said to have deprived themselves of their deliberative powers nor to have divested themselves of all control of the corporation.⁵⁸ In like manner objection on the ground of the separation of the voting power from the beneficial ownership cannot be successfully urged against an agreement which merely serves to provide a convenient method by which distant and widely sepa-

of the stock of a company may be vested in one set of persons, and the control of the company irrevocably vested in others. It seems clear that such a state of affairs would be intolerable, and is not contemplated by the law, the universal policy of which is that the control of stock companies shall be and remain with the owners of the stock. The right to vote is an incident of the ownership of stock, and cannot exist apart from it. The owners of these trust certificates are, in our opinion, the equitable owners of the shares of stock which they represent; and, being such, the incidental right to vote upon the stock necessarily pertains to them. They may permit the trustees, as holders of the legal title, to vote in their stead, if they choose, but when they elect to exercise the power themselves the law will not permit the trustees to refuse it to them." Quoted in *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75.

⁵⁷ Where an agreement is entered into between the owners of certain stock which provides for the delivery of the stock to one of the parties to be selected by four of the five parties, thereto, to be by him held in trust for a period of ten years and voted as a unit in conformity with the direction of four-fifths of the owners, and for the right to purchase

in the event of the disagreement of the parties, its purpose being to vest and retain, for a fixed period, the management and control of the enterprise in the hands of its promoters, the agreement is valid and legal. *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159.

That the effect of the transfer of participation certificates representing stock deposited by the stockholders with trustees is to place in the trustees the legal title to the majority of the stock of the company and also the voting power, thus separating the latter from the beneficial ownership of the certificate owners does not necessarily render illegal the trust agreement, where the voting power is to be exercised in accordance with the certificate owners' wishes as expressed by a committee chosen by them for the purpose. *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949, the court saying: "This election (of directors) by the trustees according to the direction of the committee selected by the participation shareholders, who are the beneficial owners of the stock, is really an election by the stockholders through their proxies; that is, their agents empowered to act for them."

⁵⁸ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

rated shareholders are enabled to participate indirectly in the control and management of the corporation and from which each shareholder may withdraw at any time and demand the return of his stock and under the terms of which the depositary is merely a proxy required to vote the stock as directed by a committee, the depositary's power and that of the committee being derived from the shareholders by the same instrument.⁵⁹ This principle that every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the corporation cannot be invoked by one who is not claiming that injury has been done to his interest by reason of a stockholder divesting himself of control of his stock, but who, on the other hand, was one of the parties to the divesting agreement.⁶⁰

§ 1716. — Operation as restraint on alienation or trade. Another objection which has been raised in some cases to the validity of voting trusts is that they operate as restraints upon alienation, and this contention will be sustained where the provisions of the agreement under consideration are such that they will so operate.⁶¹ Thus where parties to a voting trust agreement, being holders of a majority of the stock of a corporation, agreed to deposit their stock with a trust company for a period of fifteen years and to execute irrevocable

⁵⁹ *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933, in which case the court further said: "Such an arrangement differs widely from an agreement whereby the stock is placed in the hands of trustees, who are invested with the power of voting it as their interests may dictate, irrespective of the wishes or direction of the owners. Such an agreement as the latter would be void, as against the policy of our corporation law."

⁶⁰ *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638.

⁶¹ "It is true that, as a rule, those who have the largest interests in a corporation are entitled to control its affairs; and where a combination to effect such a result is entered into for a fixed, definite, and reasonable period of time, * * * it is not necessarily obnoxious to the rule which condemns as illegal all contracts in restraint of alienation. But when

such restraint is for an indefinite period of time a very different situation presents itself." *Brown v. Britton*, 41 N. Y. App. Div. 57, 58 N. Y. Supp. 353. See also *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412. Thus equity will not enforce a provision whereunder stock which is held subject to an agreement that it shall be placed in the hands of trustees with power to vote it at all meetings for a period of three years and that while the stock may be sold, the right to vote it may not be sold and that the sale shall be subject to the conditions of the trust and, further, that the other parties to the agreement shall have the first right to purchase, as such conditions operate as a restraint on alienation. *Moses v. Scott*, 84 Ala. 608, 4 So. 742.

proxies covering such stock running to two of their number as trustees and agreed further that if any of them should fail to renew such proxy every three years, the trust company should have authority to do so in his behalf, the agreement was void as violating the spirit, if not the letter of the statute, respecting free alienation of personal property and contrary to the declared public policy of the state.⁶² And it has been held that even though in the particular instance it is possible that no harm will be worked by an agreement, the obvious and only object of which is to effect a combination of interests by means of which the power of certain members to control and direct the affairs and policy of the corporation may be perpetuated indefinitely, the courts will, nevertheless, not consider it with favor, but will regard it as pernicious in principle by reason of its tendency to restrain alienation.⁶³ A similar rule applies to agreements which operate to create monopolies or otherwise to restrain trade.⁶⁴

§ 1717. Revocability. Naturally the question of the revocability of a voting trust agreement is largely dependent upon its validity, granting that the agreement is based upon a consideration. If the agreement is valid, it is irrevocable, if it is void or voidable, the sub-

⁶² *Sullivan v. Parkes*, 69 N. Y. App. Div. 221, 74 N. Y. Supp. 787. See also *Williams v. Montgomery*, 68 Hun (N. Y.) 416, 22 N. Y. Supp. 1033. But see *Scruggs v. Cotterill*, 67 N. Y. App. Div. 583, 73 N. Y. Supp. 882, where it was held that an agreement between the owners of all of the stock of a corporation that in the event of the death of any of them, one of the survivors should have an option to buy the stock held by the deceased shareholder at a certain price within a certain time, although designed to perpetuate control of the corporation in the hands of the parties to the agreement and their survivors, was not illegal as restricting the right to alienate property.

⁶³ *Brown v. Britton*, 41 N. Y. App. Div. 57, 58 N. Y. Supp. 353.

⁶⁴ *Fisher v. Bush*, 35 Hun (N. Y.) 641; *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am.

St. Rep. 541, 30 N. E. 279; *Hafer v. New York, L. E. & W. R. Co.*, 9 Ohio Dec. 470, 14 Cinc. L. Bul. 68. See also *Clarke v. Central R. & B. Co. of Ga.*, 50 Fed. 338, 15 L. R. A. 683.

A voting trust agreement under which the trustees convey to subscribers shares of stock purchased by the trustees but reserve to themselves for twenty-five years the possession of the stock and all voting rights thereon, agreeing to vote the same as a unit on all matters, to issue to the subscribers voting trust certificates showing the subscribers' interests and to pay to the subscribers all dividends earned by the stock so held, is not invalid because against public policy as restraining trade or restricting alienation of property. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

scribing stockholders may withdraw.⁶⁵ Another matter to be considered is "whether the irrevocable trust is or is not coupled with an interest. If coupled with an interest, such agreements have been generally sustained, but, if not coupled with an interest, they are regarded as in the nature of a revocable power,"⁶⁶ and there is some divergency in the decisions as to whether or not a voting trust agreement is coupled with an interest, though this divergency is generally explainable by reason of the different forms assumed by these agreements.⁶⁷

⁶⁵ A proxy and power of attorney made by a stockholder in a corporation giving voting powers and rights to deal with the stock in various ways and to sell and exchange it, the stockholder agreeing not to sell it, and conferring an interest and by its terms irrevocable for a period less than three years, will not be revoked upon a bill filed by the maker to that end unless it appears that the purposes, for which it was given are illegal, or in violation of some statute or against public policy. *Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638.

On the other hand, the North Carolina court has said: "Restrictions on the right to vote stock, like restrictions on the right to sell stock, are not favored by the courts, and the courts have held that any holder of trustee's certificates issued under similar contracts and agreements as this one might at any time demand back his part of the stock." *Shepard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

It has also been said: "Whether an agreement to vote as a unit, or as an agreed majority may dictate, for any given length of time, is a contract so binding in its terms that no party to it can withdraw from it, or disregard it, without the consent of his fellows, may be a very different question. Possibly public policy may exert an influence in the solution of this

problem. * * * And even if such contract be lawful, and, upon its naked face, exert a continuing force, the grave question comes up, will a court of chancery, in its enlightened discretion, lend its aid in the enforcement of a contract of so doubtful policy?" *Moses v. Scott*, 84 Ala. 608, 4 So. 742.

⁶⁶ *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103. And see § 1694, supra.

If the trust is active, the stockholder cannot terminate it at will. *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

In case of a mere dry trust, the stockholder may revoke a power of attorney in form irrevocable. *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723.

As to the character of such trusts, see generally § 1705, supra.

⁶⁷ A provision in a voting trust agreement which gives the trustees the first right to purchase the stock of any contracting party who does not desire to continue the trust relation, at double the par value for the use and benefit of the remaining parties, creates a power coupled with a beneficial interest which is irrevocable. *Boyer v. Nesbitt*, 227 Pa. 398, 136 Am. St. Rep. 890, 76 Atl. 103.

Where the sole consideration for the trust agreement is the mutual promises of the subscribers, it is not coupled with an interest. *Bridgers*

If the element of consideration is wanting, the agreement is revocable.⁶⁸ The consideration which is sufficient to render an agreement, valid in other respects, irrevocable, may take various forms, such as the detriment of one of the parties,⁶⁹ or it may consist in the purchase of stock on the faith of the promise of others to enter into the agreement⁷⁰ but it has been held that where the owners of the stock transfer the shares to trustees with authority to vote at elections according to the direction of a majority of those holding trust certificates, and the only consideration for such transfer and agreement is the mutual promises of several stockholders, any stock-

v. First Nat. Bank, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

Where the only interest of the trustees in the stock of the other subscribers to the voting agreement is to vote such stock, the trust is not coupled with an interest. *Bridgers v. First Nat. Bank*, 152 N. C. 293, 31 L. R. A. (N. S.) 1199, 67 S. E. 770.

⁶⁸ See § 1694, *supra*.

⁶⁹ Where one of the parties to a voting trust surrenders its security for a debt due it from the corporation and takes it back in another form, the trust is coupled with an interest and the agreement under which it was formed is irrevocable. *Thompson-Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

⁷⁰ With regard to a voting agreement entered into by persons contemplating the purchase of a block of stock that the stock should be voted as a unit for a period of five years, the court, in *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, said, "It may be assumed that neither of the parties would have entered into the transaction or agreed upon the purchase of the stock except upon these conditions, and it must be held that each contributed his money to the purchase of the stock upon the promise made to him by the others. There was thus a sufficient consideration for the agreement

granting the right to vote the stock. It was in the nature of a power coupled with an interest, and, being given for a valuable consideration, could not be revoked at the pleasure of either."

An agreement which recites that the subscribers, stockholders in a corporation, in order to promote and protect the value of the stock and to secure the satisfactory management of the company, are desirous that the title to the stock shall stand in the name of specified trustees and be voted by them for a period of twenty-five years, and by which it is provided that each subscriber shall pay the amount set opposite his name and shall be entitled to receive a certain amount of stock on the expiration of the agreement and which also provides for the issuance, distribution and redemption of trustee certificates, for the collection and distribution of dividends by the trustees, for the succession of trustees, for the relation of the subscribers, for the management of funds and voting of stock by the trustees and the nature and extent of their liability, being founded on the mutual promises of the subscribers, is based upon a sufficient consideration. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412.

holder may revoke his agreement and withdraw his stock at will. Furthermore, stockholders who become such after an agreement of this character is entered into are not bound by its terms, but will hold their shares freed from the limitations of the agreement.⁷¹

Whether an agreement is open to the objection that it binds the subscribers so that they cannot withdraw from it is a question which does not concern any other person and as long as they are satisfied and continue to act in accordance with it, no one else has any right to complain.⁷²

§ 1718. Trustees. In the absence of statutory provision to the contrary the subscribers may designate one or more of their number to act as trustee or may select a third person or a corporation, as they may see fit.⁷³ A voting trust by the terms of which it is provided that the majority stock in a debtor corporation held by a creditor corporation and by certain other stockholders shall be deposited with a specified trust company to secure the indebtedness and be voted by it, is not invalidated by the fact that the trustee is also a stockholder in the debtor corporation, where there is nothing in the situation of the parties to the agreement which requires that the trustee be without interest.⁷⁴ While, as has been seen, in order to be valid, a voting trust agreement must benefit the corporation as a whole and all of the stockholders alike, it is the duty of the parties to the agreement to provide for the expense of executing the trust, including the com-

⁷¹ *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, citing *Woodruff v. Dubuque & S. C. R. Co.*, 30 Fed. 91; *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2,025; *Fisher v. Bush*, 35 Hun (N. Y.) 641.

⁷² *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

⁷³ Under the Pennsylvania statute (P. L. c. 141, § 1) it is essential to the validity of a voting trust agreement that the trustee named therein be one who is beneficially interested in either the stock or the business of the corporation. Thus in a case arising in that state it was held that where the trustee named in a voting trust agreement was without such interest,

and voted the stock only as directed by a committee named by the beneficial owners, the agreement created only an inactive trust and was revocable. *Com. v. Roydhouse*, 233 Pa. 234, 82 Atl. 74.

The power of an English corporation created for the purpose of voting stock in a New Jersey corporation pursuant to a voting trust agreement was denied per *Dixon, J.*, in *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773.

⁷⁴ *Thompson-Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

As to the effect of interest upon the qualifications of a trustee, see *Clarke v. Central R. & B. Co. of Ga.*, 50 Fed. 338, 15 L. R. A. 683.

pensation of the trustee. Since the corporation itself, although it owns some of its own stock, cannot enter into a trust agreement, because it "has no legal interest in the determination of who shall be chosen as its officers at any particular election," it follows that it is not under obligations to compensate voting trustees for their services, or to pay the charges of a trust company acting as depositary under a voting trust agreement. Nor will such an obligation be created by implication because such services are frequently paid for by corporations, nor because the directors have paid for such services in the past, and they were rendered at the express request of the directors. The usual practice is to specify in the voting trust agreement how and when the expenses of the trust shall be liquidated. But in the absence of such precise provisions, it is held, a trust company acting as a depositary under the agreement has a lien upon shares of stock deposited with it for its services, if the agreement provides that the trustees shall receive a reasonable compensation.⁷⁵ It is sometimes provided in voting trust agreements entered into to effect the reorganization of an involved corporation, that the expense of conducting the trust, including the compensation of the trustees, shall be borne by the new company, but the courts do not seem to have passed upon the validity of such arrangements.⁷⁶

Where stock is transferred by the owners to one of their number in trust for such owners, to hold it intact, vote it as directed and divide the profits among the owners, but only to dispose of it when the trustee and a specified one of the owners should mutually agree to do so, the only title which the owners have is a voice in determining how the stock shall be voted and an equitable right to the profits, and an owner has no such title or right of possession as will give him the right to bring an action for trover and conversion against the trustee on the refusal of the latter to permit the issue to such owner of a certificate for his proportion of such stock.⁷⁷

§ 1719. Effect upon rights of stockholders. It would seem that even when by the creation of a valid voting trust a stockholder has parted with the right to vote his shares, he may still vote them and exercise other rights of a stockholder, without impairing the validity of the trust. Thus it has been held that where the owner of a

⁷⁵ *Clark v. National Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930.

⁷⁷ *Louisville Trust Co. v. Stockton*, 75 Fed. 62.

⁷⁶ *United Water Works Co. v. Omaha Water Co.*, 164 N. Y. 41, 58 N. E. 58.

majority of the stock of a corporation had assigned the same to a trustee for the benefit of creditors, with full power of attorney, the power was not invalidated because the owner subsequently voted the stock, which still stood on the books in his name, where the trustee was present at the time and did not object.⁷⁸ It has also been held that the beneficial owner of shares of stock of an insolvent corporation, whose sole evidence of title to such stock is a voting trust certificate held by him subject to an agreement giving to the voting trustees, during the term of the agreement "all rights of every name and nature, including the right to vote in respect of any and all of such stock," is a stockholder of the corporation within the meaning of a statute authorizing stockholders to institute proceedings to wind up the business of an insolvent corporation.⁷⁹ Likewise, a stockholder, party to a valid voting trust agreement, has been held not entitled to recover damages from the trustees for corporate mismanagement especially where their sole acts as trustees have been participation in the election of directors, on the board of which they have never constituted a majority.⁸⁰ An equal right belongs to one who has become the owner of stock which, in the hands of a former owner, was represented in the agreement, and this irrespective of his knowledge of the existence of the agreement and the fact that his stock was included therein.⁸¹ And persons purchasing a new issue of stock are entitled to relief in equity against an agreement between holders of stock previously issued whereby the purchasers of the new stock are deprived of all voice in the management of the company and of the right to combine with other stockholders to elect a majority of the directors.⁸² Where, on the other hand, the complainant is the owner of shares of stock that were not included within the trust agreement, he may attack the voting trust agreement upon any ground that would be open to a stockholder, including any inherent invalidity in the contract itself,⁸³ but a nonparticipating stockholder cannot

⁷⁸ Third Nat. Bank of Cincinnati v. Jackson, 156 Fed. 144.

⁷⁹ O'Grady v. United States Independent Tel. Co. (N. J. L.), 71 Atl. 1040.

⁸⁰ Lawrence v. Curtis, 191 Mass. 240, 77 N. E. 314.

⁸¹ Ryan v. Seaboard & R. R. Co., 89 Fed. 397.

⁸² White v. Thomas Inflatable Tire

Co., 52 N. J. Eq. 178, 28 Atl. 75.

⁸³ Luthy v. Ream, 270 Ill. 170, Ann. Cas. 1917 B 368, 110 N. E. 373, rev'g 190 Ill. App. 315; Lebus v. Stansifer, 154 Ky. 444, 157 S. W. 727; Thomas Maddock Sons' Co. v. Biardot, 81 N. J. Eq. 233, 87 Atl. 66; Warren v. Pim, 65 N. J. Eq. 36, 55 Atl. 66; White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178, 28 Atl. 75.

complain where the corporation is managed lawfully and with due regard to his interests as a stockholder, although the corporation is being run under a voting trust agreement to the satisfaction of those joining therein.⁸⁴ Thus, it has been held that a voting trust agreement placing the control of the management of a hopelessly insolvent corporation owning several subsidiary corporations in the hands of a committee composed of three members representing the creditors and two representing a majority of the stockholders and providing that the committee should be paid by the corporations concerned in certain proportions was a legitimate and proper arrangement, and that a plan of reorganization worked out and put into effect by such committee will not be set aside at the suit of a minority dissenting stockholder, especially where it appears that he knew of the plans from the start and that it is no longer possible to restore the corporations to statu quo.⁸⁵ Likewise, a voting trust agreement formed in contemplation of a proposed merger of the corporation operating thereunder with others will not be held invalid in the suit of a nonparticipating stockholder of the first corporation where the proposal is still embryonic and it does not appear that any consolidation in violation of law is intended.⁸⁶

§ 1720. Character of certificates issued under trust agreement.

As a necessary incident of the creation of the usual form of voting trust, there come into existence those evidences of title in stock known as voting trust certificates, but the precise legal status of these instruments is as yet unsettled. It has been held, on the one hand, that they are practically identical in character with the shares of stock which they represent; so much so, at least, as to partake of their attribute of negotiability.⁸⁷ A court of the same state earlier held, on the other hand, that a voting trust certificate was taxable under a statute providing for taxing evidences of transfers of stock.⁸⁸

§ 1721. Remedies. While it may now be stated as a general rule that voting trust agreements are valid, either as between the parties or as regards attack by outsiders, if drawn and operated in accord-

⁸⁴ *Moore v. Bank of British Columbia*, 106 Fed. 574; *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *Zimmermann v. Jewett*, 19 Abb. N. Cas. (N. Y.) 459.

⁸⁵ *Ecker v. Kentucky Refining Co.*, 144 Ky. 264, 138 S. W. 264.

⁸⁶ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

⁸⁷ *Union Trust Co. of Rochester v. Oberg*, 214 N. Y. 517, 108 N. E. 809.

⁸⁸ *United States Radiator Corporation v. State*, 151 N. Y. App. Div. 367, 135 N. Y. Supp. 981.

ance with the rules heretofore considered, the courts have been slow to enforce them by way of decrees of specific performance. Particularly is this reluctance manifested where it is made to appear that a decree of that nature will place or continue in control of a corporation a minority faction thereof. In general such a decree will be refused, and the party aggrieved by the refusal to carry out the agreement will be left to his remedy at law for damages. Nor will equity compel the performance of an agreement where its natural tendency, irrespective of the actual results, is to interfere with the faithful performance of their duties by the directors of the corporation.⁸⁹ As a matter of course, to warrant the court in compelling specific performance, there must be a contract capable of enforcement.⁹⁰ Nor will such relief be afforded where there is an adequate

⁸⁹ *Teich v. Kaufman*, 174 Ill. App. 306.

⁹⁰ Thus where the two trustees named in a voting trust agreement were unable to agree how to vote the stock they represented, and likewise unable to agree upon the choice of a third person as arbitrator, as provided by the trust agreement, and the contract was silent as to what steps should be taken to break the deadlock, it was held that there was no contract capable of specific enforcement. *Sullivan v. Parkes*, 69 N. Y. App. Div. 221, 74 N. Y. Supp. 787.

A contract to form a corporation, the stock of which should be sold only to stockholders agreeing to elect directors who would employ one of the parties as general agent at an agreed compensation even if such a contract would have been binding upon directors of such a corporation, is so indefinite as to be incapable of specific performance and an action for damages for failure to carry out such an agreement will not lie. *Flaherty v. Cary*, 62 N. Y. App. Div. 116, 70 N. Y. Supp. 951, *aff'd* 174 N. Y. 550, 67 N. E. 1082.

An agreement between the owner of a majority of the stock of a corporation to convey to another a portion

of his stock, to cause the issuance to him of enough treasury stock so that their holdings will be equal and to procure the execution of a proxy running from himself and the owner of the remainder of the stock so that the new stockholder's voting power will equal that of the others combined, coupled with a provision that each of the parties to the contract will convey one-half of a share of stock to some third person to be agreed upon who shall vote the same in the event of any disagreement between the parties to the contract, is incapable of enforcement by a decree of specific performance, although based upon adequate consideration and executed save for the two last provisions. *Kennedy v. Monarch Mfg. Co.*, 123 Iowa 344, 98 N. W. 796.

Where three stockholders of a corporation, each holding 250 shares thereof, and together holding a majority of the stock, signed an agreement to "deposit with the voting trustees certificate or certificates to the amount of \$21,000 (210 shares) * * * together with sufficient transfers of such stock to the voting trustees," the court held that this contract did not call for a deposit of 210 shares by each of the parties, but at the most

remedy at law.⁹¹ There are cases, however, where specific performance or its practical equivalent has been decreed.⁹²

The aid of equity has likewise been refused to prevent an anticipated breach of a voting trust agreement.⁹³ But where it is alleged that a breach of the trust agreement is threatened in voting to increase the number of directors, equity will, on a proper showing, enjoin the voting of a party's stock by the trustee until it is determined in an action then pending whether or not such act on the part of the trustee will constitute a violation of the trust.⁹⁴

Equity will not compel the restoration of stock transferred by one party in a stock pooling agreement to another, where the transfer was made in accordance with the conditions of the pool agreement and in

70 shares each, and refused to enjoin the voting of the 210 shares held by the defendant by him and to decree specific performance of the contract. *Wood v. Cook*, 132 N. Y. App. Div. 318, 117 N. Y. Supp. 51.

⁹¹ So a court of equity will not decree specific performance of a contract between stockholders of a banking corporation to pool their stock and to acquire, for the benefit of the pool, sufficient additional stock so that the pool shall control the corporation, and thereafter to vote such stock as a unit on all corporate matters as shall be decided by a majority of the parties, at the suit of one of the parties, where the other party, after acquiring sufficient stock, had repudiated the agreement and effected a voting alliance with other stockholders, even though such contract was legal and capable of specific performance, but will leave the complaining party to his remedy at law for breach of contract. *Gleason v. Earles*, 78 Wash. 491, 51 L. R. A. (N. S.) 785, 139 Pac. 213.

⁹² Thus an agreement on the part of the vendor of two-thirds of the stock of a corporation, with the purchasers thereof, that for a certain period his remaining third should be pooled with that of the purchasers, during which time all the stock should share rat-

ably in all the benefits of such pool, was valid, and the purchasers were entitled to an accounting from the vendor for benefits belonging to the pool retained by him, especially in view of the fact that for three years the vendor had turned over and distributed such benefits in accordance with the agreement. *Green v. Higham*, 161 Mo. 333, 61 S. W. 798.

⁹³ *Gleason v. Earles*, 78 Wash. 491, 51 L. R. A. (N. S.) 785, 139 Pac. 213. Thus where a contract providing for irrevocable proxies running from the owners of stock to trustees named therein and contemplating the vesting of voting rights of such stock in two trustees for a period of fifteen years made no adequate provision for breaking a deadlock between the trustees as to how to vote the stock and contained no undertaking on the part of one of the trustees not to vote the stock belonging to him personally, it was held that such trustee would not be enjoined, at the suit of the other or of the remaining parties to the agreement from voting his personal stock. *Sullivan v. Parkes*, 69 N. Y. App. Div. 221, 74 N. Y. Supp. 787.

⁹⁴ *Byington v. Piazza*, 131 N. Y. App. Div. 895, 115 N. Y. Supp. 918. See also *Harper v. Smith*, 93 N. Y. App. Div. 608, 87 N. Y. Supp. 516.

anticipation of its continuance, as alternative relief when specific performance of the contract is denied, but will leave the complaining party to his remedy at law for breach of contract.⁹⁵ It has been held that one who has pooled his stock under an agreement made in good faith and for a lawful purpose cannot rescind the agreement where stock has been purchased by other parties in reliance thereon, although it contained provisions contrary to public policy relating to his employment in a lucrative corporate position.⁹⁶ Even where the agreement is valid, if any of its terms are broken by other parties to the agreement a participating stockholder has then a right to elect to treat the contract as ended and to maintain an action to recover his stock.⁹⁷ In a proper case, on a bill by one of the participating stockholders, the trustee will be enjoined from acting under the trust and the return of his stock to the stockholder will be decreed,⁹⁸ and injunctive relief will not be denied complainant because he is in *pari delicto* with

⁹⁵ A contract between the holder of a majority of the stock of a corporation and a prospective shareholder whereby the stockholder in consideration of the payment to the corporation of a sum of money and the lease to it of certain property, undertakes to transfer to such person a portion of his own stock, to cause to be issued to him sufficient treasury stock to make their holdings equal and to procure the execution of a permanent proxy running from him and from the sole remaining stockholder so that his voting power would always equal theirs combined, executed in all respects save for the granting of the proxy, will not be rescinded because of failure to execute such proxy, in an action against the corporation and the original majority stockholder, since the unexecuted portion of the agreement did not concern the corporation and the lease and payment to it were for a good consideration independently of such other provision, and it was beyond the power of the other defendant to restore either the money paid or the property leased. *Kennedy v. Monarch Mfg. Co.*, 123 Iowa 344, 98 N. W. 796.

Owners of stock who have conveyed their stock to the corporation to be sold to secure funds for the payment of corporate obligations, in consideration of an agreement that they shall have and retain office as trustees and officers of the corporation, cannot upon breach of the contract by their ouster from office, recover the stock conveyed or its value, as in an action of claim and delivery, where the corporation has already disposed of the stock, nor as in an action for conversion, since they can show neither wrongful taking, wrongful disposition, nor any general or special ownership of the stock or right to its immediate possession at the time of any alleged wrongful taking. *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302.

⁹⁶ *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62, 33 L. R. A. (N. S.) 63, 114 Pac. 908.

⁹⁷ *Gray v. Bloomington & N. Ry.*, 120 Ill. App. 159.

⁹⁸ *Luthy v. Ream*, 270 Ill. 170, Ann. Cas. 1917 B 368, 110 N. E. 373, rev'g 190 Ill. App. 315. See, to the same effect, *Sheppard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

defendant.⁹⁹ Where a reorganization committee, in working out plans to rehabilitate a corporation then insolvent, created a voting trust thereby exceeding the powers conferred upon it by the stockholders, it was held that such stockholders were entitled to maintain an action to recover their stock.¹ Actions for damages for failure to carry out a voting trust agreement are of infrequent occurrence, largely because of the extreme difficulty of establishing a measure of damages. Of course no such action can be maintained where the agreement is invalid, and in such cases it is held that not only will damages for failure to perform be refused, but likewise incidental damages as for reimbursement for expenses incurred on the faith of the contract.² The formation of an illegal voting trust, by means of which the assets of the corporation are wasted or the shares of a stockholder diminished in value, may form the basis of an action for damages.³ Mandamus will lie to compel the delivery of the books, papers and other property of a corporation to officers elected by directors named at a regular stockholders' meeting by a majority in interest of the stockholders against former officers claiming under a contract between the original incorporators that the faction they represent should have the right permanently to elect a majority of the board of directors, such agreement being invalid because contrary to public policy.⁴

⁹⁹ Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847.

¹ Warren v. Pim, 65 N. J. Eq. 36, 55 Atl. 66; United Water Works Co. v. Omaha Water Co., 164 N. Y. 41, 58 N. E. 58.

² Flaherty v. Cary, 62 N. Y. App. Div. 116, 70 N. Y. Supp. 951, aff'd 174 N. Y. 550, 67 N. E. 1082; Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

Thus an agreement between the president and the teller of a corporation that the former shall, in the interest of both, organize a voting combination of stock for the purpose of controlling the election of directors to the end that a board will be selected that will conduct the business along lines believed by the parties to the agreement to be for the best interests of the corporation, but which also provided that both of the parties should be retained in office, being in-

valid because against public policy, is unenforceable, and no right of action can be founded upon a provision of such an agreement that the parties shall share equally the expense incurred in organizing such a stock combination. Withers v. Edmonds, 26 Tex. Civ. App. 189, 62 S. W. 795. In like manner, owners of stock who have transferred their stock to the corporation for an unlawful consideration, namely, their appointment and retention as trustees and officers of the company, cannot maintain an action for breach of the contract by ouster from office, nor one to enforce its performance. Glass v. Basin & Bay State Min. Co., 31 Mont. 21, 77 Pac. 302.

³ Worth v. Knickerbocker Trust Co., 151 N. C. 191, 65 S. E. 918.

⁴ Morel v. Hoge, 130 Ga. 625, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935, 61 S. E. 487.

CHAPTER 41

MANAGEMENT AND CONTROL IN GENERAL

- § 1725. General considerations.
- § 1726. Powers of stockholders—In general.
- § 1727. — As an individual acting alone.
- § 1728. — Where owner or owners of all or majority of stock act.
- § 1729. Powers of directors—In general.
- § 1730. — Powers as individuals.
- § 1731. Powers of officers or agents other than directors—In general.
- § 1732. — Powers as affected by ownership of large part or all of stock.
- § 1733. Control of directors by stockholders—General rules.
- § 1734. — Effect of statutes or charter provisions.
- § 1735. Requirement of consent of stockholders—General rule.
- § 1736. — Necessity created by statute or charter.
- § 1737. Rights of minority stockholders—In general.
- § 1738. — Where one corporation controls another corporation.

§ 1725. **General considerations.** For purposes of classification, the persons who to a greater or less extent manage or control a private corporation are either (1) the stockholders, (2) the board of directors, or as it is sometimes called, the board of trustees and the individual members thereof, and (3) the officers and agents of the corporation other than the directors, such as the president, vice president, secretary, treasurer, general manager, etc. It is not within the scope of this chapter to consider in detail the powers of stockholders,¹ nor to state what powers are not possessed by the board of directors but are possessed by the stockholders themselves.² In this chapter the intention is to merely state a few general rules relating to the management and control of corporations, leaving for consideration in succeeding chapters such questions as the rights of minority stockholders,³ the powers of directors and the method by which they exercise their powers,⁴ and the powers of officers other than the directors.⁵

§ 1726. **Powers of stockholders—In general.** In the absence of a provision to the contrary in the charter of a corporation or the gen-

¹ See chapter on Stockholders, *infra*.

⁴ See Chap. 42, *infra*.

² See §§ 1961-2001.

⁵ See Chap. 42, *infra*.

³ See chapter on Stock and Stockholders, *infra*.

eral law, the management and control of the corporation is vested primarily in the stockholders or members collectively, as constituting the corporation, and in them alone.⁶ No one else can act for or bind the corporation unless authorized by them, or by the charter or general law; and it is for them to elect or appoint the officers or agents to represent and act for the corporation, and to define their powers, unless there is some charter or statutory provision to the contrary.⁷ Subject to qualifications hereafter noted, stockholders or members of a corporation represent and may bind the corporation by vote of the majority at a corporate meeting,⁸ and acquiescence by all the stockholders or members may be regarded as acquiescence of the corporation.⁹ In other words, if there is no statute nor charter provision vesting control in a board of directors or trustees, then the stockholders retain the right to manage the corporation,¹⁰ although in such a case they may confer by a by-law such power upon the board of directors or trustees.¹¹

Almost universally, however, the power of management is vested by a general statute or charter provision in a board of directors or trustees;¹² and in such a case, the powers so vested in the directors or trustees must be exercised by them, and cannot be exercised by the stockholders.¹³ It has been said that "when the charter of a

⁶ See *Low v. Connecticut & P. R. R.*, 45 N. H. 370.

⁷ See § 1966.

⁸ Rights of minority stockholders, see chapter on Stock and Stockholders, *infra*.

⁹ See § 2177 et seq.

¹⁰ See *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 596, 41 L. Ed. 265.

In North Carolina, by statute, until the first directors are elected, the corporate affairs and management are vested entirely in the subscribers. *Palmer v. Lowder*, 167 N. C. 331, 83 S. E. 464.

¹¹ See *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 594, 597, 41 L. Ed. 265.

¹² See *Union Trust Co. of Maryland v. Carter*, 139 Fed. 717.

The statutes in nearly every state provide that the business of ordinary private corporations shall be managed

by a board of directors. In Massachusetts, the statute provides that the board of directors may exercise all the powers of the corporation except such as are conferred by law or by by-laws of the corporation upon the stockholders. *Massachusetts Business Corp. Law of 1903*, § 19.

¹³ *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843, 853; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *McCullough v. Moss*, 5 Den. (N. Y.) 567, 575.

"Under our statute a corporation can act only through its board and directors and officers. Its property is not subject to the control of its members or stockholders." *Beardstown Pearl Button Co. v. Oswald*, 130 Ill. App. 290, 295.

"But the power of a corporation formed under the corporation act of this state [Oregon], as to its rela-

private corporation or the general laws invest the board of directors with the power to transact the business of the corporation, to manage its affairs, and to fill vacancies occurring in the board, the power is exclusive in its character," meaning thereby that the power excludes any power in the stockholders in connection therewith.¹⁴ So, as said in an early New York decision, "when a charter invests a board with the power to manage the concerns of the corporation, the power is exclusive in its character. The incorporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment. * * * The stockholders as such, in their collective capacity, could do no corporate act. The directors were their representatives, and alone authorized to act."¹⁵ Moreover, if the charter vests the power to manage the affairs of the corporation in a board of directors, it is not within the power of the corporation, by a by-law or otherwise, to vest the management in an executive committee.¹⁶ So it is held that "when a statute provides that powers granted to a corporation shall be exercised by any set of officers or any particular agents, such powers can be exercised only by such officers or agents, although they are required to be chosen by the whole corporation; and if the whole corporation attempts to exercise powers which by the charter are lodged elsewhere, its action upon the subject is void."¹⁷ Of course if the charter pro-

tions with third persons, is vested in and exercised by the directors. The power of the shareholders is limited to a few matters concerning its internal affairs, namely, the election of directors, the increasing of the capital stock, the adding to the powers and purposes of the corporation, and the authorizing its dissolution." *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 23 Fed. 232, 244.

"Doubtless the stockholders might instruct the trustees as to the course to be pursued, but the power of the corporation was vested in the trustees, and they only could express its will." *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565, 575.

"Every stockholder of a corporation holds his stock subject to the execution of all the powers conferred

by law upon the corporation, and he must abide by the decision of the directors or stockholders, as the case may be, upon all matters which the law commits to their determination and control." *Colby v. Equitable Trust Co.*, 124 N. Y. App. Div. 262, 271, 108 N. Y. Supp. 978.

Sometimes a stockholders' committee is agreed upon, especially where the corporation is in financial difficulties, to take the place of the board of directors. See *Roberts v. Vonnegut*, 58 Ind. App. 142, 104 N. E. 321.

¹⁴ *Moses v. Tompkins*, 84 Ala. 613, 619, 4 So. 763.

¹⁵ *McCullough v. Moss*, 5 Den. (N. Y.) 567, 575.

¹⁶ *Tempel v. Dodge*, 89 Tex. 69, 33 S. W. 222, 32 S. W. 514.

¹⁷ *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N. H. 85.

vides that certain powers shall be vested "exclusively" or "solely" in the directors, the stockholders have no authority in regard thereto.¹⁸

Stockholders cannot, it seems, even when assembled, make contracts, where the management is vested in directors. Thus, it was held in an early case in New York, in the Supreme Court, that a lease executed in pursuance of a resolution of the stockholders was void for the reason that the power of managing the business of the company was vested solely in the board of directors.¹⁹ So the stockholders, where the statute provides that "the corporate powers of the corporation shall be exercised" by a board of trustees, cannot, even when duly assembled, sell part or all of the corporate property, without any action of the board of trustees.²⁰ So it has been held that where the charter provides that the business and affairs of an insurance company shall be under the control of a board of directors, the stockholders at their annual meeting have no power to pass upon claims for losses, such matter being exclusively within the powers of the board of directors.²¹ A fortiori, if a by-law provides that certain acts shall not be done without the order of the directors, the stockholders or members cannot authorize such an act by a resolution.²² But where, by statute, the power to transact the corporate business is lodged in the directors, there is dictum to the effect that the stockholders cannot enter into contracts at stockholders' meetings, unless "all of the stockholders are in attendance at such meetings."²³ However, it is submitted that the only importance of all being present is that their unanimous agreement precludes any attack on the act on the part of stockholders.

On the other hand, where a particular corporate power is vested in the directors or trustees, and not in the stockholders, the exercise of such power at a meeting called as a stockholders' meeting will be valid, if the stockholders and directors or trustees are the same persons, and all are present and participate in the meetings.²⁴ So, it seems, all the stockholders may make a contract at a stockholders' meeting, where the directors are present at the meeting and participate in making the contract.²⁵

¹⁸ Union Trust Co. of Maryland v. Carter, 139 Fed. 717.

¹⁹ Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27, 63.

²⁰ Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

²¹ Stoehlke v. Hahn, 158 Ill. 79, 84, 42 N. E. 150, aff'g 55 Ill. App. 497.

²² In re La Solidarite Mut. Ben. Ass'n, 68 Cal. 392, 9 Pac. 453.

²³ Colorado Springs Co. v. American Pub. Co., 97 Fed. 843, 853.

²⁴ People v. Sterling Burial Case Mfg. Co., 82 Ill. 457.

²⁵ First Trust Co. v. Miller, 160 Wis. 336, 151 N. W. 813.

As a matter of fact, under our present laws and practice, the powers of management vesting in the stockholders as a body are very few.²⁶ They control the affairs of a corporation, while it exists and does business, in proportion to the number of their shares, through the officers elected by them. They have power to hold meetings,²⁷ elect directors and sometimes other officers,²⁸ adopt by-laws, unless there is a statute or charter provision to the contrary,²⁹ and increase or decrease the capital stock, add to the powers and purposes of the corporation, or authorize the dissolution of the corporation.³⁰ It has been held that they may appoint a committee to investigate the affairs of the corporation, as against the objection that the management of a corporation belongs to the directors.³¹ In cases of mismanagement by the board of directors or other corporate officers, they may, in a proper case, sue in equity to protect their rights, including suits to enjoin or set aside ultra vires transactions, and to prevent diversion of misapplication of assets.³² But they cannot, by their own joint action, remove directors,³³ except at the end of their term of office, by electing others in their stead.

If a statute authorizes the directors to do an act or make a contract, but only with the consent of a majority or a certain proportion of the stockholders, it impliedly precludes the right of the stockholders alone to act.³⁴

§ 1727. — As an individual acting alone. Individual stockholders, like other persons, may be expressly or impliedly authorized by the stockholders as a whole or by the board of directors, to act as agents of the corporation.³⁵ But unless expressly or impliedly authorized, the stockholders or members of a corporation are not its agents in any sense merely because of their relation, and, acting as individuals, they

²⁶ See *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 35, 86 Pac. 1120.

²⁷ See Chap. 39.

²⁸ See § 1756, *infra*.

²⁹ See § 486.

³⁰ *Paducah & I. Ferry Co. v. Robertson*, 161 Ky. 485, 171 S. W. 171, and see § 1729, *infra*, as to what matters are beyond the powers of the directors. See also the chapter on Stock and Stockholders, *infra*.

³¹ *Star Line v. Van Vliet*, 43 Mich. 364, 5 N. W. 418.

³² See chapter on Stock and Stockholders, *infra*.

³³ See § 1814 et seq., *infra*.

³⁴ *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 351, 80 Am. St. Rep. 132, 62 Pac. 552.

³⁵ But the fact that the president of a corporation is the personal agent of a majority stockholder does not transform the stockholder into an agent of the corporation or its president. *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120.

have no power to bind it.³⁶ Thus, a stockholder, not specially authorized to act as agent, cannot bind the corporation by contracts made on its behalf,³⁷ or convey or mortgage its property,³⁸ or transfer its good-will,³⁹ or release a debt due to it.⁴⁰ So he cannot employ an

³⁶ **United States.** *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473.

Alabama. *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41.

California. *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 46 L. R. A. 142, 71 Am. St. Rep. 94, 57 Pac. 468.

Connecticut. *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173.

Illinois. *Sellers v. Greer*, 172 Ill. 549, 40 L. R. A. 589, 50 N. E. 246, rev'g 64 Ill. App. 505; *Bouton v. Board Sup'rs McDonough Co.*, 84 Ill. 384; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373.

Indiana. *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267, 29 Am. Dec. 372.

Maryland. *Morelock v. Westminster Water Co.*, 4 Atl. 404.

Michigan. *Chase v. Michigan Tel. Co.*, 121 Mich. 631, 80 N. W. 717; *Donoghue v. Indiana & L. M. Ry. Co.*, 87 Mich. 13, 49 N. W. 512.

Minnesota. *Mercantile Nat. Bank of Cleveland v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825.

Missouri. *Jones v. Williams*, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486.

New Jersey. *Vandyke v. Brown*, 8 N. J. Eq. 657.

Pennsylvania. *Monongahela Bridge Co. v. Pittsburg & B. Traction Co.*, 196 Pa. St. 25, 79 Am. St. Rep. 685, 46 Atl. 99.

Tennessee. *Bristol Bank & Trust Co. v. Jonesboro Banking & Trust Co.*, 101 Tenn. 545, 48 S. W. 228; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209.

Vermont. *Wheelock v. Moulton*, 15 Vt. 519.

West Virginia. *Western Min. &*

Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406.

The fact that a city in which a bridge company's bridge is located purchases the entire capital stock of the bridge company, and the stock is assigned to it, except several shares which are placed in the names of the officers and directors of the bridge company, does not dissolve the bridge company nor vest in the city the title to its property, nor give the city any right to manage and control the bridge. *Monongahela Bridge Co. v. Pittsburg & B. Traction Co.*, 196 Pa. St. 25, 79 Am. St. Rep. 685, 46 Atl. 99.

³⁷ **United States.** *Denver Engineering Works Co. v. Elkins*, 179 Fed. 922, 926.

Alabama. *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 So. 41.

Montana. *Deschamps v. Loiselle*, 50 Mont. 565, 148 Pac. 335.

Nebraska. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 60 L. R. A. 927, 108 Am. St. Rep. 716, 93 N. W. 1024.

New York. *McCloskey v. Goldman*, 62 Misc. 462, 115 N. Y. Supp. 189.

Virginia. *Eichelberger v. Mann*, 115 Va. 774, 80 S. E. 595.

Washington. *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120.

³⁸ *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; *Wheelock v. Moulton*, 15 Vt. 519. See also §§ 26, 27.

³⁹ *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 46 L. R. A. 142, 71 Am. St. Rep. 94, 57 Pac. 468.

⁴⁰ *Harris v. Muskingum Mfg. Co.*,

attorney to represent the corporation.⁴¹ And since a stockholder is not the agent of the corporation merely because of his relation, notice to a stockholder, when not acting under authority as agent, is not notice to the corporation.⁴² Nor are his declarations or admissions admissible as evidence against the corporation.⁴³ Whether a stockholder is an agent of the company depends upon the facts of the particular case.⁴⁴

§ 1728. — Where owner or owners of all or majority of stock act. The situation arising where one person owns all the stock is practically the same as where all the owners of stock join in an act but not at a corporate meeting; and this is true in cases where one stockholder owns a majority of the stock and cases where stockholders owning a majority but not all the stock act together but not at a corporate meeting. The question in each case is what is the effect of an act, contract or transfer under such circumstances, which being further reduced is whether the corporation and the owners of the stock are separate entities. The theory that even where one individual acquires the entire capital stock of a corporation, he and the corporation are not one and the same, but are distinct and separate legal entities and must be so treated,⁴⁵ with the exception that at certain times the fiction of corporate entity is inapplicable,⁴⁶ has been discussed at length in a preceding volume. The question is not entirely free from difficulty nor are the decisions wholly unanimous in their views. Generally, however, it is held that whatever power stockholders may have to act as or for the corporation must be exercised at a corporate meeting called and conducted according to law; and that acts by the stockholders or members individually, and not at a corporate meeting, even though a majority or all may concur, and even though their consent be expressed in a writing signed by them, are not the action of the corporation, and are void,⁴⁷ although there is some authority tending to the contrary.⁴⁸ For instance, un-

4 Blackf. (Ind.) 267, 29 Am. Dec. 372.

⁴¹ *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060; *Breathitt Coal, Iron & Lumber Co. v. Gregory*, 25 Ky. L. Rep. 1507, 78 S. W. 148.

⁴² See next chapter.

⁴³ See chapter on Actions by and against Corporations, *infra*.

⁴⁴ *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. 828.

⁴⁵ See § 22.

⁴⁶ See §§ 42-48.

⁴⁷ See § 1630, *supra*.

A majority of the stockholders cannot transfer real estate. *Canadian Country Club v. Johnson*, — Tex. Civ. App. —, 176 S. W. 835.

⁴⁸ See *Jordan v. Collins*, 107 Ala. 572, 18 So. 137, where directors owned all the stock and agreed among themselves to authorize the president to

less otherwise provided by statute, it has been held that even all the stockholders of a corporation, whether one or more, cannot convey or mortgage corporate property by all signing or consenting to the mortgage or conveyance, without formal action at a meeting held for that purpose,⁴⁹ although under some circumstances it has been held that the instrument may be given effect in equity.⁵⁰ A fortiori, stockholders who own all the stock cannot make a contract, upon selling their stock, which will bind the corporation.⁵¹ But it is held that persons about to become directors and who are the sole stockholders may bind a corporation by a contract, the benefits of which the corporation receives.⁵² So it has been held that if one owns all the stock of the corporation, and the board of directors is composed of persons who evidently have been selected because they will acquiesce in his complete and exclusive control, he may make any contract the cor-

sell the corporate assets; *Lemars Shoe Co. v. Lemars Shoe Mfg. Co.*, 89 Ill. App. 245, where directors and stockholders identical; *M. Groh's Sons v. Groh*, 80 N. Y. App. Div. 85, 80 N. Y. Supp. 438.

A chattel mortgage executed by the president and secretary of a corporation, with the consent of all the stockholders, is valid. *Kalamazoo Spring & Axle Co. v. Winans, Pratt & Co.*, 106 Mich. 193, 64 N. W. 23.

In Texas it is held that the stockholders, at least by unanimous consent, may do a valid corporate act without the formality of a resolution or other action of the directors, where there are no creditors. *Aransas Pass Harbor Co. v. Manning*, 94 Tex. 558, 63 S. W. 627, where deed of corporate real estate executed by president was held valid, there being no creditors and all of the directors and stockholders consenting thereto, notwithstanding there was no action by the directors or stockholders as a board.

⁴⁹ *United States. De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, 175 U. S. 40, 53, 44 L. Ed. 65; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473.

Illinois. Sellers v. Greer, 172 Ill.

549, 40 L. R. A. 589, 50 N. E. 246, rev'g 64 Ill. App. 505.

Michigan. Rough v. Breitung, 117 Mich. 48, 75 N. W. 147.

Minnesota. Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261.

Ohio. Bundy v. Ophir Iron Co., 38 Ohio St. 300.

Tennessee. Parker v. Bethel Hotel Co., 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209.

Vermont. Wheelock v. Moulton, 15 Vt. 519.

See also § 22.

In Maryland, however, "where one person is the owner of all the capital stock of a corporation, it has been held bound by his acts in reference to its property." *Cotten v. Tyson*, 121 Md. 597, 604, 89 Atl. 113, citing only Maryland cases.

⁵⁰ *First Nat. Bank of Gadsden v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 So. 351; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; *Bundy v. Ophir Iron Co.*, 38 Ohio St. 300.

⁵¹ *Puritan Coal Min. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, 440, Ann. Cas. 1914 B 37, 85 Atl. 426.

⁵² *Beltz v. Garrison*, 254 Pa. 145, 98 Atl. 956.

poration could make, since in such case "the corporate entity, as distinguished from him in his capacity of agent, is to be ignored."⁵³

However, it is necessary to distinguish between decisions denying the authority of all the stockholders, where not assembled at a meeting, to bind the company by their joint act, and decisions holding that where all the stockholders act together but as individuals and not in the name of the corporation, the latter is not bound.⁵⁴ Thus, it might well be held that a deed of corporate property executed by all the stockholders, in their own name or in the name of the person owning all of the stock, was not binding on the company because not purporting to have been executed by it,⁵⁵ and yet be held that such a deed executed in the name of the corporation, although not authorized at a corporate or directors' meeting, was valid.

If one person owns a majority of the stock of the corporation he cannot, merely because thereof, make a contract binding the corporation.⁵⁶ To illustrate: A corporation had only three stockholders, one of them being a mere nominal stockholder. The managing stockholder had embezzled corporate funds. It was held that the other stockholder who held most of the stock could not settle with the manager for the embezzlement although the corporation was solvent and creditors would not be injuriously affected by the settlement.⁵⁷ Furthermore, it has been held that one holding a majority of the stock in a corporation and who managed the strictly financial matters of the corporation has no power to agree to a cancellation of a policy of fire insurance on its property.⁵⁸

§ 1729. Powers of directors—In general. The question as to the powers of directors is the subject of a subsequent chapter of this work.⁵⁹ Suffice it to state in this connection that in this country they are the real governing power of a corporation. They manage

⁵³ *Edwards v. Plains Light & Water Co.*, 49 Mont. 535, 143 Pac. 962.

⁵⁴ The contract of a stockholder, "made in his own name," is not binding upon a corporation, the stock of which he owns and controls. *Reed v. Inhabitants of City of Trenton*, 80 N. J. Eq. 503, 85 Atl. 270.

⁵⁵ *Baldwin v. Canfield*, 26 Minn. 43, 59, 1 N. W. 261.

⁵⁶ *National Hollow Brake Beam Co. v. Chicago Ry. Equipment Co.*, 226 Ill. 28, 35, 80 N. E. 556, rev'g 123

Ill. App. 533; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373; *Donoghue v. Indiana & L. M. Ry. Co.*, 87 Mich. 13, 49 N. W. 512; *Collins v. Leary* (N. J. Ch.), 74 Atl. 42. See also *Liebhardt v. Wilson*, 38 Colo. 1, 120 Am. St. Rep. 97, 88 Pac. 173.

⁵⁷ *Reinecke v. Bailey*, 33 Ky. L. Rep. 977, 112 S. W. 569.

⁵⁸ *C. C. Hendee Co. v. Insurance Co. of Pennsylvania*, 158 Wis. 521, 149 N. W. 147.

⁵⁹ See §§ 1961-2005, *infra*.

the corporation, and ordinarily the stockholders cannot interfere unless they act fraudulently or beyond the powers of the corporation itself. To be sure, at least in case of large corporations, much of their authority is expressly or impliedly delegated by them such as to an executive committee of the board, to a general manager, to the president, or to the vice president, secretary or treasurer. At the same time, if power is not expressly or impliedly delegated by them, or power is not conferred on other officers by a statute, by the charter, or by valid by-laws enacted by the stockholders, the board of directors is the supreme and only body authorized to represent the corporation in its dealing with third persons. However, the board of directors, unless expressly authorized, has no authority as to changes in the character or organization of the corporation, such as the making, altering or repealing by-laws;⁶⁰ amendments or alterations of the charter;⁶¹ increase or reduction of capital stock;⁶² reorganization, reincorporation or consolidation;⁶³ dissolution of the corporation,⁶⁴ etc. Such acts are organic and must be authorized by the stockholders as a body. Furthermore, as to some acts, outside the regular business of the corporation, the directors cannot act, either by the common law or by statute, without the consent of all or of a majority or of a certain per cent. of the stock,⁶⁵ as for instance, it is generally held in case of the sale of all the property of a corporation not in a failing condition.⁶⁶

Of course any powers specially conferred by statute upon the stockholders cannot be exercised by the directors,⁶⁷ at least unless the stockholders delegate such powers to the directors.⁶⁸

§ 1730. — Powers as individuals. The directors or trustees of a corporation are vested with its management, not as individuals, but as a board, and, as a general rule, they can act so as to bind the corporation only when they act as a board and at a legal meeting; and acts of a majority of the board other than at a meeting are ordinarily illegal.⁶⁹ It follows that the director or trustee of a corporation is not individually the agent of the corporation and has no power individually to bind it by any contract or to act for the corporation,⁷⁰

⁶⁰ See § 1994, *infra*.

⁶¹ See § 1995, *infra*.

⁶² See § 1996, *infra*.

⁶³ See § 1997, *infra*.

⁶⁴ See § 1999, *infra*.

⁶⁵ See § 1961, *infra*.

⁶⁶ See § 1998, *infra*.

⁶⁷ *Ex parte Winsor*, 3 Story 411.

⁶⁸ See *Ex parte Winsor*, 3 Story 411, holding power nondelegable.

⁶⁹ See §§ 1854-1860, *infra*.

⁷⁰ *Georgia. Monroe Mercantile Co.*

even though he owns a large majority of the corporate stock,⁷¹ unless he is expressly authorized to act for the corporation as its agent in a particular matter, or he is intrusted with the general management of the corporation, or clothed with apparent authority by being permitted to act,⁷² or unless his acts or declarations have been ratified by

v. Arnold, 108 Ga. 449, 34 S. E. 176;
Spinks v. Athens Sav. Bank, 108 Ga. 376, 33 S. E. 1003.

Indiana. **Allemong v. Simmons**, 124 Ind. 199, 23 N. E. 768.

Iowa. **Dockstader v. Young Men's Christian Ass'n**, 109 N. W. 906.

Kentucky. **Israel v. Louisville Jockey Club & Driving Park Ass'n**, 5 Ky. L. Rep. 853.

Maine. **Peirce v. Morse-Oliver Bldg. Co.**, 94 Me. 406, 47 Atl. 914; **Morrison v. Wilder Gas Co.**, 91 Me. 492, 64 Am. St. Rep. 257, 40 Atl. 542; **Trott v. Warren**, 11 Me. 227.

Massachusetts. **Henry Wood's Sons Co. v. Schaefer**, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881.

Missouri. **Calumet Paper Co. v. Haskell Show Printing Co.**, 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115; **Danglade & Robinson Min. Co. v. Mexico-Joplin Land Co.**, — Mo. App. —, 190 S. W. 35.

Montana. **Farrell v. Gold Flint Min. Co.**, 32 Mont. 416, 423, 80 Pac. 1027; **Wagner v. St. Peter's Hospital**, 32 Mont. 206, 216, 79 Pac. 1054.

Nevada. **Edwards v. Carson Water Co.**, 21 Nev. 469, 34 Pac. 381.

New Hampshire. **New Boston Fire Ins. Co. v. Upton**, 67 N. H. 469, 36 Atl. 366; **Buttrick v. Nashua & L. R. Co.**, 62 N. H. 413, 13 Am. St. Rep. 578.

Texas. **Southern Kansas Ry. Co. of Texas v. Logue**, — Tex. Civ. App. —, 139 S. W. 11.

Vermont. **Sias v. Consolidated Lighting Co.**, 73 Vt. 35, 50 Atl. 554; **Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.**, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

Wisconsin. **Milwaukee Brick & Cement Co. v. Schoknecht**, 108 Wis. 457, 84 N. W. 838.

"It is fundamental that a director cannot speak for his board without express authority." **Dockstader v. Young Men's Christian Ass'n (Iowa)**, 109 N. W. 906.

One director cannot give validity to the false claim of another director in such manner as to estop the corporation from objecting thereto. **Kroegher v. Calivada Colonization Co.**, 119 Fed. 641.

⁷¹ **Clement v. Young-McShea Amusement Co.**, 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82, rev'g on other grounds 69 N. J. Eq. 347, 60 Atl. 419.

See, generally, on this question, § 1732, *supra*.

⁷² **Robinson Reduction Co. v. Johnson**, 10 Colo. App. 135, 50 Pac. 215.

The directors, duly assembled, may constitute one of their number an agent to perform a particular act or represent the corporation in a greater or less degree. **Guillaume v. K. S. D. Land Co.**, 48 Ore. 400, 88 Pac. 586, 86 Pac. 883.

By holding a director out as its agent, or by ratification or acquiescence, the corporation may of course become bound by his act. **Dockstader v. Young Men's Christian Ass'n (Iowa)**, 109 N. W. 906; **Wagner v. St. Peter's Hospital**, 32 Mont. 206, 79 Pac. 1054.

A single director may acquire the power to bind the corporation by the habit of acting for it with the assent and acquiescence of the board. **York v. Mathis**, 103 Me. 67, 68 Atl. 746.

Where there are practically only

the board, the rule being that the directors may ratify any act of one of their number that they could have authorized in the first instance.⁷³ In such a case, however, his power to bind the corporation does not depend upon the mere fact that he is a director, but upon the fact of his being expressly or impliedly clothed with authority.

§ 1731. Powers of officers or agents other than directors—In general. Sometimes the board of directors expressly or impliedly delegate most or all their powers to some officer or officers or agent. If that is done, then the extent of the powers of the managing officer or agent depends upon the power expressly delegated to him, plus the power conferred upon him by the statute, charter or by-laws, and also the apparent authority conferred upon him by permitting him to act as the general representative of the corporation in his dealings with third persons. All these questions of power are considered in detail in the following chapter.

A court should not, in an action to compel a corporate officer to return capital stock alleged to have been issued without any consideration, grant a temporary injunction against all the corporate officers restraining them from exercising any corporate management during the action.⁷⁴

§ 1732. — Powers as affected by ownership of large part or all of stock. Although it has been held that the fact that the particular officer of a corporation making a contract on its behalf owns nearly all its shares of stock is important in determining his implied powers,⁷⁵

three stockholders of a corporation and the directors never had a regular meeting, one of the directors who is also general manager may sell the property of the corporation, where the other two consent thereto. *Magowan v. Groneweg*, 16 S. D. 29, 91 N. W. 335, aff'g on rehearing 14 S. D. 543, 86 N. W. 626. "Where, without the slightest infringement of a public right, a sale of this kind is made to an innocent purchaser by all the directors and officers of the corporation, and acquiesced in by all the stockholders, the mere failure to call a formal meeting to determine the advisability of making such sale is not, alone, sufficient to justify inter-

ference on the part of creditors." *Magowan v. Groneweg*, 14 S. D. 543, 86 N. W. 626, aff'd on rehearing 16 S. D. 29, 91 N. W. 335.

⁷³ *Guillaume v. K. S. D. Land Co.*, 48 Ore. 400, 88 Pac. 586, 86 Pac. 883, and see generally § 2177 et seq., *infra*.

The unauthorized acts of a director may be confirmed by the acts or acquiescence of the board. *York v. Mathis*, 103 Me. 67, 68 Atl. 746.

⁷⁴ *Moore v. Moore Mica Paint Co.*, 150 N. Y. App. Div. 792, 135 N. Y. Supp. 210.

⁷⁵ *Levy v. West Side Const. Co.*, — N. Y. Misc. —, 162 N. Y. Supp. 661. See also *Deming v. Maas*, 18 Cal. App. 330, 123 Pac. 204; *Roberts v.*

the general rule is that the fact that an officer owns a majority or nearly all the stock of the company does not vest him with any additional power.⁷⁶ A fortiori, the fact that an officer owns nearly all the stock of a corporation gives him no power to sell corporate bonds for his individual benefit, where he holds them to raise money for corporate purposes.⁷⁷ Moreover, it is held that evidence as to the number of shares of stock in the company held by an officer who made the contract sued on is not, standing by itself, admissible on an issue as to his authority to make the contract.⁷⁸ It has been held that the fact that the president of the corporation owned the entire capital stock of the corporation does not authorize him to execute a corporate mortgage without the action of the directors.⁷⁹ On the other hand, it is held that where two officers of a corporation own all its stock, they may make any contract, since the directors must necessarily be dummies.⁸⁰

§ 1733. Control of directors by stockholders—General rules. As already noted,⁸¹ stockholders have very little to do with the management of the corporation, and they cannot ordinarily, even at a meeting, enter into a contract binding on the company. It would seem to naturally follow that if they have practically no original authority, they cannot control or interfere with the directors, at least so long as

Hilton Land Co., 45 Wash. 464, 88 Pac. 946.

⁷⁶ Woodruff v. Shimer, 174 Fed. 584; In re Roanoke Furnace Co., 166 Fed. 944; Demarest v. Spiral Riveted Tube Co., 71 N. J. L. 14, 58 Atl. 161. See also § 1728, supra.

The fact that an officer of a corporation owns a large part, a majority, or nearly all, of the stock of the corporation, does not authorize him to contract for the corporation outside of the course of its ordinary business. Demarest v. Spiral Riveted Tube Co., 71 N. J. L. 14, 58 Atl. 161.

"It is true, the vice-president owned a large majority of the shares of stock; but that fact could not vest her with any additional power." Friedman v. Leshner, 198 Ill. 21, 27, 92 Am. St. Rep. 255, 64 N. E. 736, aff'g 99 Ill. App. 42.

It has been held, however, that

there is no sound reason why a general manager owning practically all the stock should not be permitted to execute a promissory note in the corporate name and behalf. Baines v. Coos Bay Nav. Co., 45 Ore. 307, 313, 77 Pac. 400.

⁷⁷ Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Electric Light Co., 162 N. Y. 67, 56 N. E. 505, aff'g 12 N. Y. App. Div. 199, 42 N. Y. Supp. 781.

⁷⁸ Traitel Marble Co. v. Brown Bros., 159 N. Y. App. Div. 485, 144 N. Y. Supp. 562.

⁷⁹ Union Nat. Bank v. State Nat. Bank, 155 Mo. 95, 78 Am. St. Rep. 560, 55 S. W. 989.

⁸⁰ Carney v. Penn Realty Co., 174 N. Y. App. Div. 86, 159 N. Y. Supp. 273.

⁸¹ See § 1726, supra.

the latter are not acting in bad faith or beyond the powers of the corporation. The following rules govern this question:

1. Stockholders may interfere with acts of officers which are not only beyond the powers of the officers as such but also beyond the powers of the corporation itself, i. e., where the act is *ultra vires*, provided the contract has not been executed and there is no laches or elements of estoppel.⁸²

2. Stockholders may, in a proper case, restrain or recover damages for acts of officers which are fraudulent,⁸³ as where they exercise the corporate powers for their private or personal advantage or gain.⁸⁴ This matter is treated of hereafter in the next chapter.

3. But the rule is too well settled to admit of argument that individual stockholders cannot question corporate acts of directors, within their discretion, where not *ultra vires*, not forbidden by statute or good morals or not fraudulent, but done in good faith and in the exercise of an honest judgment.⁸⁵

Where, as is customary, the management and control of the corporation is vested by a statute or the charter, not in the stockholders or members, but in a board of directors and trustees, their action in regard to the affairs of the corporation is controlling and exclusive, and the stockholders or members cannot control the directors or trustees in the exercise of the judgment vested in them by the charter.⁸⁶ So the stockholders have no power to appoint an agent to act with the

⁸² See § 1526, *supra*, and also chapter on Stock and Stockholders, *infra*.

⁸³ However, election of appraisal of one's stock where he dissents to a sale of all the corporate assets, such appraisal being provided for by statute, precludes the right to avoid the sale for fraud. *Wall v. Anaconda Copper Min. Co.*, 216 Fed. 242.

⁸⁴ *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721.

⁸⁵ *Wilson v. American Ice Co.*, 206 Fed. 736; *McMullen v. Ritchie*, 64 Fed. 253; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68; *Skeen v. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162; *Theis v. Spokane Falls Gas Light Co.*, 49 Wash. 477, 95 Pac. 1074.

"To hold otherwise would be to substitute the judgment and discre-

tion of others in the place of those determined on by the scheme of incorporation." *Ellerman v. Chicago Junct. Railways & Union Stockyards Co.*, 49 N. J. Eq. 217, 232, 23 Atl. 287.

⁸⁶ *Hunt v. American Grocery Co.*, 80 Fed. 70; *Oregonian Ry. Co. v. Oregon Railway & Navigation Co.*, 23 Fed. 232; *Wallamet Falls Canal & Lock Co. v. Kittridge*, 5 Sawy. (U. S.) 44, Fed. Cas. No. 17,105; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27; *McCullough v. Moss*, 5 Den. (N. Y.) 567; *Com. v. Trustees of Roman Catholic Society*, 6 Serg. & R. (Pa.) 508.

This is also the rule in British Columbia. *Dunsmuir v. Colonist Prtg. & Pub. Co.*, 9 Brit. Col. 290.

directors, where a statute provides that the business of the corporation shall be managed by the directors thereof.⁸⁷ The directors, however, cannot repudiate any act done by authority of the stockholders, if it is an act which it is within the power of the stockholders to authorize.⁸⁸

The corporate acts of directors, said Justice Collin in a decision of the New York Court of Appeals, "within the powers of the corporation, in the lawful and legitimate furtherance of its purposes, in good faith and the exercise of an honest judgment, are valid, and conclude the corporation and the stockholders. Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient."⁸⁹ To the extent that the corporate articles place the management and control of a corporation in the hands of the directors, they are authorized to use their judgment and discretion in regard thereto. An action taken by them pursuant thereto will not be reversed by the court at the instance of the stockholders. Thus, it has been said that "in exercising the delegated power of managing its concerns for the common benefit of all the members of the corporation, the trustees were subject to the control of the membership, through its power to supersede them at recurring elections; and if the trustees improvidently managed its affairs by incurring debts or otherwise, the remedy of the members was thus to supersede them. As to all matters of management and control within the scope of their powers, the affairs of the corporation were committed to their judgment and discretion, and the courts cannot sit in review of their errors."⁹⁰ As said in a federal decision, "corpora-

⁸⁷ *Charlestown Boot & Shoe Co. v. Dunsmore*, 60 N. H. 85.

⁸⁸ *Smith v. Wells Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000.

⁸⁹ *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 124, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

⁹⁰ *McKee v. Chautauqua Assembly*, 130 Fed. 536.

When a party becomes a member of a corporation he does so subject to

any reservation which may have been made by the legislature of the right to alter, amend or repeal the corporate charter, and with the understanding that such power may be exercised, and the possibility of its exercise must be read into the contract to which the subscriber becomes a party. Where, therefore, under such reserved power, the legislature makes a change in the organic law of the corporation, it is not material that the directors

tions, like individuals, often have enforceable rights against others which it is deemed best not to press to suit. The purely discretionary powers of a board of directors concerning the internal affairs of their corporation, fairly and honestly exercised, are not reviewable or controllable by the courts of law or equity. A board of directors is elected by the stockholders of a corporation for the very purpose of managing its affairs, and in so doing, so long as they act in good faith and strictly *intra vires*, it is their judgment, and not that of its stockholders outside of the board of directors, or of any court, that is to shape its policies or decide upon its corporate acts.”⁹¹ “Those who embark in a corporate enterprise as stockholders” said the court in a Kentucky case, “impliedly agree that its affairs shall, so far as they are confined to the scope of the business set out in the articles of incorporation, be controlled by a governing board, selected in the manner provided in the articles, and in accordance with the law; and that the corporation shall endure for the purpose for which it was organized, for the entire period fixed by the articles, unless sooner dissolved by operation of law. The judgment or discretion of the governing body, usually a board of directors, as to matters *intra vires*, is entirely beyond the control of the stockholders through the intervention of the courts, except for frauds committed or threatened against the corporation or the minority stockholders.”⁹² In conducting the affairs of the corporation, the directors have discretionary power;⁹³ and, as

have not obtained the consent of the stockholders to the changes so made. *McKee v. Chautauqua Assembly*, 130 Fed. 536.

The stockholders passed a resolution providing that “no further assessment” should be levied except as they directed. Thereafter the directors borrowed money and expended it in the enterprise of the company, which was in a failing condition. The court held that the action of the directors created a debt binding on the corporation. *Shickel v. Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

Under a statute providing for the incorporation of a church by the signing and recording of a certificate, the signers to be the church trustees and that the church as incorporated might receive and convey

property, the trustees only were deemed to have control over the actions of the corporation. *Enos v. Church of St. John the Baptist*, 187 Mass. 40, 72 N. E. 253.

⁹¹ *Siegman v. Electric Vehicle Co.*, 140 Fed. 117, 118.

⁹² *Manufacturers' Land & Improvement Co. v. Cleary*, 28 Ky. L. Rep. 359, 89 S. W. 248.

⁹³ *Thayer v. Kinder*, 45 Ind. App. 111, 90 N. E. 323, 89 N. E. 408.

Acts of directors are binding on the corporation however fraudulent the contract may be in its operation. *Ross v. Saylor*, 104 Ill. App. 19.

“The manner in which a duly authorized plan is to be carried through is part of the business of the corporation, and, in the absence of fraud or bad faith, is not the subject of judicial control to any greater ex-

a general rule, stockholders cannot act in relation to the ordinary business of a corporation nor control the board of directors.⁹⁴ Directors are "trustees clothed with the power of controlling the property and managing the affairs of a corporation without let or hindrance."⁹⁵ They are not ordinary agents in the immediate control of the stockholders, but they hold their office "charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty."⁹⁶ Moreover, stockholders cannot, by subsequent action, invalidate a contract made by the board of directors, where such contract is not *ultra vires*;⁹⁷ and contracts made by the directors cannot be set aside by stockholders merely on the ground that they do not promote the best interests of the corporation.⁹⁸ In England, it has been held that where the management of the business and the control of the company is vested in the directors by the articles of incorporation, the stockholders cannot, by a resolution passed by a mere majority, order the directors to seal an agreement for the sale of all the assets of the company where they dissent on the ground that the sale is improvident and the terms are not sufficiently favorable.⁹⁹

In other words, the courts will not ordinarily interfere, at the instance of stockholders, where the acts of the board of directors or trustee are *intra vires*, unless there is a statute, charter provision or by-law limiting the powers of the directors or trustees. Thus, where the question between a stockholder and the board of directors is simply as to the wisdom of an act on the part of the directors within the scope of their legitimate authority, the courts will not interfere.¹

tent than other business of the corporation. The court cannot substitute its judgment for that of the directors and majority stockholders, and say that a less expensive plan could be successfully adopted." *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807, 60 L. R. A. 742, 54 Atl. 1.

⁹⁴ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 16, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁹⁵ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 16, 51 L. R. A. (N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁹⁶ *Continental Securities Co. v. Belmont*, 206 N. Y. 7, 16, 51 L. R. A.

(N. S.) 112, Ann. Cas. 1914 A 777, 99 N. E. 138.

⁹⁷ *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127.

A contract made by the directors, where pertaining to the ordinary business relations of the company, cannot be revoked by the stockholders. *Genessee Valley & W. Ry. Co. v. Retsof Min. Co.*, 15 N. Y. Misc. 187, 36 N. Y. Supp. 896.

⁹⁸ *Trendley v. Illinois Traction Co.*, 241 Mo. 73, 145 S. W. 1.

⁹⁹ *Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham*, [1906] 2 Ch. 34.

¹ *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147.

For instance, where no fraud is shown, the court will not order a reduction of the stock of merchandise carried by the corporation, at the request of a minority stockholder.²

The action of the stockholders at a meeting in voting down a motion to reimburse to a certain amount certain shareholders who financed an investigation does not preclude the directors from thereafter paying legitimate items of expense going to make up the amount claimed.³

These questions ordinarily arise in stockholders' actions against officers which are fully treated of in a subsequent chapter,⁴ and which will not be further considered herein. So the power of a stockholder to sue in equity to redress injuries to the corporation, including the power thereby to control the illegal or fraudulent acts of the directors, is stated in a subsequent volume of this work.⁵

§ 1734. — Effect of statutes or charter provisions. If a statute authorizes the stockholders to insert in the charter any provision defining the powers of its stockholders and directors, it has been held that it was proper to provide therein that until a certain day more than five years afterwards the stockholders should not be permitted to cast any vote nor participate in any way in the control and management of the corporation, the sole control being vested in the directors.⁶

§ 1735. Requirement of consent of stockholders—General rule. Where a corporation does an act in the ordinary course of its business, through its board of directors or other officers, the consent of all or a part of the stockholders is not necessary unless required by statute or charter.⁷ Justice Gray said, in a decision of the New York Court of Appeals, that "it is difficult to find a solid foundation for the argument which denies to the directors the power of making a contract which the law expressly permits the corporation to make without the authorization of the stockholders. If it is deemed to be too extensive a power to be vested in the directors, and dangerous to the rights of stockholders in the possibilities of fraud, it is for the legis-

² *Figge v. Bergenthal*, 130 Wis. 594, 110 N. W. 798, 109 N. W. 581.

³ *Rio Grande Fire Ins. Co. v. Herder*, — Tex. Civ. App. —, 180 S. W. 1150.

⁴ See chapter on Stock and Stockholders, *infra*.

⁵ See chapter on Stock and Stockholders, *infra*.

⁶ *Union Trust Co. of Maryland v.*

Carter, 139 Fed. 717, construing Virginia statute.

⁷ Purchases of real estate as dependent on consent of stockholders, see § 1106.

Mortgages as dependent on consent of stockholders, see § 1301.

Bonds as dependent on consent of stockholders, see § 976.

lature to interfere and prescribe regulations for its exercise.”⁸ However, as already stated, it is generally held that the transfer or lease of all the property of a corporation is not an act in the ordinary course of business, but that consent of all or a majority of the stockholders is necessary.⁹

§ 1736. — Necessity created by statute or charter. Sometimes, for the better protection of the stockholders, their assent, or the assent of a certain proportion of them, is expressly required by the charter or a general law to validate acts by the directors or trustees, which, except for such requirement, would fall properly within their powers.¹⁰

⁸ *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 23, 2 L. R. A. 648, 19 N. E. 489.

⁹ See §§ 1206-1209, 1242.

¹⁰ *United States. The Allianca*, 73 Fed. 452 (under the New York statute).

Alabama. *Southern Building & Loan Ass'n v. Casa Grande Stable Co.*, 128 Ala. 624, 29 So. 654.

California. *Forbes v. San Rafael Turnpike Co.*, 50 Cal. 340.

Illinois. *Thomas v. Citizens' Horse-Railway Co.*, 104 Ill. 462.

New York. *Welch v. Importers' & Traders' Nat. Bank*, 122 N. Y. 177, 25 N. E. 269; *Davidson v. Westchester Gaslight Co.*, 99 N. Y. 558, 2 N. E. 892; *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547, 2 N. E. 909; *Rochester Sav. Bank v. Averell*, 96 N. Y. 467; *Vail v. Hamilton*, 85 N. Y. 453; *Greenpoint Sugar Co. v. Whittin*, 69 N. Y. 328; *Everson v. Eddy*, 59 Hun 620, 12 N. Y. Supp. 872; *McComb v. Barcelona Apartment Ass'n*, 56 Hun 644, 10 N. Y. Supp. 546, aff'd 134 N. Y. 598, 31 N. E. 613; *Beebe v. Richmond Light, Heat & Power Co.*, 13 Misc. 737, 35 N. Y. Supp. 1; *The Lyceum v. Ellis*, 25 Jones & S. 532.

South Carolina. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

In some states, statutes provide that directors of a manufacturing cor-

poration shall have no power to incumber the plant or machinery until authorized by a majority of the stockholders. *Carlsbad Water Co. v. New*, 33 Colo. 389, 81 Pac. 34, holding a mineral water company a “manufacturing” company.

The New York statute requiring the written assent of the holders of two-thirds of the stock to a mortgage, repealing a former statute which impliedly authorized a corporation to mortgage its property, but declaring that the repeal shall not affect nor impair any right acquired under any statute repealed, does not require assent of stockholders to a mortgage executed in pursuance of a valid contract therefor made before enactment of the statute. *The Allianca*, 73 Fed. 452, 68 Fed. 781.

Under a statute authorizing corporations to mortgage their property where stockholders owning at least two-thirds of the stock give their written assent, a mortgage is not invalid because there are only two stockholders, if they assent. *Welch v. Importers' & Traders' Nat. Bank*, 122 N. Y. 177, 25 N. E. 269.

Where it was part of the arrangement under which land was conveyed to a corporation that it should give two mortgages to secure future advances for improvements thereon, and the deed and mortgages were executed

Thus, the statutes sometimes require that mortgages by a corporation must receive the assent, or the written assent, of the holders of a majority of the stock, or of two-thirds of the stock, and in such a case, as against stockholders who may object, the directors or trustees cannot mortgage the property of the corporation without such assent of the stockholders, in substantial compliance with the provisions of the statute.¹¹ So, in some states, the statutes provide that the stock and bonded indebtedness of corporations shall not be increased except in pursuance of general laws, nor without the consent of the holders of a certain proportion of the stock.¹² And sometimes, by express statutory provision, the alienation or sale of lands of corporations, or of a particular class of corporations, must be assented to by the stockholders, or a certain proportion of them.¹³ It has been held that requiring the consent of stockholders to a mortgage does not include the necessity for consent to an assignment for the benefit of creditors,¹⁴ but that a statute requiring consent in case a corporation shall mortgage its property "or give any lien thereon" includes an assignment for the benefit of creditors.¹⁵

A statute requiring the written assent of the stockholders owning at least two-thirds of the capital stock means two-thirds of the stock which has been actually issued.¹⁶ If the unanimous vote of the stockholders is required, the unanimous consent of the stockholders in a company holding stock in another company is not necessary to validate an act of the latter company.¹⁷ Persons who have made no payment on their subscriptions, but who are officers, and persons who have

and delivered at the same time, it was held that the mortgages were not within a statute requiring the written assent of stockholders before execution of a mortgage by corporation. *McComb v. Barcelona Apartment Ass'n*, 56 Hun (N. Y.) 644, 10 N. Y. Supp. 546, aff'd 134 N. Y. 598, 31 N. E. 613.

¹¹ See § 1361, *supra*.

¹² See § 976, and also *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Smith v. Ferries & Cliff House Ry. Co.* (Cal.), 51 Pac. 710.

¹³ See § 1197, and also *Marquette, H. & O. R. Co. v. Atkinson*, 44 Mich. 166.

Where the law requires that a specified portion of the stockholders shall

give their consent prior to sale or incumbrance of the corporate property, attempt by the trustees or other officers to sell or incumber the property without such consent is without force. *Southern Building & Loan Ass'n v. Casa Grande Stable Co.*, 128 Ala. 624, 29 So. 654; *Anaconda Copper Min. Co. v. Heinze*, 27 Mont. 161, 69 Pac. 909.

¹⁴ *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

¹⁵ *Meloy v. Central Nat. Bank*, 7 Mackey (18 D. C.) 69.

¹⁶ *The Lyceum v. Ellis*, 25 Jones & S. (N. Y.) 532.

¹⁷ *Sabre v. United Traction & Electric Co.*, 225 Fed. 601.

made substantial payments either in cash or property or work, are stockholders for the purpose of giving assent, although no certificates have been issued to them.¹⁸ Where the assent of the holder of certain stock is necessary, and the stock is registered on the books in the name of a pledgee, his assent is required.¹⁹ The assent of particular stockholders to a mortgage is not to be excluded from consideration because they are secured thereby, where the indebtedness of the corporation to them is valid and binding, and there is no bad faith.²⁰ When the assent of the holders of a certain proportion of the stock of a corporation is required for the validity of a contract, mortgage, or other corporate act, the assent of the corporation in behalf of shares owned by it, or of a person holding shares in trust for it, or its pledgee, cannot be considered.²¹

Although a statute requires the assent of two-thirds of the stockholders to be expressed at a stockholders' meeting, it is sufficient that the act is approved by all the directors at a directors' meeting, without any approval at a stockholders' meeting, where all the stock is owned by the directors.²²

Any instrument is sufficient to constitute the written assent of the holders of two-thirds of the stock, as required by statute, if it contains reasonable evidence of such assent, and identifies the transaction consented to, although the amount of the transaction may not be specified.²³ A resolution passed at a stockholders' meeting by a vote of stockholders owning two-thirds of the stock, entered on the minutes, and attested by the secretary, authorizing the execution of a mortgage, is a "written assent," within the meaning of the statute.²⁴

The assent of the stockholders must be as broad as the mortgage.²⁵

¹⁸ *McComb v. Barcelona Apartment Ass'n*, 56 Hun (N. Y.) 644, 10 N. Y. Supp. 546, aff'd 134 N. Y. 598, 31 N. E. 613. See also *Purdon v. Ontario Loan & Debenture Co.*, 22 Ont. (Can.) 597.

¹⁹ *Vail v. Hamilton*, 85 N. Y. 453.

²⁰ *Rittenhouse v. Winch*, 133 N. Y. 678, 31 N. E. 623, 57 Hun 587, 11 N. Y. Supp. 122; *Welch v. Importers' & Traders' Nat. Bank*, 122 N. Y. 177, 25 N. E. 269.

²¹ *Vail v. Hamilton*, 85 N. Y. 453.

²² *Thomas v. Citizens' Horse-Railway Co.*, 104 Ill. 462.

²³ *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328; *Greenpoint Sugar Co. v.*

Kings County Mfg. Co., 7 Hun (N. Y.) 44.

²⁴ *Beebe v. Richmond Light, Heat & Power Co.*, 13 N. Y. Misc. 737, 35 N. Y. Supp. 1, aff'd 3 N. Y. App. Div. 334, 38 N. Y. Supp. 395.

²⁵ Written assent of the stockholders that the real and personal property of the corporation "may be mortgaged" is broad enough to warrant cancellation of a mortgage on some of its chattels, and the substitution of another mortgage on other chattels. *Star Co. v. Andrews*, 26 Jones & S. (N. Y.) 188. See also § 1301, *supra*.

A vote of the stockholders authoriz-

Where a statute authorizes a corporation to mortgage its property, real and personal, and another authorizes it to mortgage its franchises, both statutes, however, requiring written assent of stockholders, a mortgage on the property and franchises is invalid as to the franchises where the assent of stockholders to the mortgage does not include the franchises.²⁶

When the statute requires written assent of the stockholders as a condition precedent to or "before" the execution of a mortgage on the property of the corporation, it is sufficient if the written assent be given and filed at the same time as the mortgage;²⁷ and even when the assent is not given until after the execution of the mortgage, the mortgage will be valid if there are no intervening rights, or as against purchasers with notice.²⁸

In most of the states in which the question has arisen, if not in all, statutes requiring the written assent of stockholders, or their assent at a general meeting, are construed as intended for their protection and benefit only, and it has been held that they only can attack the act for want of such assent; that, if they acquiesce, neither creditors of the corporation nor the corporation itself can complain.²⁹

ing the directors to mortgage "any or all of the rights, estate, property, and franchises" of the corporation gives power to mortgage land of which the corporation has purchased the fee since the vote, but in which they had a leasehold interest with an option to purchase the fee. *Evans v. Boston Heating Co.*, 157 Mass. 37, 31 N. E. 698.

²⁶ *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 547, 2 N. E. 909.

²⁷ *Welch v. Importers' & Traders' Nat. Bank*, 122 N. Y. 177, 25 N. E. 269; *Everson v. Eddy*, 59 Hun (N. Y.) 620, 12 N. Y. Supp. 872.

²⁸ *Rochester Sav. Bank v. Averell*, 96 N. Y. 467. See also § 1301, note 32, *supra*.

²⁹ *United States. Coe v. East & West Railroad Co. of Alabama*, 52 Fed. 531; *Hervey v. Illinois Midland Ry. Co.*, 28 Fed. 169

Alabama. *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 20 So. 84; *Barrett v. Pollak Co.*, 108 Ala. 390, 54 Am. St. Rep. 172, 18 So. 615.

New York. *Beebe v. Richmond Light, Heat & Power Co.*, 3 App. Div. 334, 38 N. Y. Supp. 395.

North Carolina. *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143, 20 S. E. 366.

West Virginia. *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 16 S. E. 501.

See also § 1302, notes 45-51, *supra*, and §§ 976, 1197, 1210.

The creditors of a corporation cannot attack the validity of a mortgage given by it to secure money borrowed, because notice to the stockholders of a meeting at which the holders of a majority of the stock consented to the mortgage was not given as required by statute. *Anderson v. Bullock County Bank*, 122 Ala. 275, 25 So. 523.

Where a statute provides that mining property owned by a corporation shall not be sold by the directors except upon ratification by two-thirds of the stockholders, a person not a stockholder will not be permitted to

Since such statutes are intended merely for the protection and benefit of stockholders, they may waive insufficiency of a notice of a meeting called to authorize the execution of a mortgage, or ratify the action of the directors taken without their consent;³⁰ and they may be estopped by acquiescence.³¹

If a corporation receives and retains the consideration for a mortgage, it and its stockholders may be estopped to set up want of consent of stockholders.³²

§ 1737. Rights of minority stockholders—In general. Where stockholders as a body have power to do certain acts, the question as to the extent of their powers as against one or more dissenting stockholders who constitute a minority is of great importance, and the law in connection therewith is fully stated in a subsequent volume.³³ Sometimes, by statute, stockholders who vote against a sale of all the property of the corporation are given the right to demand the value of their stock in the corporation.³⁴

§ 1738. — Where one corporation controls another corporation. If one corporation owns a majority of the stock of another corporation, then the other stockholders of the latter corporation occupy the position of minority stockholders, with the rights pertaining to minority stockholders.³⁵ It follows that the holding company cannot manage the other company for the sole benefit of the former.³⁶ This matter is fully treated hereafter.

impeach a deed of a mining corporation of mining property on the ground that it was executed without authority, since such provision is for the benefit of the stockholders only. *Galbraith v. Shasta Iron Co.*, 143 Cal. 94, 76 Pac. 901.

³⁰ *Campbell v. Argenta Gold & Silver Min. Co.*, 51 Fed. 1; *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Rochester Sav. Bank v. Averell*, 96 N. Y. 467; *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

³¹ *Benbow v. Cook*, 115 N. C. 324, 44 Am. St. Rep. 454, 20 S. E. 453.

³² *Hamilton Trust Co. v. Clemes*, 17 N. Y. App. Div. 152, 45 N. Y. Supp.

141; *Texas Western Ry. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98.

³³ See chapter on Stock and Stockholders, *infra*.

³⁴ *Wall v. Anaconda Copper Min. Co.*, 216 Fed. 242; *Cole v. Wells*, 224 Mass. 504, 113 N. E. 189; *Ennis v. Federal Brewing Co.*, 123 N. Y. App. Div. 691, 108 N. Y. Supp. 230.

³⁵ See chapter on Stock and Stockholders, *infra*.

³⁶ *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529; *Turner v. Calumet & H. Min. Co.*, 187 Mich. 238, 153 N. W. 718, where a holding company was enjoined from voting at stockholders' meetings for persons as directors who were also its own directors.

CHAPTER 42

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I. GENERAL CONSIDERATIONS

§ 1739. First officers and agents. When a corporation comes into being, it generally has no officers or agents except the board of directors usually required to be named in the articles of incorporation. On the organization of the corporation, the usual practice is for the directors, at their first meeting, to elect a president, secretary and treasurer, and sometimes a vice president and a general manager. Then the by-laws, usually adopted at the same time either by the stockholders or the directors, generally fix, at least roughly, the duties of the various officers. If the president is to be the actual officer in charge, it is advisable, to avoid disputes as to his powers, to state in the by-laws that he shall be the general manager of the corporation. In some states it is provided by statute that the directors may, if they

deem it proper, elect one person to discharge the duties of secretary and treasurer. The next step, under ordinary circumstances, is to employ the necessary help to conduct the business of the corporation which is usually done by the officer who happens to be really in charge of the company.

§ 1740. Distinction between "officers" and mere "agents"—In general. There is "a broad line of demarcation between the officers who manage the affairs of a corporation, and its mere agents."¹

It has been said that "one distinction between officers and agents of a corporation lies in the manner of their creation. An office is created by the charter of the corporation, and the officer is elected by the directors or the stockholders. An agency is usually created by the officers, or one or more of them, and the agent is appointed by the same authority. It is clear that the two terms officers and agents are by no means interchangeable. * * * The officers, as such, are the corporation. An agent is an employee."² Another distinction between an officer and an agent which has been suggested is that an officer of a corporation, if illegally excluded from his office, may by mandamus compel the corporation to reinstate him, while an agent may be dismissed without cause and his only remedy would be compensation in damages.³ Notwithstanding all this, corporate officers are often indiscriminately referred to as agents, and they in fact occupy the position of agents as far as third persons dealing with the corporation are concerned. In other words, corporate officers, at least those other than directors, are agents, but agents of the corporation are not necessarily officers of the corporation.

§ 1741.—Action by officers distinguished from action by mere agents. A corporation must act either per se, through its officers, or per alium, through its agents.⁴ Where a corporation does not go outside its corporate machinery and capacity in doing an act, it has been said that "it is a confusion of terms and of ideas to say that it is acting through an agent when the fact is that it is acting through an agency and in chief. This distinction is not merely verbal and

¹ Bullock Beresford Mfg. Co. v. Hedges, 76 Ohio St. 91, 94, 81 N. E. 171. See also Com. v. Christian, 9 Phila. (Pa.) 556.

² Vardeman v. Penn Mut. Life Ins. Co., 125 Ga. 117, 5 Ann. Cas. 221, 54 S. E. 66.

³ Com. v. Christian, 9 Phila. (Pa.) 556.

⁴ International Seal Co. v. Beyer, 33 App. Cas. (D. C.) 172, 174.

hence trivial, but, on the contrary, marks the wide difference that exists between acting for oneself by an inherent faculty and the employment of another person to act for one and in one's stead. In this, as in all cases, loose terminology implies and conduces to loose reasoning. The maxim '*qui facit per alium facit per se*' requires and should be applied only when the agent—the alius—is not the principal acting for himself."⁵ So it has been held in Canada that when a president takes a mortgage he does not act as an agent but "is exercising the corporate powers of the institution in the only way in which they can be exercised at all: he acts directly and in chief, and not by delegation. The metaphysical body never can in fact act; but as it does act in contemplation of law, its functions must be performed through the instrumentality of others; but such others are no more agents in the proper acceptation of the term, than the amanuensis who writes the name of another in his presence and at his request, or who takes hold of the hand and guides the movements of the marksman, is an agent."⁶ This is well illustrated in connection with statutes requiring affidavits to be made by one occupying a certain position or "his agent or attorney."⁷

§ 1742. — Acts through officers and agents as a delegation of power. Action by a corporation through its board of directors or other officers or agents in a matter in which it is authorized to act as agent or trustee does not involve a delegation of power so as to come within the principle, *delegatus non potest delegare*, for a corporation cannot act in any other way. This principle, therefore, does not prevent a corporation, when authority is conferred by its charter, from acting as attorney in fact of another in executing a conveyance or other acts, or from acting as trustee, executor, guardian, etc. "When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities is as one being, or artificial person, in the performance of its engagement, and involves no delegation of powers. So that, when a corporation is invested with

⁵ American Soda Fountain Co. v. Stolzenbach, 75 N. J. L. 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822, 68 Atl. 1078.

"In a theoretical sense, it is true, the executive officers are said to be agents of the corporation, but in reality they are the moving force itself of the corporation. In these

respects executive officers of a corporation differ materially from the agent of a natural person." Glucose Sugar Refining Co. v. St. Louis Syrup & Preserving Co., 135 Fed. 540.

⁶ Bank of Toronto v. McDougall, 15 U. C. C. P. 475, 482.

⁷ See § 1443, *supra*.

a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as such must be considered to be included in the artificial person as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained."⁸

The power of the directors of a corporation and other officers to delegate the power conferred upon them is considered hereafter.⁹

§ 1743. Who are officers—In general. It is sometimes important to determine whether a person representing a corporation is to be classed as an officer of the company or merely as an agent or employee, especially in construing statutes relating only to "officers" of corporations. Generally the officers of a corporation are enumerated in its charter or by-laws, and include a president, vice president, secretary, treasurer and sometimes others. The statutes in most of the states expressly provide for the election of a president, secretary and treasurer, and then provide that there shall be such other officers, agents and factors as the corporation shall authorize for that purpose.¹⁰

If the charter expressly enumerates who shall be officers of the company, a person whose position is not enumerated is not an officer as to members of the corporation, since the charter is conclusive upon them.¹¹

The distinction between corporate "officers" and mere agents has already been noted.¹² The term officer, it has been held, refers to a person in regular and continual service as distinguished from one en-

⁸ Killingsworth v. Portland Trust Co., 18 Ore. 351, 7 L. R. A. 638, 17 Am. St. Rep. 737, 23 Pac. 66.

⁹ See §§ 1951-1960, *infra*.

¹⁰ In New Jersey and some of the other states the provision is that the corporation shall have such other officers, agents and factors, who shall be chosen in such manner and hold their office for such terms as may be prescribed by the by-laws.

¹¹ Com. v. Christian, 9 Phila. (Pa.) 556, where the court also said: "But it is urged that a corporation may have officers not recognized by the charter and by-laws. It is possible this may be so as to matters arising between strangers and the corporation."

¹² See § 1740, *supra*.

gaged to render service in a particular transaction;¹³ but of course a person may be in regular and continual service and still be a mere employee or agent rather than an officer. It has been said that "a secretary is not necessarily an officer of a corporation";¹⁴ but the treasurer, at least where required to be chosen by the directors and to give bond, is an officer.¹⁵ Power of the board of directors of a bank to appoint and dismiss at pleasure "a president, vice president, cashier and other officers," does not, under the rule of ejusdem generis, include a "solicitor of business."¹⁶

§ 1744. — No officer without an office. A person employed by a corporation is not an officer, it seems, if there is no such office corresponding to his duties provided for either in the charter or by-laws of the company.¹⁷

§ 1745. — Directors as officers. In a broad sense, there is no doubt but that a director of a corporation is an officer thereof,¹⁸ and he is generally held to be embraced within the term "officers" as used in statutes.¹⁹ Thus, a director has been held an officer within a statute providing for verification of pleadings by a corporate officer.²⁰ But while a director is ordinarily considered an officer, he is not always such an officer as is contemplated by certain statutes or by-laws.²¹

¹³ Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 505, 34 L. Ed. 1023.

¹⁴ Karsch v. Pottier & Stymus Manufacturing & Improvement Co., 82 N. Y. App. Div. 230, 81 N. Y. Supp. 782.

¹⁵ Com. v. Tuckerman, 10 Gray (Mass.) 173, 187.

¹⁶ Case v. First Nat. Bank of Brooklyn, 59 N. Y. Misc. 269, 109 N. Y. Supp. 1119, explaining Harrington v. First Nat. Bank, 1 Thomps. & C. (N. Y.) 361.

¹⁷ "Martin was therefore not an officer of the corporation at all, but merely an employee, designated as 'cashier.'" Knoxvill Water Co. v. East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447.

¹⁸ In re Harper, 133 Fed. 970; Com. v. Wyman, 8 Mete. (Mass.) 247, 253, within statute as to embezzlement.

See also State v. Johnson, 115 Ind. 467, 17 N. E. 910.

¹⁹ United States v. Means, 42 Fed. 599, 603; In re Peninsula Cut Stone Co. (Del. Ch.), 82 Atl. 689; Torbett v. Eaton, 49 Hun (N. Y.) 209, 1 N. Y. Supp. 614, aff'd 113 N. Y. 623, 20 N. E. 876; Brand v. Godwin, 29 N. Y. St. Rep. 143, 8 N. Y. Supp. 339, aff'g 24 N. Y. St. Rep. 305, 3 N. Y. Supp. 807.

²⁰ The managing director of a foreign corporation is an officer who may verify pleadings. Best v. British & A. Mortg. Co., 131 N. C. 70, 42 S. E. 456.

²¹ Eastham v. York State Tel. Co., 86 N. Y. App. Div. 562, 83 N. Y. Supp. 1019.

²² See Bristol Bank & Trust Co. v. Jonesboro Banking Trust Co., 101 Tenn. 545, 553, 48 S. W. 228.

Statutes or by-laws sometimes distinguish between directors who are elected by the stockholders and officers of the corporation who are elected or appointed by the directors.²² Thus, a director is not an officer within a statute providing that the directors may remove any "officers" when the interests of the corporation shall require.²³ So directors have been held not officers within a provision that "salaries of officers and employees shall be determined by the board of directors."²⁴

§ 1746. — General manager or agent as officer. A "general manager" may or may not be an officer. The general manager may be an officer, such as the president, vice president, secretary or treasurer who has been permitted exclusively to manage and control its affairs;²⁵ or he may be merely one of the directors.²⁶ Or the office of "general manager" may be expressly provided for by a statute, the charter or a by-law. But a general agent or manager is not necessarily an officer,²⁷ and the general agent or managing agent within a state is not ordinarily an officer of a foreign corporation.²⁸

On the other hand, a general agent is sometimes considered to be an officer within a statute,²⁹ and the effect of a ruling in California is that verification of a pleading by the "manager" of a corporation is a verification by an "officer."³⁰ A "field manager" of an oil company, although specifically named by a by-law as one of the "executive officers" of the company, has been held in Oklahoma not an officer of the company but an employee.³¹

²² Creighton v. Campbell, 27 Colo. App. 120, 149 Pac. 448.

²³ Laughlin v. Geer, 121 Ill. App. 534, 537.

²⁴ Schoening v. Schwenk, 112 Iowa 733, 737, 84 N. W. 916.

²⁵ Cope v. C. B. Walton Co., 77 N. J. Eq. 512, 76 Atl. 1044.

²⁶ See York v. Mathis, 103 Me. 67, 68 Atl. 746.

²⁷ Vardeman v. Penn Mut. Life Ins. Co., 125 Ga. 117, 5 Ann. Cas. 221, 54 S. E. 66; Studebaker Bros. Co. of New York v. R. M. Rose Co., 65 N. Y. Misc. 322, 119 N. Y. Supp. 970; Thomas F. Meton & Sons v. Isham Wagon Co., 15 Civ. Proc. (N. Y.) 259, 4 N. Y. Supp. 215.

²⁸ Wheeler & Wilson Mfg. Co. v. Lawson, 57 Wis. 400, 15 N. W. 398.

²⁹ In re St. Lawrence & A. R. Co., 133 N. Y. 270, 278, 31 N. E. 218, under statute requiring verification of pleadings by an officer.

Within the meaning of the New York Code of Civil Procedure, the liquidating committee of a corporation possessing authority to take such procedure as may be necessary for liquidation purposes will be deemed corporate officers, as far as the right to verify pleadings is concerned. Willis v. James Rowland & Co., 117 N. Y. App. Div. 122, 102 N. Y. Supp. 386.

³⁰ Stockton Lumber Co v. Blodgett, 3 Cal. App. 94, 84 Pac. 441.

³¹ Badger Oil & Gas Co. v. Preston, — Okla. —, 152 Pac. 383.

In any event, a superintendent of one branch of the business, hired for one year, is not an officer.³² And, of course, a foreman acting under the directions of a superintendent is not an officer.³³

A field manager of a corporation is none the less an employee by reason of the fact that at the time he was president of the company. He may occupy a dual relation.³⁴

§ 1747. — College professors. Within the meaning of a statute exempting from taxation real estate belonging to literary institutions, occupied by them "or their officers," professors in a college have been held to be officers.³⁵ But a professor in a college was held not an officer of the corporation but a person in its employment, in so far as taxing his salary was concerned.³⁶

§ 1748. Necessity for directors and other officers. Of course a corporation can act only through agents.³⁷ And officers and agents are necessary to the management of its affairs.³⁸ But the franchise of a corporation is not taken away or surrendered, nor is the corporation dissolved by the mere failure to elect trustees,³⁹ nor by the resignation of all the officers.⁴⁰ The dissolution of a corporation is not affected by the failure to elect officers,⁴¹ but it "requires the judgment or decree of a competent court or an edict of the legislature or sovereign power to wholly terminate the legal existence of a corporation."⁴² "A board of directors is not essential to the existence of a corporation."⁴³ However, in the first instance, in order to have

³² *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385.

³³ *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435.

³⁴ *Badger Oil & Gas Co. v. Preston*, — Okla. —, 152 Pac. 383.

³⁵ *Williams College v. Assessors of Williamstown*, 167 Mass. 505, 46 N. E. 394.

³⁶ *Union County v. James*, 21 Pa. St. 525.

³⁷ *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 So. 737; *Long v. Powell*, 120 Ga. 621, 48 S. E. 185; *Southern Elec. Securities Co. v. State*, 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785; *American Soda Fountain Co. v. Stolzenbach*, 75

N. J. L. 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822, 68 Atl. 1078.

³⁸ *Muscatine Turn Verein v. Funck*, 18 Iowa 469.

³⁹ *Speer v. Colbert*, 200 U. S. 130, 144, 50 L. Ed. 403; *Com. v. Cullen*, 13 Pa. St. 133.

⁴⁰ *Muscatine Turn Verein v. Funck*, 18 Iowa 469.

⁴¹ *Boston Glass Manufactory v. Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; *Brock v. Poor*, 216 N. Y. 387, 401, 111 N. E. 229; *Tilley v. Coykendall*, 172 N. Y. 587, 591, 65 N. E. 574.

⁴² *Tilley v. Coykendall*, 172 N. Y. 587, 591, 65 N. E. 574.

⁴³ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763.

de jure corporate existence, at least for many purposes, the statutory or charter provisions relating to the election and qualification of directors must be strictly complied with,⁴⁴ although it would seem that a corporation may be a de facto one without the election of directors.⁴⁵

The fact that the officers of a corporation are in prison does not prevent a corporation acting for itself.⁴⁶

§ 1749. Number of directors. The number of the directors is generally fixed by statute or the charter, either expressly or by providing that there shall not be less nor more than certain numbers. So by-laws often fix the number of directors.⁴⁷ If the number of directors to be chosen is prescribed, the provision must be complied with;⁴⁸ but of course, if the charter provides that there shall not be less than a certain number nor more than a certain number of directors, it is not necessary to elect the maximum number.⁴⁹ The fact that less than the full number of directors is chosen at an election does not render their election invalid, since the vacancies may be filled by another election.⁵⁰

Generally, the number of directors may be increased or reduced, provided the statutory provisions in regard thereto are followed.⁵¹ If the statute providing for a change in the number of directors by the stockholders provides that a transcript of the proceedings shall be filed in the offices where the original certificates of incorporations were filed, the change does not take effect, it is held in New York, until the filing of such transcript in the proper offices.⁵² But where the statute requiring corporations to adopt by-laws within a certain time and to file them, fixes no time within which they must be filed,

⁴⁴ *Kardo Co. v. Adams*, 231 Fed. 950, rev'g on other grounds 222 Fed. 967.

⁴⁵ *Kardo Co. v. Adams*, 231 Fed. 950, rev'g on other grounds 222 Fed. 967.

⁴⁶ *In re Witherbee*, 202 Fed. 896.

⁴⁷ See § 518, p. 1108.

Power of the stockholders to adopt a by-law fixing the number of directors includes power to amend such by-law. *Renn v. United States Cement Co.*, 36 Ind. App. 149, 73 N. E. 269.

⁴⁸ *Conant v. Millaudon*, 5 La. Ann. 26; *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380.

⁴⁹ *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221.

⁵⁰ *Great Falls & T. County R. Co. v. Ganong*, 48 Mont. 54, 136 Pac. 390; *In re Excelsior Ins. Co.*, 38 Barb. (N. Y.) 297; *In re Union Ins. Co.*, 22 Wend. (N. Y.) 591; *Wright v. Com.*, 109 Pa. St. 561, 1 Atl. 794.

⁵¹ *In re Westchester Trust Co.*, 186 N. Y. 215, 78 N. E. 875.

⁵² *In re Westchester Trust Co.*, 186 N. Y. 215, 78 N. E. 875, rev'g 114 N. Y. App. Div. 856, 100 N. Y. Supp. 249; *Lewis v. Matthews*, 161 N. Y. App. Div. 107, 146 N. Y. Supp. 424.

the failure for several years to file by-laws increasing the number of directors does not invalidate the by-laws so as to make the election of additional directors illegal.⁵³ In many states the statutes authorize the corporation by its by-laws to provide for the number of directors; and in such a case the stockholders have the power to amend the by-laws by a provision for an additional number of directors to take office at once.⁵⁴ A by-law which required a board of directors of five is deemed modified by unanimous consent of the stockholders where a board of three conduct the business for a long series of years.⁵⁵ The California statute providing that the number of the directors "may by a majority of the stockholders of the corporation, be increased, or diminished to any number not less than three," means, it is held, a majority in interest of the stockholders and not a majority in number only.⁵⁶ Where the statute authorizing a reduction of the number of directors makes no provision as to how that reduction is to be effected after it has been voted, it cannot be said that certain of the directors are ipso facto deprived of office while others remain as directors of the corporation, but, unless the number can be reduced by the voluntary act of the directors themselves, the reduction can only become effective when the terms of office of a sufficient number of directors expire.⁵⁷ A provision in the articles of incorporation that the number of directors shall not be changed except by the unanimous consent of all the stockholders of the corporation has been held a valid one in New York, notwithstanding a statute that the number may be increased or reduced at the will of stockholders owning a majority of the stock, where another statute provides that the articles of incorporation "may contain any provision for the regulation of the business and the conduct of the affairs of the corporation, and any limitation upon its powers, or upon the powers of its directors and stockholders, which does not exempt them from the performance of any obligation or the performance of any duty imposed by law."⁵⁸

⁵³ *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

⁵⁴ *In re Griffing Iron Co.*, 63 N. J. L. 168, 41 Atl. 931, *aff'd* 63 N. J. L. 357, 57 L. R. A. 624, 46 Atl. 1097.

See also *Gold Bluff Mining & Lumber Corporation v. Whitlock*, 75 Conn. 669, 55 Atl. 175, holding that stockholders, at a special meeting, may increase number of directors and proceed at the same meeting to elect the additional directors.

⁵⁵ *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

⁵⁶ *Bank of Los Banos v. Jordan*, 167 Cal. 327, 139 Pac. 691.

⁵⁷ *In re Manoca Temple Ass'n*, 128 N. Y. App. Div. 796, 113 N. Y. Supp. 172.

⁵⁸ *Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855, *aff'g* 145 N. Y. App. Div. 916, 130 N. Y. Supp. 20. See generally § 202, *supra*.

The effect of the reduction of the number of directors below the number fixed by statute, by death, resignation or the like, is stated hereafter.⁵⁹

§ 1750. Agents of subsidiary corporation as agents of principal corporation. If "one corporation makes use of another as its instrument through which to perform its business, the principal corporation is really represented by the agents of the subcorporation, and its liability is just the same as if the principal corporation had done the business in its own name."⁶⁰

§ 1751. How officers and agents must act. The stockholders of a corporation, in acting for it, can only act at a corporate meeting legally called and conducted;⁶¹ and the directors can act for it only as a board and at a legal directors' meeting.⁶² With regard to other officers and agents, the general rule is that they may act for and bind the corporation in precisely the same way as if they were the agents of a natural person, unless there is some express provision to the contrary in the charter or by-laws.⁶³ The charter of a corporation may expressly require its agents to act in a particular way, and, if the provisions are not merely directory, they cannot bind the corporation unless they act in the way prescribed.⁶⁴ And their powers may be restricted or a particular mode of action prescribed by the by-laws of the corporation. But by-laws cannot limit the apparent authority of corporate agents, as against persons dealing with them without notice.⁶⁵

§ 1752. Acts as representative of the corporation or as an individual. A corporate officer or agent may, of course, act either as such or personally in matters in which the corporation may be deemed to have an interest.⁶⁶ Whether he is acting in the one capacity or the other is often difficult to determine, but in any event he cannot obtain personal benefits while acting as the representative of

⁵⁹ See § 1884, *infra*.

⁶⁰ *Buie v. Chicago, R. I. & P. R. Co.*, 95 Tex. 51, 55 L. R. A. 861, 65 S. W. 27, followed in *St. Louis & S. F. R. Co. v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403.

⁶¹ See § 1630, *supra*.

⁶² See §§ 1854-1860, *infra*.

⁶³ *Covington v. Covington & C. Bridge Co.*, 10 Bush (Ky.) 69.

⁶⁴ See § 1449, *supra*.

⁶⁵ See § 1931, *infra*.

⁶⁶ *Liebhart v. Wilson*, 38 Colo. 1, 88 Pac. 173; *Dejon v. Street*, 79 Conn. 333, 65 Atl. 145; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 66 L. R. A. 387, 57 Atl. 1001; *Saginaw Suburban R. Co. v. Connelly*, 146 Mich. 395, 109 N. W. 677.

the corporation without being liable to account to the corporation therefor.⁶⁷ Where a party dealing with the corporate agent looks to him personally, he may be estopped from proceeding against the corporation.⁶⁸

§ 1753. Validity of agreements relating to corporate offices—In general. In a previous chapter the validity of voting trusts has been fully stated.⁶⁹ In this connection, the validity of agreements by majority stockholders or officers, on selling all or part of their stock or otherwise, to put in the purchaser or another as a director or other officer, will be noted. It seems that if a director who owns a majority of the stock sells it, he may agree to resign and to induce other directors to resign so as to enable the purchaser to get control of the company.⁷⁰ But it is held that a contract whereby one selling part of his stock agrees to secure to the purchaser a certain office in the corporation is void as against public policy unless consented to by the other stockholders.⁷¹ So it was held that an agreement of stockholders, on selling stock, that they will change the board of directors and put in the purchasers, or persons whom the purchasers name, is void as against public policy.⁷² An agreement by one stockholder for the sale, directly or indirectly, of an office in the corporation, or of a permanent position therein, is against public policy and invalid notwithstanding the contracting stockholder has shares sufficient in amount to give him control in the election of officers.⁷³ Where the directors do not constitute all the stockholders, they cannot agree with a third person with whom they contract that he shall be made a director.⁷⁴ But where all of the stockholders, on selling a majority

⁶⁷ See *infra*, this chapter.

⁶⁸ *Rounsaville v. North Carolina Home Fire Ins. Co.*, 138 N. C. 191, 50 S. E. 619.

⁶⁹ See Chap. 40, *supra*.

⁷⁰ *Barnes v. Brown*, 80 N. Y. 527. See also *Rider Life Raft Co. v. Roach*, 97 N. Y. 378.

⁷¹ In this case the seller was not an officer of the company but it was held that, as stockholder, he "was placed under direct inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence,

which required him to look only to the best interest of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates." *Guernsey v. Cook*, 120 Mass. 501.

⁷² *Fremont v. Stone*, 42 Barb. (N. Y.) 169.

⁷³ *Jones v. Williams*, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486. To same effect, see *Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72.

⁷⁴ *Seymour v. Detroit Copper & Brass Rolling Mills*, 56 Mich. 117, 23 N. W. 186, 22 N. W. 317.

of the stock, agree that they are to be continued in their old positions as officers of the company for five years, with an increase in salary, such agreement is not against public policy and binds the purchasers of the stock.⁷⁵ Where officers are required to be appointed by the board of directors, a contract of sale of a majority of the stock providing that the secretary and treasurer should resign and the board of directors would appoint the purchaser's nominees to such positions, even if invalid as to such appointment, is not wholly invalid because thereof, since it is merely an incidental provision inserted for the benefit of the purchaser and of which he need not avail himself unless he desires.⁷⁶

The board of directors cannot bind the corporation by an agreement that a certain person, employee or officer shall be made a member of the board.⁷⁷ So directors cannot sell out their office for personal advantage by resigning and thus giving control to others,⁷⁸ nor by procuring for a consideration a third person and his friends to be elected directors and given the control and management.⁷⁹ So a note given to a director in consideration of his resignation is against good morals and not binding.⁸⁰

A contract whereby a person owning or representing all the stock of a corporation agrees to give another a certain number of shares of stock in the company in consideration of his becoming a director is not against public policy where it appears that the latter took the office unhampered and that the only motives were the local importance of the person sought as director and his views as to extension and consolidation.⁸¹

§ 1754. — Agreements abdicating or limiting powers or discretion of directors or other officers. An agreement between a third person

⁷⁵ *Kantzler v. Bensinger*, 214 Ill. 589, 598, 73 N. E. 874, rev'g 112 Ill. App. 293.

⁷⁶ *San Remo Copper Min. Co. v. Moneuse*, 149 N. Y. App. Div. 26, 133 N. Y. Supp. 509.

⁷⁷ *Sowter v. Seekonk Lace Co.*, 34 R. I. 304, 83 Atl. 437.

⁷⁸ *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

⁷⁹ *McClure v. Law*, 161 N. Y. 78, 76 Am. St. Rep. 262, 55 N. E. 388.

⁸⁰ "Trustees of corporations owe

duties to others besides themselves; they have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be bought out of office. They may resign when they please, but they must not make profit or benefit to themselves in the matter of such resignation." *Forbes v. McDonald*, 54 Cal. 98.

⁸¹ *Almy v. Orne*, 165 Mass. 126, 42 N. E. 561.

and directors or other officers whereby the latter place themselves in a position where their duties as officers are, or may be, antagonistic to their duties under the agreement, is void as against public policy.⁸² For instance, a contract by a director, without the knowledge of the stockholders, to repurchase stock sold by the director to the manager of the corporation, upon discontinuance of his employment from any cause, is invalid as against public policy.⁸³ It was said in an Ohio decision that "the authorities are uniform that a director of a corporation cannot barter and sell his official discretion, nor enter into any contract whatever as to his actions in his official capacity that will in any way restrict or limit the free exercise of his judgment and discretion, or place him under any direct and powerful inducement to disregard his duty to the corporation and the stockholders in the management of the corporate affairs. Such a contract is against public policy and void."⁸⁴ This rule is well supported by the authorities.⁸⁵ Applying this rule, the Ohio Supreme Court held that a director could not make a valid contract to declare dividends in the future when earned.⁸⁶ An agreement of a director to use his vote and influence to the disadvantage of the corporation, and in the interest and benefit of third persons, is of course an immoral and corrupt contract and will not be enforced.⁸⁷ A contract whereby a heavy stockholder appoints a director as his agent to look after his interests in the corporation is void as against public policy, so far as it requires the director to assist the stockholder without regard to his duty as director to act for all the stockholders alike.⁸⁸ So an agreement by a director to keep another person permanently in place as an officer of the corporation is void as against public policy notwithstanding there is no direct private gain to the promisor.⁸⁹

An agreement between shareholders controlling the stock of a corporation that certain directors shall act as nominal or dummy directors, subservient to the will of the others, is illegal.⁹⁰ This rule is

⁸² *Sauerhering v. Rueping*, 137 Wis. 407, 119 N. W. 184.

⁸³ *Timme v. Kopmeier*, 162 Wis. 571, L. R. A. 1916 D 1114 with note, 156 N. W. 961.

⁸⁴ *Thomas v. Matthews*, — Ohio St. —, L. R. A. 1917 A 1068 with note, 113 N. E. 669.

⁸⁵ *West v. Camden*, 135 U. S. 507, 34 L. Ed. 254; *Singers-Bigger v. Young*, 166 Fed. 82.

⁸⁶ *Thomas v. Matthews*, — Ohio St.

—, L. R. A. 1917 A 1068 with note, 113 N. E. 669.

⁸⁷ *Attaway v. Third Nat. Bank*, 93 Mo. 485, 492, 5 S. W. 16.

⁸⁸ *Singers-Bigger v. Young*, 166 Fed. 82.

⁸⁹ *West v. Camden*, 135 U. S. 507, 34 L. Ed. 254.

⁹⁰ *Jackson v. Hooper*, 76 N. J. Eq. 592, 27 L. R. A. (N. S.) 658 with note, 75 Atl. 568.

founded upon the well-known principle that contracts by which an individual director or the entire board abdicates, in whole or in part, their discretionary power of control over the affairs of the corporation, or even those which merely tend to influence the exercise of such power, are void.⁹¹ The directors "represent all of the stockholders and creditors, and cannot enter into agreements, either among themselves or with stockholders, by which they abdicate their independent judgment."⁹² "A contract by which the directors of such corporations in conclusive form abdicate their duty of management in this respect, and turn it over to an alien body, is in direct violation of the words and meaning of the statute, and is as typical an instance of an ultra vires act as can well be imagined."⁹³

§ 1755. Proof of official position. Parol evidence is admissible to prove that a certain person was or is an officer of a corporation.⁹⁴

II. ELECTION OR APPOINTMENT

§ 1756. Power to elect or appoint. In the absence of any provision in the charter of a corporation or the general law, the corporation, acting by vote of the majority of the stockholders or members at a corporate meeting, has the inherent power to appoint directors and such other officers as may be deemed necessary for the management of its affairs. Such power need not be expressly conferred, but will be implied.⁹⁵ Furthermore, unless so provided by statute, a

⁹¹ Note in 27 L. R. A. (N. S.) 658.

⁹² Jackson v. Hooper, 76 N. J. Eq. 592, 27 L. R. A. (N. S.) 658, 75 Atl. 568.

⁹³ McCarter v. Firemen's Ins. Co., 74 N. J. Eq. 372, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048, 73 Atl. 80.

⁹⁴ Stovell v. Alert Gold Min. Co., 38 Colo. 80, 87 Pac. 1071.

⁹⁵ Beardsley v. Johnson, 121 N. Y. 224, 24 N. E. 380; Wright v. Com., 109 Pa. St. 561, 1 Atl. 794; Com. v. Gill, 3 Whart. (Pa.) 228; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852. And see Protection Life Ins. Co. v. Foote, 79 Ill. 361.

A national bank has power under the National Banking Act to elect directors and commit to them the management of the bank. Commer-

cial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601.

In Nebraska the parties who control the affairs of a fraternal benefit association must be chosen by the membership. State v. Bankers' Union of World, 71 Neb. 622, 99 N. W. 531.

A corporation holding a majority of the stock of two mining corporations appointed the boards of directors of such mining corporations. The fact of appointment in such manner was held not to make the government of the mining corporations a matter of common control. Where, therefore, certain parties were directors of one of the mining companies and of the holding company, they were not deemed to be common to both of the mining companies. Pierce v. Old

corporation is not precluded from electing directors merely because it has ceased to do business nor because of its insolvency.⁸⁶

§ 1757. Original directors. In many states, the statutes provide that the articles of incorporation shall state the number of directors and their names, who shall act as such for the first year.⁸⁷ In other jurisdictions, the selection of directors is made a part of the organization of the company, before or after the filing of the articles of incorporation;⁸⁸ and ordinarily statutory or charter provisions relating to the election of directors do not apply to the selection of the original directors.⁸⁹ Thus, a statute providing that directors shall be chosen "by a majority of the votes of the stockholders voting" does not apply to directors for the first year, named in the certificate of incorporation, as provided by statute.¹ Although a statute provides that the affairs of the corporation shall be managed by directors "to be elected" from the stockholders, an instrument is not invalid where executed by corporate officers authorized thereunto by the directors named as such for the first year in the articles of incorporation. Were it otherwise the corporation would be without a managing board possessing authority to act for it until a board should be elected at the first annual meeting.²

§ 1758. By whom to be elected or appointed—In general. Primarily, and in the absence of provision to the contrary, the power to elect directors and other officers is in the stockholders.³ But the power may be and often is conferred upon the directors, so far as other officers are concerned. Generally, the stockholders elect the

Dominion Copper Mining & Smelting Co., 67 N. J. Eq. 399, 58 Atl. 319.

⁸⁶ Beardsley v. Johnson, 121 N. Y. 224, 24 N. E. 380.

⁸⁷ See § 202, *supra*.

⁸⁸ See chapter 9, *supra*, and especially §§ 251, 255.

⁸⁹ In Kentucky, however, because of the statutes, "it is not within the power of the incorporators to designate in the articles of incorporation an initial board of directors without any action upon the part of the stockholders." *Lebus v. Stansifer*, 154 Ky. 444, 157 S. W. 727.

¹ *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423, 57 N. E. 614, *aff'g* 17 N. Y. App. Div. 152, 45 N. Y. Supp. 141.

² *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 222, 79 Pac. 889.

³ See *Klix v. Polish Roman Catholic St. Stanislaus Parish*, 137 Mo. App. 347, 118 S. W. 1171.

But where a corporation has no power to issue stock, trustees or directors elected by holders of stock are not legally elected. *Cooke v. Marshall*, 196 Pa. St. 200, 64 L. R. A. 413, 46 Atl. 447, *aff'g* 191 Pa. St. 315, 64 L. R. A. 413, 43 Atl. 314.

If no provision is made as to how their successors shall be chosen, it seems that the directors may elect their successors. *State v. Vanderbilt University*, 129 Tenn. 279, 164 S. W. 1151.

directors, and the directors elect or appoint the other officers;⁴ but sometimes, although not often, officers other than the directors are elected by the stockholders.⁵ Officers appointed by directors to execute a contract become agents of the corporation and not agents of the directors.⁶ Statutes often provide that only directors shall be elected at the annual meeting of the stockholders,⁷ or else provide that such officers as the president, secretary, etc., can be elected only by the board of directors.⁸ It follows that if the charter or statute vests the power to elect or appoint officers in the board of directors, they cannot be elected or appointed by the stockholders.⁹ So if a by-law requires certain officers, agents or employees to be elected by the directors, an appointment by other officers is invalid unless ratified by the board of directors.¹⁰ Thus, if a by-law provides that its officers shall include a general manager and also a superintendent, "which officers shall be elected by the board of directors," the manager cannot appoint a superintendent.¹¹ Statutes often expressly authorize directors to appoint such officers and agents as the business may require.¹² The directors may elect a vice president, although the statute merely provides that they shall choose a president, secretary, treasurer, and such other officers as the by-laws shall prescribe, and

⁴In most states the selection of the corporate officers is not a matter within the power of the incorporators or organizers of the corporation, but is a duty devolving upon the board of directors. *Rideout v. National Homestead Ass'n*, 14 Cal. App. 349, 112 Pac. 192.

The power to appoint the cashier of a bank lies with the directors. *Mason v. Moore*, 73 Ohio St. 275, 296, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

⁵Under a charter providing that there shall be "three directors, out of whom a president shall be chosen," it is sufficient if the president be elected by a legally constituted meeting at the same time with the other directors, without having been previously elected a director. *Currie's Adm'rs v. Mutual Assur. Society*, 4 Hen. & M. (Va.) 315, 4 Am. Dec. 517.

⁶*Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127.

⁷*Walsenburg Water Co. v. Moore*, 5 Colo. App. 144, 38 Pac. 60, holding void an election of a president by the stockholders.

⁸*In re St. Helen Mill Co.*, 3 Sawy. 88, Fed. Cas. No. 12,222, under Oregon statutes.

⁹*In re St. Helen Mill Co.*, 3 Sawy. 88, Fed. Cas. No. 12,222; *Walsenburg Water Co. v. Moore*, 5 Colo. App. 144, 38 Pac. 60.

"Who shall act as officers of a corporation is and must be determined by the directors." *Abbott v. Harbeson Textile Co.*, 162 N. Y. App. Div. 405, 147 N. Y. Supp. 1031.

¹⁰*Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324, applying rule to appointment of superintendent by manager.

¹¹*Colpe v. Jubilee Min. Co.*, 2 Cal. App. 393, 84 Pac. 324.

¹²*Jones v. Williams*, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486.

though there are no by-laws, where the articles of association provide for a vice president.¹³

In order to make valid an election or appointment by directors, it is necessary that the directors themselves shall have been legally elected.¹⁴

Where the articles of incorporation provided that "all officers shall be chosen by the directors at their first meeting after their appointment or election, and shall hold office for one year, or until their successors are elected and qualified," it was held that, where the stockholders had failed, at an annual meeting, to elect directors, the hold-over directors had power, at a meeting called for that purpose, subsequent to the annual meeting, to elect new officers as the successors of those in office.¹⁵

§ 1759. — In case of vacancy in board of directors. Statutes generally declare that the corporation may provide by by-law for the filling of vacancies in the board of directors. If a statute authorizes the board of directors to fill a vacancy in the office of director, then of course the board may accept the resignation of a director and elect his successor,¹⁶ and it seems may elect a new director where one ceases to be a director and thereby reduces the number under the minimum fixed for the number of directors.¹⁷ But the statutory right of directors to fill any vacancy in the board for the unexpired portion of the term does not authorize them to appoint persons to fill the positions of newly-created directors, where the number of directors is increased.¹⁸ If there is no provision in the charter or by-laws for fill-

¹³ *Myar v. Poe*, 79 Ark. 465, 95 S. W. 1005, holding that the articles of association was a by-law "within the meaning of the statute authorizing the election of a vice president. It is not essential to the validity of a by-law that it be enacted in any particular form."

¹⁴ *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689, aff'g 34 Ill. App. 268; *Brown v. Company*, 22 Pittsb. Leg. J. N. S. (Pa.) 343.

¹⁵ "The hold-over board were possessed of the same powers as would have been enjoyed by a new board, had one been elected at the 1908 annual meeting." *State v. Guertin*,

106 Minn. 248, 130 Am. St. Rep. 610, 119 N. W. 43.

¹⁶ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

¹⁷ *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 396, 28 Atl. 719.

¹⁸ *Gold Bluff Mining & Lumber Corporation v. Whitlock*, 75 Conn. 669, 55 Atl. 175.

The New Jersey statute providing that any vacancy among the directors caused by death, resignation, removal or otherwise shall be filled in such manner as may be provided by the by-laws, and, in the absence of such provision, shall be filled by the board of directors, does not apply to the filling up of a board of directors

ing a vacancy in the board by the directors, where the directors are reduced by death below the minimum number prescribed by the charter, the stockholders may supply the vacancy.¹⁹ Less than a majority of the board is sometimes prohibited by statute from filling vacancies.²⁰

§ 1760. Time and mode—In general. The time and method of electing or appointing officers depends upon whether the election is by the stockholders or by the board of directors.

§ 1761. — In case of elections by stockholders. Eliminating from consideration the selection of directors as a part of the preliminary acts in connection with the incorporation or organization of a corporation, already considered in a preceding volume,²¹ it is proper in this connection to refer to a few rules governing the election of directors and other officers by the stockholders. Directors are elected by the stockholders, and generally at their annual meeting; and directors cannot agree with a third person that he shall be made a director, unless the stockholders and directors are identical.²² In the absence of express provision on the subject in the charter or general law, the stockholders may elect or appoint directors and other officers at such times and in such mode as they may see fit.²³ But charter or statutory provisions, when there are any, must be substantially complied with, both as to time and mode.²⁴ Thus, if the statute, charter or by-laws provide that directors can only be elected at the regular annual meeting of the stockholders, the stockholders cannot ratify the filling of vacancies by the directors, at a special meeting of the stockholders afterwards held.²⁵ If annual elections are required, an election must be held substantially once in every year.²⁶

whose membership is enlarged by a vote of the stockholders, but such offices must be filled by the stockholders. In re Griffing Iron Co., 63 N. J. L. 168, 41 Atl. 931, 63 N. J. L. 357, 57 L. R. A. 624, 46 Atl. 1097.

¹⁹ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

²⁰ *Moses v. Tompkins*, 84 Ala. 613, 618, 4 So. 763.

²¹ See §§ 251-255, *supra*.

²² *Seymour v. Detroit Copper & Brass Rolling Mills*, 56 Mich. 117, 23 N. W. 186, 22 N. W. 317.

²³ *Burr's Ex'r v. McDonald*, 3 Gratt. (Va.) 215.

²⁴ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Conant v. Millaudon*, 5 La. Ann. 26; *State v. McCullough*, 3 Nev. 202.

²⁵ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763.

If the charter of a corporation or the general law requires that the directors shall be elected at the regular annual meetings, they cannot be elected, nor can vacancies be filled at a special meeting. *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763.

²⁶ When the charter or general law requires that the stockholders shall elect directors or trustees annually at

In a preceding chapter in this volume, the law relating to stockholders' meetings has been stated.²⁷ The rules therein laid down as to the necessity for a formal meeting, notice of the meeting, time and place of holding the meeting, the conduct of the meeting, persons entitled to vote, proxies, cumulative voting, etc., applying equally well where the purpose of the meeting, wholly or in part, is to elect directors; and reference should be made to such chapter for the rules governing meetings of stockholders where directors are elected. However, in some states, there are statutes especially made applicable to stockholders' meetings to elect directors.²⁸

In particular cases, the courts, in considering the validity of corporate elections of directors by the stockholders, have applied the general rules governing meetings of stockholders, where the question involved was the place of meeting,²⁹ time of the meeting,³⁰ notice of the time and place of the meeting.³¹ In like manner they have

such time and place, and in such manner as may be prescribed by the by-laws, an election must be held substantially once in every year. *State v. McCullough*, 3 Nev. 202.

²⁷ See §§ 1633-1655, *supra*.

²⁸ In North Carolina, by statute, a judge may order a corporate election of directors, but only after an application to the directors to call a meeting. *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

²⁹ *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145, and see § 1634, *supra*.

³⁰ Stockholders may change the time for the annual meeting of the corporation. *Gold Bluff Mining & Lumber Corporation v. Whitlock*, 75 Conn. 669, 55 Atl. 175.

When the by-laws of the corporation provide that the directors shall be elected at an annual meeting of stockholders to be held on a designated date, and that the officers and directors then and thus elected shall hold office for one year and until their successors are elected, an election for officers and directors can be validly held on another date, where the annual election was not called

or held by reason of the failure of the directors or other officials whose duty it was to issue the call therefor. *Walsh v. State*, — Ala. —, 74 So. 45.

In New York, an election of directors before the filing of the certificate showing an increase in their number is not void even if irregular. *Lewis v. Matthews*, 161 N. Y. App. Div. 107, 146 N. Y. Supp. 424. The same is true where the number of directors is reduced. In *re Westchester Trust Co.*, 114 N. Y. App. Div. 856, 100 N. Y. Supp. 249, *rev'd* on other grounds 186 N. Y. 215, 78 N. E. 875.

³¹ *People v. Matthiessen*, 269 Ill. 499, Ann. Cas. 1916 E 1035, 109 N. E. 1056, *aff'g* 193 Ill. App. 328; *Jones v. Hilledale Cemetery Society*, 23 Ky. L. Rep. 1486, 65 S. W. 838; In *re Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502; In *re Keller*, 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133; In *re Utica Fire Alarm Tel. Co.*, 115 N. Y. App. Div. 821, 101 N. Y. Supp. 109.

If special meeting is for the purpose of electing directors, the notice of the meeting should state its pur-

been applied to questions as to adjournments of meetings,³² who may vote,³³ proxies,³⁴ cumulative voting,³⁵ what constitutes a quorum,³⁶

pose. *Dolbear v. Wilkinson*, 172 Cal. 366, 156 Pac. 488.

If the charter requires the election of trustees to be regulated by by-laws, members must take notice of the provisions thereof as to the time and place fixed for the election. *Jones v. Hilldale Cemetery Society*, 23 Ky. L. Rep. 1486, 65 S. W. 838.

Under the New York statute requiring notice of a meeting for the election of directors, but permitting the adoption of by-laws, notice need not be given of an adjourned annual meeting, where a by-law authorizes the transaction of business at an adjourned annual meeting without further notice thereof. *In re Hammond*, 139 Fed. 898.

³² *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509; *De Zavala v. Daughters of Republic of Texas*, 58 Tex. Civ. App. 19, 124 S. W. 160.

³³ *Indiana*. *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

Maryland. *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281.

Nebraska. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

New Jersey. *Thomas v. International Silver Co.*, 72 N. J. Eq. 224, 73 Atl. 833; *O'Connor v. International Silver Co.*, 68 N. J. Eq. 680, 62 Atl. 408, aff'g 68 N. J. Eq. 67, 59 Atl. 321.

New York. *In re George Ringler & Co.*, 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593; *Lord v. Equitable Life Assur. Society*, 47 Misc. 187, 94 N. Y. Supp. 65, aff'd 109 App. Div. 252, 96 N. Y. Supp. 10.

Pennsylvania. *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829; *Coolbaugh v. Herman*, 221 Pa. 496, 70 Atl. 830.

Even if holders of preferred stock are expressly authorized by statute to

vote for directors, they may waive such right by accepting preferred stock expressly negating the right to vote. *State v. Brooks*, — Del. —, 74 Atl. 37.

Stockholder is necessary party to suit to enjoin the voting of his stock. *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147.

³⁴ *Walker v. Johnson*, 17 App. Cas. (D. C.) 144; *Pope v. Whitridge*, 110 Md. 468, 73 Atl. 281; *In re Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502.

³⁵ *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; *Gregg v. Granby Mining & Smelting Co.*, 164 Mo. 616, 65 S. W. 312; *In re Mathiason Mfg. Co.*, 122 Mo. App. 437, 99 S. W. 502; *Schwartz v. State*, 61 Ohio St. 497, 56 N. E. 201; *State v. Schwartz*, 19 Ohio Cir. Ct. 350, 10 Ohio Cir. Dec. 413; *Com. v. Flannery*, 203 Pa. 28, 52 Atl. 129.

"While propriety dictates that such inspectors [of election] should not interest themselves in securing votes for either contesting candidate, nevertheless the fact that they suggest and advise stockholders to cumulate their votes in favor of a successful candidate, furnishes no legal cause for setting aside such election." *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012.

³⁶ *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997; *Ashcroft v. Hammond*, 132 N. Y. App. Div. 3, 116 N. Y. Supp. 362.

A by-law that a majority of the entire stock shall constitute a quorum is invalid where a statute provides that an election of directors at the annual meeting shall be held by the stockholders who attend the meeting for that purpose. *Darrin v. Hoff*, 99 Md. 491, 58 Atl. 196.

inspectors of election,³⁷ etc. The election will not be deemed to be invalid because less than the required number of directors are chosen,³⁸ nor because of the ineligibility of one of the persons elected.³⁹ If stockholders elect directors at a valid election, they cannot thereafter, at an adjourned meeting, reconsider and undertake to fill vacancies by resolving that the previous election was illegal.⁴⁰ A portion of the stockholders cannot withdraw from the meeting in order to break a quorum, after the meeting is organized.⁴¹ If the by-laws require the election of directors to be by nomination and ballot, and the printed ballots contained names of persons nominated for directors, but also contained blank lines stated in the ballot to be "for any other name you may care to vote for," persons whose names are written in, and who receive a majority of the votes, are elected although not orally nominated.⁴²

In a proper case, a court of equity may supervise and control the election, and appoint a master to hold it.⁴³ Thus, if the directors refuse to give notice of a stockholders' meeting to elect officers, in order to perpetuate themselves in office, the court may order such a meeting and election under the supervision of a master in chancery.⁴⁴ In some states, where statutes so provide, if the election of directors is

Independently of statute, if less than a majority of the stock attend the annual meeting, they may elect directors. *Eagle Iron Co. v. Colyar*, 156 Fed. 954; *Darrin v. Hoff*, 99 Md. 491, 58 Atl. 196.

³⁷ *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145, failure to file oath of inspectors of election held not to invalidate the election.

Those whose violent acts caused the president of the corporation to refuse to continue to act as inspector of election or to remain in attendance cannot take advantage of their own lawless conduct and reorganize the meeting and recount the votes. *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

Where a by-law designates certain officers as inspectors of election, giving them plenary powers, they possess the sole right to determine when the polls shall close. *Clopton v. Chandler*,

27 Cal. App. 595, 150 Pac. 1012.

³⁸ See § 1764, *infra*.

³⁹ Those duly elected may fill the vacancy. *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929.

⁴⁰ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

⁴¹ *Com. v. Vandegrift*, 232 Pa. 53, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912 C 1267, 81 Atl. 153.

⁴² *Wirth v. Fehlberg*, 30 R. I. 536, 76 Atl. 438. But see dissenting opinion of Justice Sweetland.

⁴³ *Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829, *aff'g* 246 Pa. 552, 92 Atl. 701.

In Pennsylvania, such a course is proper only where there is a decree or interlocutory order pending in the court to be executed. *Yetter v. Delaware Valley R. Co.*, 206 Pa. 485, 56 Atl. 57.

⁴⁴ *Bartlett v. Gates*, 118 Fed. 66.

not held on the day designated by the by-laws, the chancellor may summarily order that an election be held on the application of any stockholder.⁴⁵

§ 1762. — In case of election or appointment by directors. If officers are elected or appointed by the directors, they must, in exercising the power, act legally as a board,⁴⁶ and as required by the charter or statute.⁴⁷ Elections by the board must be held within the state, in some jurisdictions.⁴⁸ The mode of action by directors in appointing officers, i. e., the necessity for acting as a board at a meeting of the board, etc., is governed by the same rules applicable to other acts of directors.⁴⁹

§ 1763. Mandamus to compel election. Stockholders may compel by mandamus the calling of an election to elect directors, where the directors or other officers have refused to call an election at the time fixed by the statute or charter.⁵⁰ So if at an annual meeting of the stockholders they fail or refuse to elect directors, any stockholder may, by mandamus, compel the corporation and the directors holding over to call a meeting for the purpose of electing a board of directors.⁵¹

§ 1764. Effect of election of less than required number of directors. An election of a less number of directors than the number which the meeting was called to elect is valid as to those actually elected.⁵² It seems that the election of two directors instead of five, where the charter provides that five directors shall be elected annually, does not make the election void as to the two elected.⁵³

§ 1765. Who may question. The validity of the election of directors or other officers can be questioned only by the corporation or its stockholders.⁵⁴ It cannot be questioned by strangers.⁵⁵ More-

⁴⁵ *In re Jackson*, 9 Del. Ch. 279, 81 Atl. 992, containing form of order.

⁴⁶ *Hancock v. Holbrook*, 9 Fed. 353.

⁴⁷ *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763.

⁴⁸ *Place v. People*, 87 Ill. App. 527, aff'd 192 Ill. 160, 61 N. E. 354, and see § 1865, *infra*.

⁴⁹ See §§ 1853-1895, *infra*, as to directors' meetings.

⁵⁰ *State v. Lady Bryan Min. Co.*, 4 Nev. 400; *People v. Cummings*, 72 N. Y. 433; *People v. Governors of Al-*

bany Hospital, 61 Barb. (N. Y.) 397, 11 Abb. Pr. N. S. (N. Y.) 4.

⁵¹ *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806.

⁵² *In re Excelsior Ins. Co.*, 38 Barb. (N. Y.) 297; *In re Union Ins. Co.*, 22 Wend. (N. Y.) 591; *Wright v. Com.*, 109 Pa. St. 561, 1 Atl. 794.

⁵³ *Gilchrist v. Collopy*, 119 Ky. 110, 26 Ky. L. Rep. 1003, 82 S. W. 1018.

⁵⁴ *Baggot v. Turner*, 21 Wash. 339, 58 Pac. 212.

⁵⁵ *Baggot v. Turner*, 21 Wash. 339, 58 Pac. 212.

over, even stockholders may be estopped by their conduct to deny the title of a corporate officer,⁵⁶ and cannot attack the election, it seems, for irregularities resulting in no injury to the litigant stockholder.⁵⁷ A stockholder may, by participation or acquiescence, be estopped to question the title of directors or other officers to their office, not only as against strangers dealing with the corporation, but also as against the officers themselves. Thus it has been held that a director of a corporation has no standing as a stockholder to question the title of the other directors to their offices because of informalities in their election, when he participated in all the proceedings, and has acted as a director under an election equally informal.⁵⁸ Where a telegraph company furnished a blank to write a telegram on, which blank stated that a certain person was its president, it cannot afterwards deny, as against the sender of the telegram who relied thereon, that such person was its president.⁵⁹

Statutes providing remedies for questioning the validity of corporate elections and the title to corporate offices generally prescribe in express terms the persons who may institute proceedings.⁶⁰ In the absence of express provisions, proceedings to determine the title to office, and to oust persons who are illegally in possession, may be instituted by the corporation, by officers who have the legal title to the

⁵⁶ *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

⁵⁷ *Bartlett v. Fourton*, 115 La. 26, 38 So. 882.

⁵⁸ *Hall v. West Chester Pub. Co.*, 180 Pa. St. 561, 37 Atl. 106. See also *In re Syracuse, C. & N. Y. R. Co.*, 91 N. Y. 1; *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

A stockholder may be estopped from denying the legality of a stockholders' meeting by participating therein. *Germer v. Triple-State Natural Gas & Oil Co.*, 60 W. Va. 143, 54 S. E. 509.

⁵⁹ *Covell v. Western U. Tel. Co.* (Mo. App.), 147 S. W. 555.

⁶⁰ *In re Powell*, 5 Pennew. (Del.) 7, 58 Atl. 831.

Under a statute authorizing information by the prosecuting attorney, "or by any other person on his own relation, whenever he claims an inter-

est in the office, franchise, or corporation which is the subject of the information," stockholders claiming to have been legally elected directors of a corporation, but prevented from exercising the office by the usurpation of others, may proceed by information on their own relation, without the prosecuting attorney. *Beckett v. Houston*, 32 Ind. 393. And see *State v. Horan*, 22 Wash. 197, 60 Pac. 135.

A statute authorizing any person who "may be aggrieved by, or may complain of, any election" by directors of a corporation, to make application to a court to compel a new election, cannot be invoked by one who was not a stockholder at the time of the election complained of, and who received his stock from one of the authors of the wrong complained of. *In re Syracuse, C. & N. Y. R. Co.*, 91 N. Y. 1.

office, or, in a proper case, by stockholders.⁶¹ Sufficient showing of special interest in the business of the corporation and the corporate property to sustain the presentation of a petition and the granting of leave to file information in the nature of quo warranto is made by a statement in a petition for leave to file an information that the relator has been duly elected the president of the corporation and that the respondent refuses to surrender the office.⁶² Where by statute an information in the nature of quo warranto may be filed by the prosecuting attorney or another person on his own relation when such other person claims an interest in the office, franchise or corporation made the subject of the information, it is insufficient that the information be by a private individual who claims no interest in the corporation.⁶³

§ 1766. Validity of agreement to appoint person as officer. The appointment of officers by the directors cannot be made the subject of a valid contract between the directors and persons seeking such appointment.⁶⁴

§ 1767. Appointment of agents. Corporate agents, as distinguished from corporate officers, are generally appointed by the board of directors or by some corporate officer with authority so to do. It was at one time thought that a corporation could not appoint an agent except under the corporate seal,⁶⁵ but this doctrine has been abandoned, and it is now well settled, in this country at least, that a corporation may appoint an agent, just as a natural person may, either by writing or orally, and that neither the corporate seal nor a formal vote of the corporators or directors is necessary unless it is expressly required.⁶⁶ Necessarily, therefore, a corporation may become bound

⁶¹ *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70; *Hornblower v. Duden*, 35 Cal. 664; *Com. v. Union Fire & Marine Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50; *Com. v. Stevens*, 168 Pa. St. 582, 32 Atl. 111, and other cases cited in the notes preceding. Compare *Crawford v. State*, 52 Ohio St. 62, 38 N. E. 814.

The state or a county, when a stockholder, may contest an election of directors in a railroad company. *Hornblower v. Duden*, 35 Cal. 664; *State v.*

New Orleans, J. & G. N. R. Co., 20 La. Ann. 489.

⁶² *Place v. People*, 192 Ill. 160, 61 N. E. 354, aff'g 87 Ill. App. 527.

⁶³ *State v. Point Roberts Reef Fish Co.*, 42 Wash. 409, 85 Pac. 22.

⁶⁴ The appointment "ought not to be made a matter of bargain and sale between applicants and members of the board." *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162. See also §§ 1753, 1754, *supra*.

⁶⁵ See *Horne v. Ivy*, 1 Mod. 18.

⁶⁶ *United States. Fleckner v. Bank*

by one acting in its behalf as its agent, although the corporate minutes fail to show his employment as such.⁶⁷ However, like other acts, where agents are appointed by the directors, they must be appointed

of United States, 8 Wheat. 338, 357, 5 L. Ed. 631; *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch 299, 3 L. Ed. 351.

Alabama. *Reynolds v. Collins*, 78 Ala. 94; *Everett v. United States*, 6 Port. 166, 30 Am. Dec. 584.

California. *Crowley v. Genesee Min. Co.*, 55 Cal. 273.

Connecticut. *Howe v. Keeler*, 27 Conn. 538; *Savings Bank of New Haven v. Davis*, 8 Conn. 191.

Delaware. *John A. Bancroft & Co. v. Wilmington Conference Academy*, 5 Houst. 577.

Florida. *St. Andrews' Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340.

Illinois. *Board of Education v. Greenebaum & Sons*, 39 Ill. 609.

Indiana. *Hamilton v. New Castle & D. R. Co.*, 9 Ind. 359.

Kentucky. *Lathrop v. Commercial Bank of Scioto*, 8 Dana 114, 33 Am. Dec. 481.

Maine. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573, 74 Am. Dec. 507; *Badger v. Bank of Cumberland*, 26 Me. 428.

Maryland. *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 389, 33 Am. Rep. 264; *Northern Cent. Ry. Co. v. Bastian*, 15 Md. 494.

Massachusetts. *Sherman v. Fitch*, 98 Mass. 59; *Topping v. Bickford*, 4 Allen 120.

Missouri. *Western Bank v. Gilstrap*, 45 Mo. 419; *Cann v. Rector, Wardens & Vestrymen of Church of Redeemer*, 111 Mo. App. 164, 85 S. W. 994.

New Hampshire. *Goodwin v. Union Sewer Co.*, 34 N. H. 378; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

New York. *Mumford v. Hawkins*,

5 Den. 355; *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *American Ins. Co. v. Oakley*, 9 Paige 496, 38 Am. Dec. 561.

North Carolina. *Buncombe Turnpike Co. v. McCarrson*, 1 Dev. & B. 306.

South Carolina. *Planters' Bank of Fairfield v. Bivingsville Cotton Mfg. Co.*, 10 Rich. 95.

Tennessee. *Hopkins v. Gallatin Turnpike Co.*, 4 Humph. 403.

Wisconsin. *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

This is true of the appointment of an agent to convey or mortgage real property. *Fitch v. Lewiston Steam-Mill Co.*, 80 Me. 34, 12 Atl. 732; *Cook v. Kuhn*, 1 Neb. 472; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. And it is true of a power of attorney to confess judgment. *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

A promoter of a corporation cannot act as agent for it before it has a corporate existence. *Reynolds v. Title Guaranty Trust Co.*, — Mo. App. —, 189 S. W. 33. See also § 134.

⁶⁷ *Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321; *Golden Age No. 2 Mining & Milling Co. v. Langridge*, 39 Colo. 157, 88 Pac. 1070; *Cann v. Rector, Wardens & Vestrymen of Church of Redeemer*, 111 Mo. App. 164, 85 S. W. 994.

Oral testimony of transactions at a directors' meeting may be admitted to show the employment of a corporate agent, where there is no showing that the corporation had minutes or that there was anything in writing containing a record of the matter. *Braxmar v. Stanton*, 110 N. Y. App. Div. 167, 96 N. Y. Supp. 1096.

at a meeting of the directors rather than by the assent of the majority given singly when not so assembled.⁶⁸

A corporation may also, like a natural person, be estopped to deny the authority of a person to act as its agent by clothing him with apparent authority.⁶⁹ Thus, if a person acts as agent of a corporation with the knowledge and acquiescence of the incorporators or directors, the corporation is as much bound by his acts as if he had been appointed by formal vote or by an instrument under the corporate seal.⁷⁰ So, although the agent of a corporation be appointed without due authority, the corporation may become estopped to assert the invalidity of his appointment by accepting, with knowledge, the benefit of his services.⁷¹ A corporation may use another corporation, as well as a natural person, as its agent.⁷²

Failure to comply with the provision of the Blue Sky Law requiring agents selling corporate stock to be registered is no defense on the part of the corporation to an action by a purchaser of stock from such an agent to recover from the corporation the amount paid for shares of stock which were never delivered.⁷³

§ 1768. Presumptions in favor of title to office. Persons acting publicly as officers of a corporation are presumed to be rightfully in office, until the contrary is shown.⁷⁴ And when a corporation has

⁶⁸ *Cann v. Rector, Wardens & Vestrymen of Church of Redeemer*, 111 Mo. App. 164, 85 S. W. 994.

⁶⁹ *California*. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623.

Maine. *Badger v. Cumberland Bank*, 26 Me. 428.

Maryland. *Santa Clara Min. Ass'n v. Meredith*, 49 Md. 400, 33 Am. Rep. 264.

New Hampshire. *Goodwin v. Union Screw Co.*, 34 N. H. 378.

England. *Smith v. Hull Glass Co.*, 11 C. B. 297.

See generally §§ 1916-1925, *infra*.

⁷⁰ *Sherman Center Town Co. v. Swiggart*, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569; *Sherman v. Fitch*, 98 Mass. 59; *Goodwin v. Union Screw Co.*, 34 N. H. 378; *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187.

Where a corporation holds one out to the world as its agent, it may become bound by his acts. *Neppach v. Oregon & C. R. Co.*, 46 Ore. 374, 7 Ann. Cas. 1035, 80 Pac. 482.

⁷¹ *Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321; *Ruttle v. What Cheer Coal Min. Co.*, 153 Mich. 300, 117 N. W. 168; *Kropp v. Hermann Brewing Co.*, 138 Mo. App. 49, 119 S. W. 1066; *Hearst v. Putnam Min. Co.*, 28 Utah 184, 66 L. R. A. 784, 107 Am. St. Rep. 698, 77 Pac. 753.

⁷² *Liebhardt v. Wilson*, 38 Colo. 1, 120 Am. St. Rep. 97, 88 Pac. 173.

⁷³ *De Hoop v. Peninsular Life Ins. Co.*, — Mich. —, 159 N. W. 500.

⁷⁴ *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Susquehanna Bridge & Bank Co. v. General Ins. Co.*, 3 Md. 305, 56 Am. Dec. 740; *Burgess v. Pue*, 2 Gill (Md.) 287; *State v. Kupferle*, 44 Mo. 154, 100 Am.

elected or appointed directors or other officers, it will be presumed that the election or appointment was regular, and that charter or statutory provisions have been complied with.⁷⁵

III. QUALIFICATIONS AND ELIGIBILITY

§ 1769. General rules. Any person may be elected or appointed as a director or other officer of a corporation, unless there is some special provision on the subject in the charter or by-laws of the corporation or in a general law.⁷⁶ But sometimes particular qualifications are thus prescribed, and, in such a case, no person is eligible unless he has the prescribed qualifications. Generally, directors are required to be stockholders,⁷⁷ but ordinarily the other officers are not required to be either stockholders or members of the board of directors, unless it be the president.⁷⁸

In New Jersey, by statute, the wilful refusal of directors to file a report of the election of directors at the annual meeting, within thirty days thereafter, makes such directors, for a period of one year thereafter, ineligible for appointment or election to any office in the company as director or otherwise.⁷⁹ Likewise, in New Jersey, directors are not eligible to re-election where they fail or refuse, upon demand, to produce the books containing the names of the stockholders, at the election,⁸⁰ or where they neglect or refuse to produce an alphabetical

Dec. 265; *Lucky Queen Min. Co. v. Abraham*, 26 Ore. 282, 38 Pac. 65.

⁷⁵ *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380.

¹ Presumption exists that the trustees were elected at the time and place provided for by the by-laws where evidence to the contrary is not introduced. *Jones v. Hilldale Cemetery Society*, 23 Ky. L. Rep. 1486, 65 S. W. 838.

Under a statute prescribing that the articles must show the place where the officers are to be elected, it will be presumed that they were elected at the principal place of business of the corporation. *McChesney v. Batman*, 28 Ky. L. Rep. 281, 89 S. W. 198.

⁷⁶ *Wight v. Springfield & N. L. R. Co.*, 117 Mass. 226, 19 Am. Rep. 412; *Bristol Bank & Trust Co. v. Jones-*

boro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

That a party holds the controlling interest in the stock of a corporation does not, of course, disqualify him, as between himself and the corporation, from holding the office of president. *Hirsch v. Jones*, 115 N. Y. App. Div. 156, 100 N. Y. Supp. 687.

⁷⁷ See §§ 1771-1777, *infra*.

⁷⁸ A stockholder of a corporation who is not a director cannot act as president pro tem of the board of directors. *Benson v. Keller*, 37 Ore. 120, 132, 60 Pac. 918.

⁷⁹ In re Election of Directors of Brooklyn Baseball Club, 75 N. J. L. 64, 66 Atl. 1051, holding, in particular case, that the failure to file report was not a "wilful refusal."

⁸⁰ In re Jersey City Paper Co., 69 N. J. L. 594, 55 Atl. 280.

list of the stockholders entitled to vote.⁸¹ So in New Jersey, where the statute makes directors ineligible to re-election where the transfer books are not present at the election of directors, it is held that if a corporation keeps no transfer book for the transfer of its capital stock other than its certificate of stock book, and such latter book is, in fact, used as its transfer book in recording the evidence of the transfer of shares of stock, it is sufficient to produce such book without any regular and separate transfer book.⁸²

§ 1770. Power to make by-laws as to eligibility. It is undoubtedly within the power of a corporation to make by-laws prescribing the qualifications of its directors and other officers,⁸³ provided the by-laws are not inconsistent with the charter or general statutes.⁸⁴

Even if a general statute permits the president to be one other than a director, the board of directors may by their by-laws limit the choice of such officer to one of their number.⁸⁵

§ 1771. Necessity that director be a stockholder—In general. It is usual to elect the directors and other officers of a corporation from among the stockholders, and sometimes the charter, general law or by-laws expressly require that they shall be stockholders. In such a case, persons who are not stockholders are ineligible.⁸⁶ In the absence of such an express requirement, however, the ownership of stock is not necessary at all.⁸⁷ Furthermore, the requirement does not apply

⁸¹ *In re Schwartz & Gray*, 77 N. J. L. 415, 72 Atl. 70.

⁸² *In re Election of Directors of United States Cast Iron Pipe & Foundry Co.*, 74 N. J. L. 315, 65 Atl. 849.

⁸³ *Cross v. West Virginia Cent. & P. Ry. Co.*, 37 W. Va. 342, 18 L. R. A. 582, 16 S. E. 587, and see § 518, supra.

⁸⁴ Thus, if the charter of a corporation or a general law requires that the directors shall be stockholders, the necessity for ownership of stock cannot be dispensed with by a by-law.

⁸⁵ *Rankin v. Tygard*, 198 Fed. 795, 801.

⁸⁶ *Chase v. Tuttle*, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874; *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; *Despatch Line*

of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; *Chemical Nat. Bank of New York v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *In re Hassam Paving Co. of New York*, 152 N. Y. App. Div. 610, 137 N. Y. Supp. 453; *In re Elias*, 40 N. Y. Supp. 910; *In re Newcomb*, 18 N. Y. Supp. 16.

An agreement to issue shares of stock to a certain person does not make him a stockholder where the shares were never in fact issued. *Heartt v. Sherman*, 229 Ill. 581, 82 N. E. 417.

⁸⁷ *Illinois. Fey v. Peoria Watch Co.*, 32 Ill. App. 618.

Indiana. Wright v. Floyd, 43 Ind. App. 546, 86 N. E. 971.

Massachusetts. Wight v. Springfield & N. L. R. Co., 117 Mass. 226,

to the first directors of a new corporation,⁸⁸ except where the statute otherwise provides.⁸⁹ A statute which provided that any of the directors or executive officers of any corporation owning stock in another corporation shall be eligible as director in the latter corporation was held not repealed by a general statute providing that directors shall be stockholders in the corporation.⁹⁰ Persons for whose benefit stock is held in trust are qualified to hold corporate offices.⁹¹

In New York, since an amendment of the statute in 1901, directors need not be stockholders if provision to that effect is made by the charter or by-laws.⁹²

If the written agreement of association by the incorporators, which is the first step in organizing a corporation in some states, provides that none of the shares of stock shall be transferred without the consent of a certain proportion of the capital stock of the corporation, such provision does not constitute an unlawful restriction upon the

19 Am. Rep. 412, where it was said: "Although the directors of a railroad corporation are usually chosen by the stockholders from their own number, there is no rule of law that makes the holding of stock an indispensable qualification of a director, unless prescribed by some act of the legislature or by-law of the corporation."

New Jersey. In re St. Lawrence Steamboat Co., 44 N. J. L. 529; Hoyt v. Bridgewater Copper Min. Co., 6 N. J. Eq. 253.

New York. McDowall v. Sheehan, 129 N. Y. 200, 29 N. E. 299; People v. Northern R. Co., 42 N. Y. 217.

Ohio. State v. McDaniel, 22 Ohio St. 354.

Tennessee. Bristol Bank & Trust Co. v. Jonesboro Banking & Trust Co., 101 Tenn. 545, 48 S. W. 228.

England. In re British Provident Life & Guarantee Ass'n, 5 Ch. Div. 306.

There is dictum to the contrary in Penobscot R. Co. v. Dummer, 40 Me. 172, 174, 63 Am. Dec. 654, 655, and in Spering's Appeal, 71 Pa. St. 1, 21, 10 Am. Rep. 684, 689, but, as was pointed out in Wight v. Springfield & N. L. R. Co., 117 Mass. 226, 19 Am. Rep. 412,

"the remarks * * * do not appear to have been necessary to the decisions, and the reports do not show what the statutes were under which the cases arose."

⁸⁸ Camden Safe-Deposit Co. & Trust Co. v. Burlington Carpet Co. (N. J. Ch.), 33 Atl. 479; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 426, 57 N. E. 614; McDowall v. Sheehan, 129 N. Y. 200, 207, 29 N. E. 299; Davidson v. Westchester Gas Light Co., 99 N. Y. 558, 2 N. E. 892.

⁸⁹ Dancy v. Clark, 24 App. Cas. (D. C.) 487, 506.

⁹⁰ Chase v. Tuttle, 55 Conn. 455, 466, 3 Am. St. Rep. 64, 12 Atl. 874.

⁹¹ Kneeland Inv. Co. v. Berendes, 81 Wash. 372, 142 Pac. 869.

⁹² Buffalo Electro-Plating Co. v. Day, 151 N. Y. App. Div. 237, 135 N. Y. Supp. 1054.

In New York, "as the law now stands, therefore, directors need not be stockholders, if the organizers or stockholders of a stock corporation so provide, either in its certificate of incorporation or its by-laws." In re George Ringler & Co., 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593.

transfer of stock as in restraint of trade, especially where the statute requires that such agreement shall state "the restrictions, if any, imposed upon" the transfer of shares of stock, and hence a director who qualifies by virtue of shares of stock transferred in violation of such restriction is not eligible.⁹³

§ 1772. — Nominal stockholder or holder of legal title without beneficial ownership. The general rule is that beneficial ownership is not necessary, and that a person who holds the legal title to stock on the books of the corporation is qualified, although the beneficial ownership may be in another.⁹⁴ In other words, it is sufficient that the title to the stock, as it appears on the books of the corporation, is in the director, since the legal title is what counts and it is the person whose name appears as owner on the books of the company who is stockholder and eligible as director.⁹⁵ For instance, a director may hold his stock as trustee and yet be legally qualified.⁹⁶ So a person to whom one share of stock has been transferred for the express purpose of qualifying him as a director is eligible.⁹⁷ And a director may obtain his stock by gift and yet be legally qualified.⁹⁸ Thus it was held in Illinois that where one holding stock as trustee for heirs under a will, transferred one share of it to a third person to qualify him as director, and he immediately afterwards signed a blank form of assignment indorsed on the back of the certificate of stock and

⁹³ Longyear v. Hardman, 219 Mass. 405, Ann. Cas. 1916 D 1200, 106 N. E. 1012.

⁹⁴ Colorado. Creighton v. Campbell, 27 Colo. App. 120, 149 Pac. 448.

Illinois. People v. Lihme, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051, aff'g 193 Ill. App. 341.

Nevada. State v. Leete, 16 Nev. 242.

New Jersey. In re Leslie, 58 N. J. L. 609, 33 Atl. 954; In re St. Lawrence Steamboat Co., 44 N. J. L. 529.

North Dakota. In re Argus Printing Co., 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

Wisconsin. Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

England. Pulbrook v. Richmond Consol. Min. Co., 9 Ch. Div. 610.

⁹⁵ People v. Lihme, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051, aff'g 193 Ill. App. 341.

⁹⁶ Kardo Co. v. Adams, 231 Fed. 950, 965, rev'g on other grounds 222 Fed. 967; Schmidt v. Mitchell, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; In re Santa Eulalia Silver Min. Co., 51 Hun (N. Y.) 640, 4 N. Y. Supp. 174.

⁹⁷ People v. Lihme, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051, aff'g 193 Ill. App. 341; In re Argus Printing Co., 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347. To same effect, see State v. Leete, 16 Nev. 242; Toronto Brewing Co. v. Blake, 2 Ont. (Can.) 175.

⁹⁸ Kardo Co. v. Adams, 231 Fed. 950, 965, rev'g on other grounds 222 Fed. 967.

handed it back to the trustee with a memorandum agreement that the share of stock "is not held by me under any claim of ownership and is not to be construed as any part of my private estate, but I acknowledge that I hold the same merely for the purpose of qualifying me as a director in said zinc company," but the stock was transferred to the director on the books of the company and remained in his name on such books, he is eligible as director.⁹⁹

A contrary rule at one time prevailed in New York to some extent. Under the New York statute requiring that the directors of every stock corporation shall be chosen from the stockholders, and providing that, if a director shall cease to be a stockholder, his office shall become vacant, it has been held that, to be qualified as a director, one must be the beneficial as well as the legal holder of stock, and that one holding the legal title merely as trustee, the beneficial interest being in another, is not qualified.¹ In another case, where stock was transferred to a person for the sole purpose of qualifying him as a director, but the shares of stock were immediately assigned back to the true owner in blank, it was held by the New York Court of Appeals that, although his name appears upon the books of the corporation as record holder of the stock, he is not such in fact, and is not eligible even under a by-law making a "holder or owner" of stock eligible. Justice Werner, in delivering the opinion of the court, said that "it was simply a fictitious transfer, by which it was thought to comply with the naked letter of the law. * * * Their names appeared upon the books of the company as stockholders, to be sure, and that was doubtless conclusive upon the inspectors of election, both as to the right of these apparent holders to vote upon the stock, and as to their eligibility to the offices of directors or trustees. But that record is not binding upon the court in such a proceeding as this, when the statute has expressly conferred the power and imposed the duty to make an investigation of the facts and give judgment accordingly."² In this case, however, the court held that although a by-law or charter provision exists that no person shall be a director or trustee who is not a "holder or owner" of at least one share of stock, yet when a transfer of stock is made to qualify

⁹⁹ People v. Lihme, 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051, aff'g 193 Ill. App. 341.

¹ Chemical Nat. Bank of New York v. Colwell, 132 N. Y. 250, 30 N. E. 644; In re Elias, 17 N. Y. Misc. 718, 40 N. Y. Supp. 910. Compare Budd v. Munroe, 18 Hun (N. Y.) 316; Langan

v. Francklyn, 29 Abb. N. Cas. 102, 20 N. Y. Supp. 404.

² In re George Ringler & Co., 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593, rev'g 145 N. Y. App. Div. 361, 130 N. Y. Supp. 62, aff'g 70 N. Y. Misc. 581, 127 N. Y. Supp. 938.

one to be a director "and the transferee actually holds the stock during his incumbency of office, such transferee is a stockholder, within the purview of the law."³

In Ohio it was held that persons to whom stock was issued gratuitously were not eligible.⁴

The reasons pro and con are discussed by Justice Vinje in a Wisconsin decision as follows: "A rule requiring that the equitable or beneficial interest in the stock should be in a person in order to render him eligible as an officer would exclude all trustees from acting as corporate officers and in a large measure debar them from investing trust funds in corporate enterprises because they could not adequately protect such funds by participating in the active management of the business. The reason given for a contrary view is that officers of a corporation should be personally interested in its welfare, and that can be the case only when the legal and beneficial interest unite in the same person. We do not so consider it. Trust duties are some of the most sacred duties there are, and the confidence reposed through them is seldom abused. Even where stock is transferred for the express purpose of qualifying one to hold a corporate office the person so transferring it is personally interested in the sound management of the corporation and would be unlikely to jeopardize his interest by placing the stock in incompetent hands. The rule that merely a legal title qualifies is more in consonance with present business requirements and is fraught with no undue hazard to stockholders."⁵

§ 1773.—Necessity for making certain payments on stock. By-laws sometimes provide that at least a certain number of months' dues on instalment stock must be paid by stockholders before they are eligible to act as directors. In such a case, the Supreme Court of Pennsylvania said: "In enacting the by-law providing that no one on whose stock three months' dues had not been paid should be eligible to the directorship, the company probably intended that no one should be a director who had not been a stockholder for three months. We, however, give the respondents the benefit of the literal rendering of the law. If, however, they are allowed to prepay, and become eligible the day they subscribe they cannot complain if they are held to a strict compliance with the by-law."⁶

³In re George Ringler & Co., 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593.

⁴Bartholemew v. Bentley, 1 Ohio St. 37.

⁵Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 150 N. W. 1101, 149 N. W. 754.

⁶Com. v. Stevenson, 200 Pa. 509, 50 Atl. 91, holding it insufficient that

§ 1774. — **Transfer of stock not registered.** It has been held that when a director is required to be a stockholder, and by statute stock is transferable only on the books of the corporation, he must appear as a stockholder on the books of the corporation, and that a transferee whose transfer is not registered is not eligible.⁷ But registration is not necessary, in the absence of such a statute.⁸

§ 1775. — **Bankrupt stockholder.** A bankrupt is eligible where his stock stands in his name on the books of the corporation, and he is entitled to vote the same, although the title may have vested in the assignee under the bankruptcy law.⁹

§ 1776. — **Subsequent acquisition of stock.** The fact that a person is not a stockholder at the time of his election or appointment to office does not disqualify him, if he becomes a stockholder before entering upon the duties of the office.¹⁰

§ 1777. — **Effect of disposing of stock after election.** It is generally held that a person ceases to be a director or other officer at once, without any steps being taken, on his disposing of his stock, where he is required to be a stockholder.¹¹

§ 1778. **Residence or citizenship.** Sometimes, by statute, the directors of a corporation, or a certain number of them, are expressly required to be residents or citizens of the state, or of the United States.¹² But in the absence of such a requirement, residence or

directors had asked secretary to pay such amount for them, where he did not enter or make such payments until several days after the election.

⁷In *re* Argus Printing Co., 1 N. D. 434, 451, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

⁸In *re* St. Lawrence Steamboat Co., 44 N. J. L. 529; *State v. Smith*, 15 Ore. 98, 15 Pac. 137, 386, 14 Pac. 814.

⁹*State v. Ferris*, 42 Conn. 560.

One having shares in his name, although he has been adjudicated a bankrupt and a trustee elected, is qualified, where the shares have not been transferred upon the books of the company. *Sutton v. English & C. Produce Co.*, [1902] 2 Ch. Div. 502;

Pulbrook v. Richmond Consol. Min. Co., 9 Ch. Div. 610.

¹⁰*Greenough v. Alabama Great Southern Ry. Co.*, 64 Fed. 22; *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 95 Atl. 895. But see *Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 105 Pac. 940, where the director acquired the necessary shares of stock the day after election but he was declared disqualified immediately after the vote was counted, and another chosen in his place.

¹¹See § 1806, *infra*.

¹²See *Horton v. Wilder*, 48 Kan. 222, 29 Pac. 566; *State v. Smith*, 15 Ore. 98, 15 Pac. 137, 386, 14 Pac. 814;

citizenship is not necessary.¹³ A resolution not made a part of the by-laws that citizens only may be elected trustees may be revoked at any time, and upon revocation anybody eligible under the law may be elected to fill the vacancies.¹⁴

§ 1779. Effect of bankruptcy. The bankruptcy of a person who is a director or other officer of a corporation does not, in the absence of express provision to such effect, disqualify him to hold the office, or in any way affect the validity of his acts in performing its duties.¹⁵ Bankruptcy, however, is sometimes expressly declared a ground of disqualification by the charter or by-laws.¹⁶

Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620.

"After considering the many cases cited on the subject, I cannot convince myself that a person who maintains in Pennsylvania a home for himself and wife, who habitually sleeps there, takes part of his meals there, who has been officially denied the right of citizenship in Delaware on the ground that he was not a resident of Delaware, can be deemed to be a resident of Delaware within the meaning of the act requiring at least one of the directors of a corporation to be a resident of Delaware, though he be and has for many years been the manager of a corporation whose only place of business is in Delaware, and though he be habitually in attendance at that place of business during business hours. According to the natural, ordinary and usual meaning of the word 'resident,' a man is a resident of the locality in which he occupies with his wife a dwelling house, which he regards as his home, and where he habitually sleeps and stays when not engaged in his business occupation, and is none the less a resident of that locality because his place of business is in another locality. There is no need to strain the natural meaning of the word used in the act. Waples

was not at any time material in this case a resident of the state of Delaware." *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 98 Atl. 943.

¹³ *Connecticut*. *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

Illinois. *North & South Rolling Stock Co. v. People*, 147 Ill. 234, 24 L. R. A. 462, 35 N. E. 608.

Pennsylvania. *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

South Carolina. *Kerchner v. Gettys*, 18 S. C. 521.

West Virginia. *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351, 18 S. E. 620.

¹⁴ *Sorrentino v. Ciletti*, 75 N. Y. App. Div. 507, 78 N. Y. Supp. 322.

¹⁵ *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss 537, Fed. Cas. No. 635; *State v. Ferris*, 42 Conn. 560; *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397, rev'g *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719.

¹⁶ It has been held, however, that a charter or by-law providing that the office of a director shall become vacant if he becomes bankrupt does not preclude the election as a director of a person who at the time is an undischarged bankrupt. *Dawson v. African Consol. Land & Trading Co.*, [1898] 1 Ch. 6, 67 L. J. Ch. 47.

§ 1780. Married women. Since statutes have removed the disabilities of married women, they may be directors, or other officers, in the absence of express provision to the contrary, although it seems that they could not be so at common law.¹⁷

§ 1781. Holding of other office. The same person may hold several offices, as president and treasurer or cashier, and a person who holds another office may also be a director, unless there is some express provision to the contrary.¹⁸ Sometimes, however, there are provisions to the contrary,¹⁹ and infrequently the charter or by-laws prohibit directors from acting as directors of other corporations of a similar character.²⁰

§ 1782. Who may decide as to eligibility. Unless expressly authorized, the inspectors at a corporate election have no power to pass upon the eligibility of persons for whom it is proposed to vote.²¹

§ 1783. Effect of want of eligibility. It has been held that votes cast for a person who is not eligible as a director or other officer under the charter or statute cannot elect him, and that he does not become even a *de facto* officer.²² In any event, one not eligible as director because not owning any stock is not a *de facto* director where

¹⁷ *People v. Webster*, 10 Wend. (N. Y.) 554.

¹⁸ *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

Person may be secretary of two companies. *Mobile, J. & K. City R. Co. v. Owen*, 121 Ala. 505, 25 So. 612.

Officer may also be receiver of the corporation. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

¹⁹ If the charter of a corporation provides that a person who shall accept and hold any other office shall be disqualified from being and cease to be a director, a person who is elected director when he holds another office, but who does not afterwards claim or receive any salary as such other officer, is not disqualified to be director, for he will be regarded as having ceased to hold the other offices after his election as director, and

it is immaterial that he continued to voluntarily discharge the duties of the other office. *Iron Ship Coating Co. v. Blunt*, L. R. 3 C. P. 484, 37 L. J. C. P. 273.

²⁰ *State v. Buchanan*, Wright (Ohio), 233, holding provision applicable to directors of nonresident corporations.

²¹ *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

²² *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 1 L. R. A. 781, 19 N. E. 353; *In re Newcomb*, 18 N. Y. Supp. 16; *Jenner's Case*, 7 Ch. Div. 132; *Hamley's Case*, 5 Ch. Div. 705.

Compare, however, *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131.

he never accepted the office, nor performed any act as director, nor ever held himself out as director in any way.²³ It does not follow, however, that ineligibility of a person who has been elected an officer will invalidate his acts as such. Persons dealing with a corporation are not required to ascertain whether the directors or other officers of the corporation have the qualifications prescribed by the by-laws. Acts of a director or other officer are valid, therefore, so far as third persons are concerned, although he may not possess the qualifications prescribed by the by-laws, if he has been elected or appointed by the corporation and permitted to act for it.²⁴ If directors are not stockholders, as required by statute, yet nevertheless if this is known to all the stockholders at the time of their election, the right of the directors to file a petition for dissolution of the corporation cannot be attacked by the stockholders.²⁵ In any event, where a stockholder is not eligible to election as director, by provision of the by-laws, until certain instalments have been paid on his stock, the election of a stockholder as director, the provision not having been complied with, may be set aside.²⁶

§ 1784. Disqualification as defense to liability for acts done or omitted. A person cannot set up his own disqualification to be a director or other officer in a corporation, in order to escape liability as such to the corporation or its creditors for acts done by him in such capacity.²⁷

²³ *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 117, 43 Pac. 585.

²⁴ *Despatch Line of Packets v. Belamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203, where it was held that a mortgage authorized by the directors of a corporation was not invalid because one of them was not a proprietor or stockholder, as required by the by-laws of the corporation, although it was said that he was not a de facto director. See also *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397, rev'g *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719; *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380.

The fact that all of the directors were nonresidents, even where required to be residents, was held not

to invalidate their election nor affect the validity of their acts as a board of directors. *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 98 Atl. 943.

²⁵ *In re Manóca Temple Ass'n*, 128 N. Y. App. Div. 796, 113 N. Y. Supp. 172.

²⁶ *Com. v. Stevenson*, 200 Pa. 509, 50 Atl. 91.

²⁷ *Stetson v. Northern Inv. Co.*, 104 Iowa 393; *McDowall v. Sheehan*, 129 N. Y. 200, 29 N. E. 299; *Easterly v. Barber*, 65 N. Y. 252; *Donnelly v. Pancoast*, 15 N. Y. App. Div. 323, 44 N. Y. Supp. 104.

One whose name appears on the books of the corporation as the owner is presumed to be the owner. *Finn v. Brown*, 142 U. S. 56, 35 L. Ed. 936.

IV. ACCEPTANCE OF OFFICE, BOND AND OATH OF OFFICE

§ 1785. Acceptance of office. To make one an officer of a corporation, his consent, as well as an appointment or election, is necessary. A person who is elected without his knowledge, and who does not accept the office, or act as an officer, is not an officer, although he may have received stock after his election.²⁸ In a Kentucky case the court said: "One elected to an office must accept it in some way before he can be said to have become an officer. And he must accept it during the term for which he was elected. Holding over applies only to officers who were elected and installed during the term."²⁹

No formal acceptance, however, is necessary. If a person enters upon the duties of an office after his election or appointment, it is a sufficient acceptance, or, rather, sufficient ground for implying acceptance, in the absence of proof to the contrary.³⁰ Indeed, acceptance of an office may be presumed without any act, in the absence of evidence to the contrary.³¹

§ 1786. Oath of office. If required by statute, officers must take an oath of office.³² A statute or the charter of a corporation may require officers to take an oath to perform faithfully their duties, and, in such a case, until they have taken the oath, they are not de jure officers.³³ The fact that an officer has failed to take the oath, however, will not prevent him from being an officer de facto.³⁴ The object of a statute requiring an oath has been said to be "to protect the stockholder against the frauds and wrongs of the directors, under the presumption that they would perform their duty under oath more faithfully than without it."³⁵ However, a provision in the statute requiring the oaths to be filed in the office of the county clerk is to be distinguished from the requirement as to taking the oath. As said

²⁸ *Rozecrans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585.

²⁹ *Bramblet v. Commonwealth Land & Lumber Co.*, 26 Ky. L. Rep. 1176, 83 S. W. 599.

³⁰ *Blake v. Bayley*, 16 Gray (Mass.) 531; *Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278.

If the clerk of a corporation is present when a motion approving his election is passed, and himself records the vote, his acceptance of the office will be presumed. *Delano v. Trustees of Smith Charities*, 138 Mass. 63.

³¹ *Halpin v. Mutual Brewing Co.*, 20 N. Y. App. Div. 583, 47 N. Y. Supp. 412; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

³² *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940.

³³ *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940.

³⁴ *Simpson v. Garland*, 76 Me. 203; *Hastings v. Blue Hill Turnpike Corporation*, 9 Pick. (Mass.) 80.

³⁵ *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 265, 60 Pac. 940.

by Justice McCarty, in a Utah decision, "the filing of the oath does not make it any more binding, nor would the fact that it is filed be likely to add to its influence, on the directors when in the performance of their duties. The object of the statute in requiring the oath to be filed undoubtedly is to give notice to all parties who may have dealings with a corporation that its officers have taken and subscribed to an oath 'that they will not do nor consent to the doing of any matter or thing relating to the business of the corporation with intent to defraud any stockholder or creditor of the public.' While this provision of the statute is an important one, and should be observed and followed, yet when, as in this case the oath was in fact taken and subscribed to by the directors with a bona fide intention of filing it later, and which was done, we are of the opinion, and so hold, that the irregularity is not of sufficient importance to authorize a court of equity to set aside the proceedings [assessment of stock]; and especially so when, as in this case, no one appears to have been misled or injured thereby."³⁶

§ 1787. Bonds—General considerations. Ordinarily, corporate officers are not required to give bonds. However, the treasurer is sometimes bonded, and statutes or by-laws often require certain officers of banks or other corporations to give a bond. Generally, however, the necessity for giving bonds is confined to bank officers. It has been said that "the custom of requiring bonds from the various officers may probably be considered as universal among banking institutions."³⁷ On the other hand, the power to take bonds from directors or other corporate officers is inherent in every corporation.³⁸ And the fact that no statute or charter provision requires a bond of an officer does not preclude the right of a corporation to take a bond; and if a statute afterwards requires a bond it does not invalidate such common-law bond so given.³⁹ In other words, even where there is no statute nor charter provision relating to official bonds, they may be required by a by-law or by a resolution of the directors, where not in conflict with any statute or charter provision.

It is not within the scope of this work to consider at length the questions relating to fidelity bonds, embracing as they do, not only the bonds of corporate officers but also the bonds of corporate agents

³⁶ Hatch v. Lucky Bill Min. Co., 25 Utah 405, 414, 71 Pac. 865.

Cresson, 12 Serg. & B. (Pa.) 306.

³⁷ Morse, Banks and Banking, § 17.

³⁹ Lionberger v. Krieger, 88 Mo. 160, 168.

³⁸ Bank of Northern Liberties v.

and employees and in addition the bonds of public officers. For the general rules governing the subject of bonds and suretyship, reference should be made to standard textbooks relating to such subjects.⁴⁰ Space does not permit the reiteration of elementary rules governing all kinds of bonds nor the elementary rules governing the rights and liabilities of sureties, including such rules as that a bond may be valid as a common-law bond although invalid as a statutory bond, the liability of the surety is strictly construed in his favor, etc.

The rules governing bonds of public officers⁴¹ are applicable to some extent but not in their entirety, since there are many points of difference between officers of a private corporation and public officers, which affect more or less the rights and liabilities on the bond.

It seems that it is not negligence for directors of a bank to refuse to require a bond of their cashier.⁴² Recording of the bond is not necessary unless required by statute.⁴³

§ 1788. — Form, contents and time of execution. If statutes or by-laws require trustees to give a joint or several bond, they may unite in a joint bond or each trustee may give a several bond.⁴⁴ The bond need not express any consideration.⁴⁵ It is not invalid because executed after the officer has entered upon his duties,⁴⁶ nor because of a misnomer of the corporation in omitting the words "and company,"⁴⁷ nor because the condition varies from the form required by the statute.⁴⁸ It need not be in the exact language of the statute.⁴⁹ The rules and regulations existing at the time of the execution of the bond do not become terms and conditions thereof, unless such an intention is expressed upon the face of the bond.⁵⁰ The bond must be signed by the officer as well as the sureties.⁵¹

⁴⁰ See Brandt, Suretyship and Guaranty; Walker, Fidelity Bonds (combining text and digest of the cases relating to corporate fidelity bonds up to 1909).

⁴¹ See Mechem, Public Officers, §§ 263-314.

⁴² Robinson v. Hall, 59 Fed. 648, 652.

⁴³ Burgess v. Pue, 2 Gill (Md.) 254.

⁴⁴ Coombs v. Harford, 99 Me. 426, 59 Atl. 529.

⁴⁵ Fourth Nat. Bank v. Spinney, 47 Hun (N. Y.) 293.

⁴⁶ Bank of United States v. Brent, Fed. Cas. No. 910.

Rule applied to bookkeeper where the execution of the bond was necessary to render the appointment effectual. Fourth Nat. Bank v. Spinney, 47 Hun (N. Y.) 293.

⁴⁷ Pendleton v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 171.

⁴⁸ Grocers' Bank v. Kingman, 16 Gray (Mass.) 473; State Bank v. Locke, 15 N. C. 529.

⁴⁹ Bank of Carlisle v. Hopkins, 1 T. B. Mon. (Ky.) 245, 15 Am. Dec. 113.

⁵⁰ Richmond & P. R. Co. v. Kasey, 30 Gratt. (Va.) 218.

⁵¹ North St. Louis Building & Loan Ass'n v. Obert, 169 Mo. 507, 69 S. W.

Where a statute requires certain officers of particular corporations to execute a bond "conditioned that they will honestly and faithfully discharge their several duties as such officers * * * during their continuance in office," a bond taken pursuant thereto is an "official" bond within the meaning of a statute providing that no official bond shall be void for want of form or substance but the bond shall be binding "to the full extent contemplated by the law requiring the same"; and hence a bond given under such a statute but not on its face creating as broad a liability as that provided for by the statute nevertheless binds the principal and surety just as if the condition prescribed by the statute was contained therein.⁵²

§ 1789. — Director as surety. Independently of statute, a bond is not invalid because several of the directors whose duty it was to examine and approve the bond were themselves sureties thereon.⁵³ And where a statute provides that the bond shall not be signed by a director, it is nevertheless valid though so signed where he ceases to be a director before the acceptance of the bond;⁵⁴ but in case of such a statute the agreement of a director to indemnify others against loss to induce them to become sureties is void, as is a mortgage given to secure the performance of such an obligation.⁵⁵

§ 1790. — Fraud in inception of bond. Fraudulent statements, reports or concealment of the corporation, to induce the sureties to execute the bond, invalidate it.⁵⁶ Thus, a fraudulent concealment by the corporation that the officer was a defaulter at the time the bond was given and accepted vitiates the bond, on the theory that fraud vitiates all contracts; but mere failure of the corporation to investigate his accounts before taking the bond does not constitute such fraud.⁵⁷ Incorrect reports of the condition of a national bank, made as required by statute, do not discharge a surety on the theory of false representations inducing him to become surety.⁵⁸

1044. *Contra*, see *Bank of Northern Liberties v. Cresson*, 12 Serg. & R. (Pa.) 306.

⁵² *United States Fidelity & Guaranty Co. v. Poetker*, 180 Ind. 255, L. R. A. 1917 B 984, 102 N. E. 372.

⁵³ *Amherst Bank v. Root*, 2 Metc. (Mass.) 522, 534.

⁵⁴ *Franklin Bank v. Cooper*, 36 Me. 179.

⁵⁵ *Jose v. Hewett*, 50 Me. 248.

⁵⁶ See *Fidelity & Deposit Co. v.*

Courtney, 186 U. S. 342, 46 L. Ed. 1193.

⁵⁷ *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343. Compare, however, *Aetna Indemnity Co. v. Farmers' Nat. Bank of Boyertown*, Pennsylvania, 169 Fed. 737, 740, where it is said that if material assurances were untrue "or were made without proper effort on their part to inform themselves," the bond is unenforceable.

⁵⁸ *Lieberman v. First Nat. Bank of*

§ 1791. — Acceptance. In order to become operative the bond must be accepted,⁵⁹ but the acceptance need not be formal,⁶⁰ and hence need not be evidenced by a vote.⁶¹ Thus, the fact that the bond of an assistant cashier was delivered to the cashier who was one of the directors, and that the assistant cashier entered upon the duties of his office under such bond, and that such bond was retained by one of the directors of the bank, has been held sufficient to establish the acceptance of the bond, although no acceptance is shown by the minutes of the board of directors.⁶² Where a bond is conditioned to become effectual on the date of its approval "by the proper authority," the approval need not be made at a meeting of the directors, where they all in fact approved thereof.⁶³

§ 1792. — Release of sureties. Whether a surety is released because of a change of the risk depends upon the rules governing suretyship in general. An increase of the capital stock of the corporation does not release the sureties, it has been held in Delaware⁶⁴ and Missouri;⁶⁵ but in Massachusetts the contrary has been held.⁶⁶

§ 1793. — Effect of promotion or change of duties. Bonds of agents and officers of private corporations, it has been said, are governed "by principles altogether different from those applicable to official bonds, as regards the liability of the sureties; and yet a sort of analogy appears. The powers and duties of a public officer may be enlarged or diminished by legislation from time to time, and the rights and liabilities of the sureties in his bond contract and expand in conformity with the variations of his powers; for the law enters into the contract, and the surety is presumed to have known, con-

Wilmington (Del. Ch.), 40 Atl. 382. Contra, see *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50.

⁵⁹ *Franklin Bank v. Cooper*, 36 Me. 179.

⁶⁰ *United States. Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Rankin v. Tygard*, 198 Fed. 795.

Kentucky. *Pryse v. Farmers' Bank*, 17 Ky. L. Rep. 1056, 33 S. W. 532.

Maryland. *Union Bank of Maryland v. Ridgely*, 1 Harr. & G. 324.

Massachusetts. *Amherst Bank v.*

Root, 2 Metc. 522; *Dedham Bank v. Chickering*, 3 Pick. 335.

New York. *Bostwick v. Van Voorhis*, 91 N. Y. 353.

⁶¹ *Lexington & W. C. R. Co. v. Ellwell*, 8 Allen (Mass.) 371.

⁶² *Fiala v. Ainsworth*, 63 Neb. 1, 93 Am. St. Rep. 420, 88 N. W. 135.

⁶³ *Rankin v. Tygard*, 198 Fed. 795, 805.

⁶⁴ *Bank of Wilmington & Brandywine v. Wollaston*, 3 Harr. (Del.) 90.

⁶⁵ *Lionberger v. Krieger*, 88 Mo. 160, 165.

⁶⁶ *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473.

templated, and foreseen the possibility of such variation and contracted with reference thereto. In like manner the surety of an agent or officer of a private corporation is presumed to have known the stockholders and board of directors might diminish or enlarge the scope of the authority of such agent or officer, and are deemed to have obligated themselves for the care, diligence, skill, and honesty of the principal in the bond respecting the performance of the duties imposed upon him at the time of the execution thereof, and also such duties as may subsequently be devolved upon him in the exercise of corporate power."⁶⁷ If an officer who has given a bond is promoted to a higher office with greater responsibilities, the sureties are released so far as defaults connected with the higher office are concerned.⁶⁸ If the duties are merely temporarily increased or changed, the sureties are liable.⁶⁹ And the mere fact of the imposition upon the officer of other and greater responsibilities and duties, in no way interfering with or modifying those imposed by the original appointment, does not discharge the surety so far as the original duties are concerned.⁷⁰ To have that effect, "the new duties or the new office must be such as to interfere with or modify the old. If they are not, the sureties cannot complain."⁷¹

§ 1794.—What constitutes breach of bond. The liability, of course, depends upon the language of the bond.⁷² The terms of the

⁶⁷ Wait v. Homestead Bldg. Ass'n, 76 W. Va. 431, 85 S. E. 637.

⁶⁸ Garnett v. Farmers' Nat. Bank, 91 Ky. 614, 620, 34 Am. St. Rep. 246, 16 S. W. 709; American Tel. Co. v. Lennig, 139 Pa. St. 594, 604, 21 Atl. 160; Northwestern Nat. Bank v. Keen, 14 Phila. (Pa.) 7.

General rules, see 1 Brandt, Suretyship and Guaranty, §§ 433-436.

⁶⁹ Detroit Sav. Bank v. Ziegler, 49 Mich. 157, 43 Am. Rep. 456, 13 N. W. 496, which is the leading case on this phase of the subject and in which the opinion of Justice Cooley clearly shows the reason for the exception; American Tel. Co. v. Lennig, 139 Pa. St. 594, 602, 21 Atl. 160.

"Where there are several officers of an institution, as of a bank, and it is the customary and usual course of business at such institutions for one

officer to temporarily discharge the duties of another in case of the latter's absence or sickness, a surety of the former is usually liable for default made while his principal is thus temporarily filling the place of another officer." Johnson v. Eaton Milling & Elevator Co., 18 Colo. 331, 32 Pac. 825.

⁷⁰ Garnett v. Farmers' Nat. Bank, 91 Ky. 614, 34 Am. St. Rep. 246, 16 S. W. 709; Home Sav. Bank v. Traube, 75 Mo. 199, 42 Am. Rep. 402; Harrisburg Savings & Loan Ass'n v. United States Fidelity & Guaranty Co., 197 Pa. 177, 190, 46 Atl. 910; American Tel. Co. v. Lennig, 139 Pa. St. 594, 604, 21 Atl. 160.

⁷¹ Shackamaxon Bank v. Yard, 150 Pa. St. 351, 358, 24 Atl. 635.

⁷² Illinois. See Chicago, B. & Q. R. Co. v. Bartlett, 120 Ill. 603, 11 N. E.

bond may be such as to create liability even for acts done before the bond was executed.⁷³ The condition in a bond that the officer shall "well and truly execute the duties of" the office, includes not only honesty, but reasonable skill and diligence. As said by Mr. Justice Story, "if the duties are performed negligently and unskillfully—if they are violated, from want of capacity or want of care, they can never be said to be 'well and truly executed.' The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties would be utterly illusory if we were to narrow down its import to a guarantee against personal fraud only."⁷⁴ If the officer loans money without authority and fails to account for it, the sureties are liable although the borrowers are solvent.⁷⁵ Liability on the bond of an assistant cashier may be predicated on his acts in aiding in, or conniving at, misappropriations of the funds of the bank by the cashier.⁷⁶ The sureties on the bond of the manager of an elevator company are liable for losses sustained by option dealings in grain, where in violation of a corporate resolution.⁷⁷ The liability on the bond of a bank president who converted bank funds cannot be evaded on the theory that the conversion was in his capacity as bookkeeper, where his acts as bookkeeper were merely effectually to conceal the misappropriation.⁷⁸ The fact that the cashier who gave the bond was

867, aff'g 20 Ill. App. 96, bond of paymaster of railroad.

Iowa. See *Jewel Tea Co. v. Shepard*, 172 Iowa 480, 154 N. W. 755, construing bond of agent of tea company.

Kansas. *McIntyre v. American Surety Co. of New York*, 97 Kan. 629, 156 Pac. 690.

Missouri. *Gray v. Davis*, 89 Mo. App. 450.

Tennessee. *Kendrick-Roan Grain & Elevator Co. v. Weaver*, 128 Tenn. 609, 163 S. W. 814.

Wisconsin. *First Ave. Land Co. v. Hildebrand*, 103 Wis. 530, 79 N. W. 753.

There is no breach of the duties of a treasurer that "he exposed property of the corporation to be attached by one of its creditors." *The Literati v. Heald*, 141 Mass. 326, 5 N. E. 147.

The sureties are liable for the performance of the duties of the office of treasurer, although the law designates the officer as "secretary, who shall act as treasurer." *Western Boatmen's Benev. Ass'n v. Kribben*, 48 Mo. 37, 39.

⁷³ *McMullen v. Winfield Building & Loan Ass'n*, 64 Kan. 298, 56 L. R. A. 924, 91 Am. St. Rep. 236, 67 Pac. 892.

⁷⁴ *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 69, 7 L. Ed. 47.

⁷⁵ *Western Boatmen's Benev. Ass'n v. Kribben*, 48 Mo. 37, 39.

⁷⁶ *Fiala v. Ainsworth*, 63 Neb. 1, 93 Am. St. Rep. 420, 88 N. W. 135.

⁷⁷ *Farmers' Elevator Co. of Waverly v. Swanson*, 33 S. D. 377, 146 N. W. 586.

⁷⁸ *Jackson Exch. Bank v. Russell*, 181 Mo. App. 698, 164 S. W. 694.

not a director, as required by statute, does not invalidate the bond.⁷⁹

There is no liability on the bond for misdeeds as a different officer of another company, where the officer holds two offices,⁸⁰ and the sureties are not bound for the acts of an officer in connection with business outside the charter powers of the corporation.⁸¹ But it is no defense that the securities converted by the officer were obtained and held in violation of a statute, where the statute contains no penalty for its violation.⁸²

§ 1795. — Negligence of obligee or officers as defense. It is no defense to an action on the bond of an officer that the directors of the corporation or other officers have been negligent in connection with the breach of the bond.⁸³ Thus, it is no defense that the omissions of the officer whose bond is sued upon were due to the wrong, connivance or permission of the board of directors.⁸⁴ The adoption of the principle that the sureties are not liable by reason of the culpable negligence of the directors and their agents, would lead to the result, said Chief Justice Shaw in an early Massachusetts case, "that the negligence and fault of one agent, or set of agents, for a corporation, would deprive them of a remedy against another for their default. * * * The idea that the cashier is excused by the act or negligence of the directors, arises from considering the board of directors as the corporation, and then applying a very equitable principle, that

⁷⁹ *Lionberger v. Krieger*, 88 Mo. 160, 168.

⁸⁰ *Northwestern Townsite Co. v. Fidelity & Deposit Co. of Maryland*, 180 Fed. 702; *Johnson v. Eaton Milling & Elevator Co.*, 18 Colo. 331, 32 Pac. 825.

⁸¹ *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147, 165; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129.

⁸² *Walden Nat. Bank v. Birch*, 130 N. Y. 221, 14 L. R. A. 211, 29 N. E. 127.

⁸³ *United States. Phillips v. Bos-sard*, 35 Fed. 99, 100.

Delaware. *Lieberman v. First Nat. Bank of Wilmington (Del. Ch.)*, 40 Atl. 382.

Iowa. *Ida County Sav. Bank v. Seidensticker*, 92 N. W. 862.

Kansas. See *McMullen v. Winfield Building & Loan Ass'n*, 64 Kan. 298,

56 L. R. A. 924, 91 Am. St. Rep. 236, 67 Pac. 892.

Kentucky. See *Grant County Deposit Bank v. Littell's Ex'x*, 108 Ky. 442, 56 S. W. 669. Compare *Deposit Bank of Midway's Assignee v. Hearne*, 104 Ky. 819, 48 S. W. 160.

Massachusetts. *Amherst Bank v. Root*, 2 Metc. 522, 541. See also *Tap-ley v. Martin*, 116 Mass. 275.

Missouri. *State v. Atherton*, 40 Mo. 209.

If an officer gives a bond conditioned that he will "honestly, faithfully, and efficiently" perform his duties, negligence on the part of the directors making themselves liable is no excuse. *Fiala v. Ainsworth*, 68 Neb. 308, 94 N. W. 153.

⁸⁴ *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46, 71, 7 L. Ed. 47.

one ought not to recover of a surety damages caused by himself. We think the principle does not apply.”⁸⁵

§ 1796. — Limiting liability to losses discovered within certain time. If the bond provides that there shall be no liability for loss occurring by acts of the officer unless discovered during the term of the bond or within a certain number of months thereafter, the failure to discover the misdeeds of the bonded officials is not excused by the fact that they conspired together to conceal their fraud;⁸⁶ and where the loss is not discovered within the time fixed there can be no recovery.⁸⁷

§ 1797. — Notice to sureties of misconduct after execution of bond. Oftentimes the bond requires the corporation to notify the sureties on becoming aware of particular misdeeds of the officer.⁸⁸ Sometimes the bond requires the corporation to report to the surety any knowledge it may obtain that the officer is unreliable, deceitful, dishonest or unworthy of confidence.⁸⁹ However, if the officer had been in his youth sentenced to the penitentiary for larceny, a condition in the bond requiring the corporation to report if the employee has ever been a “defaulter” does not apply.⁹⁰

§ 1798. — Duration of liability on bond. Of course a bond may, by its express terms, cover the whole period of office, including re-

⁸⁵ *Amherst Bank v. Root*, 2 Mete. (Mass.) 522, 541, disapproving *People v. Jansen*, 7 Johns. (N. Y.) 332, 5 Am. Dec. 275.

⁸⁶ *Larrabee v. Title Guaranty & Surety Co.*, 250 Pa. 135, L. R. A. 1916 F 709, 95 Atl. 416.

⁸⁷ See *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977.

Such a provision does not fix a period of limitation different from that prescribed by the statute, since it does not attempt to fix the time within which suit shall be brought; nor is the limitation against public policy. *Ballard County Bank's Assignee v. United States Fidelity & Guaranty Co.*, 150 Ky. 236, Ann. Cas. 1914 C 1208, 150 S. W. 1.

⁸⁸ *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1193;

Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co., 183 U. S. 402, 46 L. Ed. 253, rev'g 100 Fed. 559, holding that it was the duty of the corporation to give such notice although the officer asserted that he had ceased to speculate, which was the misdeed referred to; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977.

⁸⁹ See *Farmers' Bank of Deepwater v. Ogden*, 192 Mo. App. 243, 188 S. W. 201, 182 S. W. 501.

⁹⁰ “Information that one had served a term in the penitentiary for stealing a set of harness is not information that he is a ‘defaulter.’” *Farmers' Bank of Deepwater v. Ogden*, 192 Mo. App. 243, 188 S. W. 201, 182 S. W. 501.

elections.⁹¹ However, as a preface to the statements of law under this head, attention is called to the fact that if a corporation or its officer desires a bond which will cover all the time the officer shall continue in office, whether by holding over or by re-election, it is necessary to so word it that he who runs may read, since the courts have almost uniformly rejected language which would ordinarily be construed to make a bond a continuing one.⁹² Moreover, even where there is language in the condition carrying the liability beyond the time for which the principal is elected, it is construed with considerable strictness, and the sureties are held only for such time as is plainly and explicitly therein specified.⁹³ Thus, where a bond was for "the term for which he has been elected, and for and during such further time as he may continue therein by any re-election or otherwise," the sureties were held not liable for defaults occurring in years when, after being out of the office for a short time, the officer was again elected.⁹⁴ So where a treasurer's bond was for and during the term for which he has been elected "and during such further time as he may continue to hold said office," it was held, his election being for one year, that the quoted clause meant "such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and that it was not intended to cover the time under which he might hold office under any subsequent election."⁹⁵

In determining how long the bond is binding on the sureties, several phases of the question must be considered. First, where the bond is indefinite as to time, the office has no fixed duration, and the officer holds over without reappointment. Where an officer has no fixed term of office but holds his position at the pleasure of the board of directors, and there is no limitation as to time in the bond, it is held

⁹¹ *Coombs v. Harford*, 99 Me. 426, 59 Atl. 529; *Lionberger v. Krieger*, 88 Mo. 160; *Challenge Yearly Ben. Ass'n v. Weis*, 52 Pa. Super. Ct. 262.

If the bond fixes its duration as "for and during all the time he shall hold the office of cashier of the said bank," the sureties are liable for defaults so long as he remains cashier, although re-elected several times. *Westervelt v. Mohrenstecher*, 76 Fed. 118, 121, 34 L. R. A. 477.

⁹² It seems almost impossible to use strong enough words to influence the courts, since in one case such a phrase

as "forever, so long as he should occupy the position," was utterly disregarded, and no reference made thereto. See *First Nat. Bank v. Briggs' Assignees*, 69 Vt. 12, 37 L. R. A. 845, 60 Am. St. Rep. 922, 37 Atl. 231.

⁹³ *O'Brien v. Murphy*, 175 Mass. 253, 78 Am. St. Rep. 487, 56 N. E. 283.

⁹⁴ *Middlesex Mfg. Co. v. Lawrence*, 1 Allen (Mass.) 339.

⁹⁵ *O'Brien v. Murphy*, 175 Mass. 253, 78 Am. St. Rep. 487, 56 N. E. 283.

in Kansas that where no new appointment for the office was ever made, the bond is a continuing one; that "where a bond is general in form, and contains no limit of time as to the liability created, and is given to secure the faithful performance of the duties of an officer having no fixed term, the mere fact that the board appointing him holds for one year only will not limit the liability of the sureties to a year." ⁹⁶

Secondly, the question arises where the bond is indefinite as to its duration but the office is for a fixed period. The rule as to the duration of liability on a bond which governs in such case is well stated by Mr. Brandt in his valuable work on Suretyship and Guaranty as follows: "When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond, specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital, and the surety will only be liable for the time therein specified. The reason is that, taking the whole instrument together, it is but fair to presume that the parties had in contemplation only a liability for the time specified." ⁹⁷ The rule is stated by the Supreme Court of Missouri as follows: "If the term of office is prescribed, and the bond is conditioned without express limitation as to period, for the faithful performance of the principal's duties, and nothing else appears to give it a wider effect, it will be construed as intended to cover acts occurring only within the prescribed term. We thus, by construction read into the bond a limitation as to period. But if it appears from all the circumstances that the intention of the parties to the contract was that the bond, being unrestricted by its own terms, should cover the acts of the principal during his continuance in the office, whether by re-elections or holding over, we cannot give it the restricted construction. Of course, if the bond in express terms should limit its operation, we could not, from evidence beyond its face, enlarge its effect." ⁹⁸ The authorities are uniform, said Chief Justice Shaw in an early Massachusetts case, "that, when the office is annual, the parties to the bond are presumed, by law, to bind themselves accordingly, if there are no words inserted in the bond, clearly extending it to a future election." ⁹⁹

⁹⁶ Merchants' Bank of Ellis v. Honey, 58 Kan. 603, 50 Pac. 871.

⁹⁷ 1 Brandt, Suretyship and Guaranty, § 185.

⁹⁸ North St. Louis Building & Loan

Ass'n v. Obert, 169 Mo. 507, 514, 69 S. W. 1044.

⁹⁹ Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1.

This is the recognized and well settled rule.¹ So the fact that a statute provides that corporate officers shall be chosen annually "and shall hold their offices until others are chosen and qualified in their stead" does not change the character of the office from an annual one to one for an indefinite time, within this rule.² Furthermore, such words as "during his continuance in office" do not extend the liability beyond the year where the officer is elected for a year, notwithstanding the bond does not recite the term of office of the officer.³

Thirdly, the situation may arise where the bond is not definite as to its duration and where the term of office is not fixed, but where there is a custom to re-elect the officer every year. Where the bond in no way referred to its duration nor to the term of office of the officer, and the office itself was not for any fixed term, the bond has been held a continuing one in Massachusetts although the officer was appointed from year to year for several years, on the theory that a mere habit or usage of the directors to re-elect every year does not impart the legal character of annual duration to the office;⁴ but in Iowa the court distinguished the Massachusetts case on the theory that in

¹ Welch v. Seymour, 28 Conn. 387; Mutual Loan & Building Ass'n v. Price, 16 Fla. 204, 26 Am. Rep. 703; South Carolina Ins. Co. v. Smith; 2 Hill (S. C.) 589; State Treasurer v. Mann, 34 Vt. 371, 80 Am. Dec. 688.

Even if the bond uses the words "during his continuance in office," the liability is limited to the term for which the officer is elected and does not cover re-elections, where there is nothing to show that it was intended as a continuing security. Ulster County Sav. Inst. v. Ostrander, 163 N. Y. 430, 57 N. E. 627, aff'g 15 N. Y. App. Div. 173, 44 N. Y. Supp. 181, and explaining Ulster County Sav. Inst. v. Young, 161 N. Y. 23, 55 N. E. 483.

Where a bank director is annually re-elected, it cannot be said that he continues to act under his original election because of failure to give a new bond each time—the statute providing that no director shall enter upon, or discharge any of the duties of his office, until his bond has been

executed and approved. State Treasurer v. Mann, 34 Vt. 371, 376, 80 Am. Dec. 688.

² Welch v. Seymour, 28 Conn. 387; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1, 3.

If the liability is limited to the "legal term of said office," and the term of office was fixed at one year subject to removal at pleasure, and until a successor was elected, the liability does not extend beyond the year. Rankin v. Tygard, 198 Fed. 795, 800.

³ Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1, 5; Blades v. Dewey, 136 N. C. 176, 103 Am. St. Rep. 924, 1 Ann. Cas. 379, 48 S. E. 627.

"The same rule is applied where the office or employment is by law or usage limited to a certain time, even if that fact be not recited in the bond." O'Brien v. Murphy, 175 Mass. 253, 255, 78 Am. St. Rep. 487, 56 N. E. 283.

⁴ Amherst Bank v. Root, 2 Mete. (Mass.) 522, 540.

that case the statute authorized the officer to "retain his office until removed therefrom" while in the Iowa case the statute provided that the officer should hold his office "at the pleasure of the board," on the theory that "a statute which unequivocally gives the cashier the right to retain his office until removed, may, without violence to the meaning of these words, be held to imply an absence of authority in the board of directors to require an annual appointment or reappointment of a cashier whose services are found to be satisfactory, while a provision that he shall hold his office at 'the pleasure of the board' does not have that obvious effect," and held that the bond was limited to one year where the actual practice of the board was to appoint the cashier annually.⁵ In Vermont, where no term of office for the cashier was fixed but a by-law provided that he should hold office during the pleasure of the board, and he in fact was re-elected annually, it was held, as against the objection that the various re-elections did not create new terms, but were simply expressions of the will of the directors that he should continue in office, that the sureties were not liable after the end of the first year.⁶ On the other hand, there is an able opinion by Justice Sanborn in the federal courts where he held that inasmuch as the federal statutes expressly provide that the cashier of a national bank shall hold office subject to the pleasure of the board of directors, a by-law providing for his annual election is nugatory as is an annual reappointment pursuant thereto; and that in such a case a bond conditioned "for and during all the time he shall hold the said office," is binding after the year and during all the years when the officer was annually reappointed, overruling the contention that because the officer was annually reappointed it converted his term of office from a continuous term, at the will of board of directors, into annual terms.⁷ In Delaware where there is no fixed term of office but the officer is required by statute to give bond, and the officer is annually re-elected, it is held that the term of office did not expire at a new election but continued until the officer was qualified by giving a new bond.⁸

Other decisions of the courts embrace more or less different situations. If the bond expressly provides that it shall cover "successive appointments" and be binding "during his continuance in office" it

⁵ *Ida County Sav. Bank v. Seidensticker*, 128 Iowa 54, 111 Am. St. Rep. 189, 5 Ann. Cas. 945, 102 N. W. 821. Contra, see same case in 92 N. W. 862.

⁶ *First Nat. Bank of Brandon v. Briggs' Assignees*, 69 Vt. 12, 37 L.

R. A. 845, 60 Am. St. Rep. 922, 37 Atl. 231.

⁷ *Westervelt v. Mohrenstecher*, 76 Fed. 118, 34 L. R. A. 477.

⁸ *Sparks v. Farmers' Bank of Delaware*, 3 Del. Ch. 274, 294.

covers acts done while holding over after a reappointment.⁹ If a bond is given while a person is holding office "during the pleasure of the board," and thereafter he is appointed to the same office for a year, the liability ceases at the end of such year, although but for such appointment for a definite time the liability might be unlimited in point of time.¹⁰ Where bonds of officers contemplate the election of a successor and procurement of a new bond, the bond continues "only for a reasonable time after the date on which the election and qualification of the successor should have taken place."¹¹ In Minnesota, where bond provided that whereas a certain person had been duly elected secretary of a named company, to serve for one year "or till his successor is elected and qualified," and the articles of incorporation provided that the secretary should hold his office until his successor was elected and qualified, it was held that the sureties were liable for misappropriations of money after the year and while holding over.¹² It has been held that where the person bonded was suspended and employed at a different salary to do different work in another place, the liability of the sureties terminated, so that his resumption of duty, some months later, of his original employment, must be considered as another and distinct employment for which the sureties cannot be bound.¹³

If the several bonds of trustees were given at a time when such bonds were proper, but afterwards the by-laws required a joint "and" several bond, the bonds, although continuing bonds, are not binding after the election of the next trustees after the adoption of such by-law.¹⁴

If a cashier's bond is given to an unincorporated association organized as a private banking company, it becomes inoperative when the company ceases to do business and merges the association into an existing corporation whose charter prohibits the transaction of any banking business.¹⁵

The expiration of the charter terminates the liability, and hence if the charter is extended while the bond is in force, it has been held

⁹ *Ulster County Sav. Inst. v. Young*, 161 N. Y. 23, 55 N. E. 483, aff'g 15 N. Y. App. Div. 181, 44 N. Y. Supp. 493.

¹⁰ *Wapello State Sav. Bank v. Colton*, 133 Iowa 147, 11 L. R. A. (N. S.) 493, 110 N. W. 450.

¹¹ *Wait v. Homestead Bldg. Ass'n*, 76 W. Va. 431, 85 S. E. 637.

¹² *Danvers Farmers' Elevator Co. v. Johnson*, 93 Minn. 323, 101 N. W. 492.

¹³ *Green v. Locke*, 31 La. Ann. 656.

¹⁴ *Coombs v. Harford*, 99 Me. 426, 433, 59 Atl. 529.

¹⁵ *Bensinger v. Wren*, 100 Pa. St. 500.

that there is no liability for acts after the time of expiration of the original charter.¹⁶

V. TERM OF OFFICE

§ 1799. General rules. The tenure of the directors or other officers of a corporation is generally fixed by the charter or general law, or by the by-laws of the corporation. If the charter or statute fixes their tenure, its provisions, of course, are controlling.¹⁷ Thus, if a statute requires directors to be elected annually, an election of directors must be held substantially once in each year.¹⁸ Almost without exception, provision is made for the election of directors annually. If the statute requires annual elections, it has been held that the articles of incorporation cannot provide that the directors named therein should act as such until they became incapacitated, resigned or died.¹⁹ An officer of a corporation is chargeable with knowledge of its charter and of its by-laws adopted before his appointment, and his tenure of office is subject to their provisions.²⁰ If the term of an officer is not so fixed, and he is elected or appointed without any provision or agreement as to his term, he holds the office at the pleasure of the corporation. A by-law providing that the executive officers "shall be elected by the directors each year at a meeting subsequent to the annual meeting of the stockholders," has been held in Oklahoma to fix no term of office.²¹

Statutes providing that the office of any director or officer of a bank "immediately becomes vacant" upon his borrowing money from the bank without specified security or for longer than a fixed period, are self-executing.²²

§ 1800. During pleasure of board of directors. If the by-laws provide that all officers shall hold office "during the pleasure" of the board of directors, the directors cannot employ a general manager for a year; ²³ but notwithstanding statutes confer power on the directors to dismiss officers at pleasure the charter or by-laws or both may

¹⁶ *Thompson v. Young*, 2 Ohio 334.

¹⁷ *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747; *O'Neal v. F. A. Neider Co.*, 118 Ky. 62, 25 Ky. L. Rep. 2279, 80 S. W. 451; *State v. Batt*, 38 La. Ann. 955; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 467.

¹⁸ *State v. McCullough*, 3 Nev. 202.

¹⁹ *State v. Anderson*, 31 Ind. App. 34, 67 N. E. 207.

²⁰ *Hunter v. Sun Mut. Ins. Co.*, 26 La. Ann. 13.

²¹ *Badger Oil & Gas Co. v. Preston*, — Okla. —, 152 Pac. 383.

²² *Cupit v. Park City Bank*, 20 Utah 292, 304, 58 Pac. 839.

²³ *Fowler v. Great Southern Telephone & Telegraph Co.*, 104 La. 751, 29 So. 271. See also § 1967, *infra*.

nevertheless fix the term of an officer at one year unless sooner removed.²⁴

In some states it is provided by statute that "officers and agents" appointed by directors "shall hold their places during the pleasure of the board" of directors, so that in such states no officer or agent appointed by the directors, as distinguished from a mere "employee," can hold his office or agency for any fixed term, regardless of contract provisions.²⁵ The question has arisen under such a statute whether a certain person was an "agent" or an "employee." Thus, in one case, a corporation organized to issue and sell annuity bonds, employed one as its "agency director," for one year, to sell such bonds and to appoint local agents to sell them. He was discharged before the end of the year and then sued for breach of contract. The court held that he was an "agent," within the statute, and hence that the corporation had a right to discharge him at any time, notwithstanding the contract expressly stated it was for a year.²⁶ So a general manager appointed for a sister state is an agent and not merely an ordinary employee.²⁷ On the other hand, a mere bookkeeper is not an agent within such statute but is a mere employee,²⁸ and the same is true as to a common carpenter.²⁹

§ 1801. Appointment for life. A general manager cannot be appointed for life or during the life of the corporation, by the directors.³⁰

§ 1802. Fixing annual salary as employment for a year. A resolution of the board of directors immediately following the election of a general manager that "the salary of the general manager for the

²⁴ Rankin v. Tygard, 198 Fed. 795, 801.

²⁵ Long v. United Savings & Annuity Co., 76 W. Va. 31, 84 S. E. 1053; Munn v. Wellsburg Banking & Trust Co., 66 W. Va. 204, 135 Am. St. Rep. 1024, 66 S. E. 230; Darrah v. Wheeling Ice & Storage Co., 50 W. Va. 417, 40 S. E. 373.

"This statute, by necessary implication, inhibits the employment by the board of such officers or agents for a definite period or term. They are not permitted thus to handicap the company in the conduct of its business." Darrah v. Wheeling Ice

& Storage Co., 50 W. Va. 417, 419, 40 S. E. 373.

²⁶ Long v. United Savings & Annuity Co., 76 W. Va. 31, 84 S. E. 1053.

²⁷ Wright v. Warren Bros. Co., 204 Fed. 231, 233, construing West Virginia statute.

²⁸ Munn v. Wellsburg Banking & Trust Co., 66 W. Va. 204, 135 Am. St. Rep. 1024, 66 S. E. 230.

²⁹ McGuire v. Old Sweet Springs Co., 73 W. Va. 321, 79 S. E. 350.

³⁰ Townsley v. Niagara Life Ins. Co., 160 N. Y. App. Div. 177, 145 N. Y. Supp. 209. See also § 1967, *infra*.

ensuing year is fixed at \$2,000, payable in monthly instalments" is a contract of employment for one year.³¹

§ 1803. Termination by election of successor. There is some question as to whether a corporate officer, even when his successor has been elected, may not remain *de facto* an officer of the company until he is in some way dispossessed of the office itself,³² although there are dicta to the contrary;³³ but there is no doubt but that where once the successor has gained possession of the office, the predecessor cannot regain power by a violent and lawless resumption of possession.³⁴

§ 1804. Term as coextensive with term of directors. The term of an officer appointed by the directors is not limited to one year merely because of the fact that the directors are elected annually.³⁵ Although directors appoint officers to execute a corporate contract, the officers are to be deemed agents of the corporation rather than agents of the directors. In such case, therefore, the authority of the officer so appointed is not abrogated by a change in the directors.³⁶

§ 1805. Termination by inconsistent acts. Acceptance by an officer of a corporation of a similar office in another corporation does not, as a matter of law, operate as a resignation of his office in the former.³⁷ The absence of a director from the state, or continued failure to attend meetings, etc., where there has been no resignation, does not have the effect of vacating his seat, unless there is some express provision to such effect.³⁸ Mere absence of directors from several or any number of meetings of the board does not of itself terminate their term of office.³⁹ But by-laws may authorize the board of directors, in such a case, to declare the office vacant, and elect another director in his place.⁴⁰

³¹ *Houghtaling v. Upper Kittanning Brick Co.*, 92 N. Y. Misc. 228, 155 N. Y. Supp. 540.

³² *Kline Bros. & Co. v. Royal Ins. Co., Ltd.*, 192 Fed. 378, 391.

³³ *Thorington v. Gould*, 59 Ala. 461, 469.

³⁴ *Kline Bros. & Co. v. Royal Ins. Co., Ltd.*, 192 Fed. 378, 391.

³⁵ *Union Bank of Maryland v. Ridgely*, 1 Harr. & G. (Md.) 324; *Germania Spar & Bau Verein v. Flynn*, 92 Wis. 201, 66 N. W. 109.

³⁶ *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127.

³⁷ *University of Maryland v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

³⁸ *First Nat. Bank of Jersey City v. Lamon*, 130 N. Y. 366, 29 N. E. 321; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Phelps v. Lyle*, 10 Adol. & E. 113.

³⁹ *State v. Vincennes University*, 5 Ind. 87; *Linley v. Bryce*, 7 Ohio 82.

⁴⁰ See *Halpin v. Mutual Brewing*

§ 1806. Effect of disposing of stock after election, so as to disqualify officer. A statutory provision that "if a director shall cease to be a stockholder, his office shall become vacant" is self-executing.⁴¹ So, independently of statute, according to the better opinion, when the ownership of stock is necessary to qualify one as a director, a person ceases to be a director if he ceases to be a stockholder because of the transfer of his stock, without any proceedings to remove him, although he may have owned stock when elected;⁴² but a mere pledge of his shares by a director does not disqualify him,⁴³ and an agreement to sell his stock does not disqualify a director where he retains the voting power respecting the stock.⁴⁴ So when a stockholder assigns in blank his certificate of stock, not having sold the same, and delivers it to another, not a purchaser, but with no intention on the part of the transferor, or of the person to whom the certificate was delivered, that the interest of the transferor in the stock should terminate, and no transfer of the stock has been made on the books of the company, the stockholder does not thereby cease to be the owner of the stock in his own right, or become disqualified to be a director of the company.⁴⁵ In a New York case where a director, at the end of the year for which

Co., 20 N. Y. App. Div. 583, 47 N. Y. Supp. 412.

⁴¹ *Sinclair v. Fuller*, 158 N. Y. 607, 53 N. E. 510.

⁴² *Stafford v. St. John*, 164 Ind. 277, 73 N. E. 596; *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev. 166, 30 Pac. 695; *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *Sinclair v. Dwight*, 9 N. Y. App. Div. 297, 41 N. Y. Supp. 193; *Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan*, 34 Wash. 216, 75 Pac. 798. Compare *Anderson Carriage Co. v. Pungs*, 127 Mich. 543, 8 Det. L. N. 456, 86 N. W. 1040. But see *Buffalo Electro-Plating Co. v. Day*, 151 N. Y. App. Div. 237, 135 N. Y. Supp. 1054.

Rule applied where director made assignment of all his property for benefit of creditors. *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719.

However, such result is not accomplished before the sale of the stock is completed. *O'Rourke v. Grand*

Opera House Co., 47 Mont. 459, 133 Pac. 965.

The rule that a stockholder ceases to be a director when he parts with his stock has no application to one who, although he has parted with his individual holdings, still retains the title to stock held by him as trustee. *Haines v. Kinderhook & H. Ry. Co.*, 33 N. Y. App. Div. 154, 53 N. Y. Supp. 368, aff'g 23 N. Y. Misc. 605, 52 N. Y. Supp. 1061.

A person does not cease to be qualified because he has entered into an executory contract to sell his stock, or given an option to purchase it. *Kuhn v. Woolson Spice Co.*, 7 Ohio Cir. Dec. 289.

⁴³ *Pulbrook v. Richmond Consol. Min. Co.*, 9 Ch. Div. 610; *Cummings v. Prescott*, 2 Younge & C. Exch. 488.

⁴⁴ *Pacific State Bank v. Coats*, 205 Fed. 618, Ann. Cas. 1913 E 846.

⁴⁵ *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 98 Atl. 943.

he was elected, sold out all his stock in the corporation and ceased to act as director, it was held that he was not bound to see that a successor was elected in his place or to tender any formal resignation.⁴⁶

In Alabama, however, it has been held that a sale of stock by one previously elected a director and president does not constitute a vacation of office in these capacities *ipso facto* in such manner as to deprive such person of the right of exercising the functions of his offices.⁴⁷

Whatever the rule may be, the corporation may be estopped to repudiate his acts if it allows him to continue to act after he has ceased to be a stockholder.⁴⁸ In other words, where the corporation permits a director to act after he has disposed of his stock, he is still an officer *de facto* so far as to make his acts valid as against third persons.⁴⁹ However, they are not *de facto* officers whose acts are binding in favor of third persons where the latter have actual knowledge of the facts and are not misled.⁵⁰

§ 1807. Shortening term of office. If elected at a regular annual meeting, the terms of offices of the directors cannot be shortened by changing the date of the annual meeting.⁵¹ So the term cannot be shortened, it seems, by a statute reducing the number of directors but making no provision in regard to when the reduction shall take place or how.⁵²

§ 1808. Holding over. Directors, trustees, or other officers of a corporation, elected or appointed for a certain time, hold over after

⁴⁶ *Sturges v. Vanderbilt*, 73 N. Y. 384, 391.

⁴⁷ *Howle v. Scarbrough*, 138 Ala. 148, 35 So. 113; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

⁴⁸ *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380.

⁴⁹ *Robinson v. Blood*, 151 Cal. 504, 506, 91 Pac. 258; *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179; *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397, *rev'd*, it seems, *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719; *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380; *Wile & Brickner Co. v. Rochester & K. F. Land Co.*, 4 N. Y. Misc. 570, 25 N. Y. Supp. 794. Compare *Benedum v. First*

Citizens' Bank, 72 W. Va. 124, 135, 78 S. E. 656.

⁵⁰ *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev. 166, 30 Pac. 695.

⁵¹ In construing the Ohio statutes, the court said that their effect "is clearly to make the term of a director regularly elected at an annual meeting to be for one year, or until the next annual election, and that no power abides in the stockholders, in any method short of removal for cause, to shorten this term." *Toledo Traction, Light & Power Co. v. Smith*, 205 Fed. 643, 647.

⁵² *In re Manoca Temple Ass'n*, 128 N. Y. App. Div. 796, 113 N. Y. Supp. 172.

the expiration of their term until their successors are elected or appointed.⁵³ Frequently there is an express provision to this effect in the charter of a corporation or the general law.⁵⁴ Failure to elect officers results in continuing the old officers in power.⁵⁵ Thus, where the corporation fails to hold its regular annual meeting for the election of directors, the directors then in office hold over until their successors are elected.⁵⁶ Where a statute requires the governor of the state to appoint one director of a chattel loan company, it has been held not necessary to appoint the same person annually, since, "by implication, in the absence of any other controlling rule, he would serve until his successor was chosen."⁵⁷

If the tenure of office is fixed as until the next annual election, but no election is held at the time for the annual election, the officer who holds over holds merely at the pleasure of the board of directors and is not entitled to hold until the next annual election.⁵⁸

⁵³ **Alabama.** *Thorington v. Gould*, 59 Ala. 461.

Connecticut. *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

Delaware. *Sparks v. Farmers' Bank of Delaware*, 3 Del. Ch. 274.

Georgia. *Milliken v. Steiner*, 56 Ga. 251; *Quitman Oil Co. v. Peacock*, 14 Ga. App. 550, 81 S. E. 908.

Illinois. *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350, 367.

Kansas. *Ft. Scott v. Schulenberg*, 22 Kan. 648.

Kentucky. *La Rue v. Bank of Columbus*, 165 Ky. 669, 178 S. W. 1033; *Wier v. Bush*, 4 Litt. 429; *Cassell v. Lexington, H. & P. Turnpike Co.*, 10 Ky. L. Rep. 486, 9 S. W. 701.

Michigan. *Kent County Agr. Society v. Houseman*, 81 Mich. 609.

Missouri. *Youree v. Home Town Mut. Ins. Co. of Warrensburg*, Missouri, 180 Mo. 153, 79 S. W. 175.

New York. *Vernon Society v. Hills*, 6 Cow. 23, 16 Am. Dec. 429; *Huguenot Nat. Bank of New Paltz v. Studwell*, 6 Daly 13; *People v. Runkle*, 9 Johns. 147.

Pennsylvania. *Jenkins v. Baxter*, 160 Pa. St. 199, 28 Atl. 682.

Tennessee. *Lynch v. Lafand*, 4 Cold. 96; *Nashville Bank v. Petway*, 3 Humph. 522.

Utah. *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

Compare, however, *People v. Twaddell*, 18 Hun (N. Y.) 427. And see *Post-Express Printing Co. v. Coursey*, 57 Hun (N. Y.) 585, 10 N. Y. Supp. 497.

⁵⁴ See *La Rue v. Bank of Columbus*, 165 Ky. 669, 178 S. W. 1033.

⁵⁵ *Simms v. Bialy Hardware & Supply Co.*, 187 Mich. 375, 153 N. W. 821.

⁵⁶ *New York, B. & E. R. Co. v. Motil*, 81 Conn. 466, 71 Atl. 563; *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350; *Potwin v. J. P. Gross & Co.*, 123 Ill. App. 34; *Appleton v. American Malting Co.*, 65 N. J. Eq. 375, 54 Atl. 454; *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405, 71 Pac. 865.

⁵⁷ *Apsey v. Chattel Loan Co.*, 216 Mass. 364, 103 N. E. 899.

⁵⁸ In accordance with the provisions of a by-law, a treasurer was to be elected at the annual meeting of the board of directors in September, such officer to hold office until the next

VI. RESIGNATION

§ 1809. Right to resign. A director or other officer of a corporation may resign at any time and thereby cease to be an officer, subject, of course, to any express charter or statutory provisions to which he has expressly or impliedly assented in accepting office, and subject to any express contract he may have made with the corporation.⁵⁹ Moreover, a charter or statutory provision that directors shall continue in office until their successors are elected or appointed and qualified does not prevent a director from resigning at any time,⁶⁰ and he is not an officer, where he has resigned, although no one has been elected to take his place, and though his resignation has not been accepted.⁶¹

However, an officer cannot fraudulently resign, as for the purpose of preventing service of process on him as the representative of the corporation.⁶² But in New York, it is held that where an officer has tendered his resignation, it not appearing that the purpose thereof was to evade service of process on the corporation, service of process can-

annual election or until his successor had been elected and qualified. On the 8th of June, 1901, plaintiff was elected treasurer, that being the first meeting of the board of directors for the election of officers. In September of that year no election was held, the minutes of the meeting of June, 1901, however, in no way indicating that the officers then elected should hold office until the election provided for September, 1902. The treasurer continued in office until removed at a regular meeting of the corporation held in January, 1902, when another was elected to fill his place. The court held, there being no contract continuing his employment beyond September, 1901, that his office expired at said time, and that it was at the pleasure of the directors only that he held office thereafter. *O'Neal v. F. A. Neider Co.*, 118 Ky. 62, 80 S. W. 451.

⁵⁹ *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662; *International Bank of St. Louis v. Faber*, 86 Fed. 443; *Fearing v. Glenn*, 73 Fed. 116; *Mexi-*

can Ore Co. v. Mexican Guadalupe Min. Co., 47 Fed. 351; *Movius v. Lee*, 30 Fed. 298; *Cloutman v. Pike*, 7 N. H. 209; *Van Amburgh v. Baker*, 81 N. Y. 46; *Bruce v. Platt*, 80 N. Y. 379; *Chandler v. Hoag*, 63 N. Y. 624, *aff'd* 2 Hun 613; *Noble v. Euler*, 20 N. Y. App. Div. 548, 47 N. Y. Supp. 302; *Sturgis v. Crescent Jute Mfg Co.*, 57 Hun (N. Y.) 587, 10 N. Y. Supp. 470; *Blake v. Wheeler*, 18 Hun (N. Y.) 496, *rev'd* in *Bonnell v. Griswold*, 80 N. Y. 128; *Ehret v. George Ringler & Co.*, 70 N. Y. Misc. 627, 129 N. Y. Supp. 546, *rev'd* on other grounds 144 N. Y. App. Div. 480, 129 N. Y. Supp. 551; *Smith v. Danzig*, 64 How. Pr. (N. Y.) 320.

⁶⁰ *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662; *Fearing v. Glenn*, 73 Fed. 116. Compare, however, *Timolat v. S. J. Held Co.*, 17 N. Y. Misc. 556, 40 N. Y. Supp. 692.

⁶¹ *In re McNaughton's Will*, 138 Wis. 179, 120 N. W. 288, 118 N. W. 997.

⁶² *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447, 457.

not be made upon him; ⁶³ however, it has been held in that state, and elsewhere that where there is a by-law providing that an officer once elected shall be deemed to hold office until his successor is elected and qualified, resignation will not terminate the official relation of an officer prior to the election of his successor, so far as pertains to a creditor seeking to obtain service upon the corporation by service on its officers.⁶⁴ So there is an exception to the rule that directors and other officers may resign at will, where the directors and all the other officers resign simultaneously for the purpose of enabling one of their number, as a stockholder, to apply for a receiver as provided for in the statutes where the corporation has "no officer empowered to hold" the corporate assets.⁶⁵

§ 1810. Form of resignation. In the absence of express provision, a resignation need not be in any particular form. It may be either oral or in writing,⁶⁶ but it must clearly show an intent to resign.

⁶³ *Continental Wall-Paper Co. v. Lewis Voight & Sons Co.*, 106 Fed. 550; *Yorkville Bank v. Henry Zeltner Brewing Co.*, 80 N. Y. App. Div. 578, 80 N. Y. Supp. 839.

⁶⁴ *Colorado Debenture Corporation v. Lombard Inv. Co.*, 66 Kan. 251, 97 Am. St. Rep. 373, 71 Pac. 584; *Timolat v. S. J. Held Co.*, 17 N. Y. Misc. 556, 40 N. Y. Supp. 692.

⁶⁵ *Zeltner v. Henry Zeltner Brewing Co.*, 174 N. Y. 247, 95 Am. St. Rep. 574, 66 N. E. 810, 79 N. Y. App. Div. 136, 80 N. Y. Supp. 338, 33 Civ. Proc. Rep. 298. Compare *Smith v. Danzig*, 64 How. Pr. (N. Y.) 320; *Carnaghan v. Exporters' & Producers' Oil Co.*, 57 Hun (N. Y.) 588, 11 N. Y. Supp. 172.

⁶⁶ *Fearing v. Glenn*, 73 Fed. 116; *Sturges v. Vanderbilt*, 73 N. Y. 384.

"The resignation of a director of a corporation need not necessarily be written. 'Putting a resignation in writing is the more orderly and proper mode of procedure, but if the fact exists, and is adequately proven, the result is necessarily the same, as applied to this case.' *Briggs v. Spaulding*, 141 U. S. 132, 154, 11 Sup. Ct.

924, 931 (35 L. Ed. 662). 'A director' is the agent of a 'business corporation and can resign orally or in writing unless there is some provision to the contrary in the charter or by-laws.' *Fearing v. Glenn*, 73 Fed. 116, 19 C. C. A. 388." In *re Kisner's Estate*, 254 Pa. 597, 99 Atl. 168.

In Montana, a statute provides as follows: "Any director, trustee or other officer of a corporation may resign his office by delivering to the secretary or president of the corporation, or depositing in the post office, * * * addressed to the corporation, at its principal place of business, his written resignation, and filing in the office of the clerk and recorder of the county where the principal office or place of business of the said corporation is situated, a duplicate of the said resignation, together with an affidavit of the delivery or mailing of said resignation, as above specified, or an acknowledgment of service thereof and by publishing in two consecutive issues of the official paper of the county where said company may be doing business, a notice of said resignation, and the director, trustee,

Oral declarations do not constitute a resignation, where ambiguous and where subsequent acts and declarations are entirely inconsistent with any intention to resign.⁶⁷

It has been held that an abandonment of all official duties for a number of years must be regarded as an implied resignation of the office.⁶⁸ A fortiori, where a director absented himself from all meetings for nearly a year, brought suit to rescind his purchase of stock which alone made him eligible to act as director, and announced his refusal to act as an officer and stockholder, it constituted an abandonment of his office of director.⁶⁹

§ 1811. Notice and acceptance of resignation. In order that the resignation of an officer may be effectual, he must give notice of the same, and cease to act as an officer,⁷⁰ but no notice to creditors of the

or other officer shall upon such filing and publication no longer be responsible for any act or default of the corporation, or of the other officers thereof, occurring after the date of said filing: Provided, however, that any director, trustee, or other officer, shall also comply with the by-laws of the corporation relating to resignations of directors or officers. This act shall apply to resident directors of foreign corporations having a place or places of business in this state, as well as to directors and other officers of domestic corporations." In the particular case, the corporation had no by-laws on the subject, and the director did nothing more than to deliver the writing to its president and thereafter to refrain from acting as an officer or director of the company. The court held that "at the common law, however, this would have sufficed * * *, and therefore was sufficient here, unless the section just quoted prescribes an exclusive method for resigning a directorship. We do not believe that such is its effect. Its language does not clearly indicate an intention to prescribe an exclusive method, but rather indicates a mode which is permissive, designed

primarily for cases where the ordinary method may not be available or where positive proof of the resignation may be desired." *B. F. Goodrich Rubber Co. v. Helena Motor Car Co.*, — Mont. —, 165 Pac. 454.

⁶⁷ *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

Mere expressions of an intention to resign if certain contingencies arise, or loose statements of intention, do not amount to a resignation, particularly where the party continues to act. *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145.

⁶⁸ *Bartholomew v. Bentley*, 1 Ohio St. 37, 42.

⁶⁹ *Dodge v. Kenwood Ice Co.*, 204 Fed. 577.

⁷⁰ *J. L. Mott Iron Works v. West Coast Plumbing Supply Co.*, 113 Cal. 341, 45 Pac. 683 (where the question was as to the effect of service of process on an officer who claimed to have resigned). And see *Union Nat. Bank of Troy v. Scott*, 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145; *Chemical Nat. Bank of New York v. Colwell*, 16 Daly (N. Y.) 28, 9 N. Y. Supp. 285, 288.

corporation or to the public generally is necessary.⁷¹ No formal acceptance or record of the resignation is necessary.⁷² Of course, if a director resigns by a writing addressed to the board "to take effect upon acceptance," he may act as director until his resignation has been accepted.⁷³

§ 1812. Validity of agreement to resign for pecuniary consideration. It has been held that an agreement to resign as a corporate officer, for a pecuniary consideration, is void as against public policy. Thus, it has been said that "if the whole or a part of a consideration be that a trustee resign his trust, the consideration is illegal. It is *contra bonos mores*. Trustees of corporations owe duties to others besides themselves; they have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be bought out of office. They may resign when they please, but they must not make profit or benefit to themselves in the matter of such resignation."⁷⁴ However, where, in order to obtain necessary working capital, the person putting up the money demanded that he be elected president, it is proper for the directors to endeavor to secure the resignation of the person then president, and he may impose as a condition, it seems, that he receive the amount owing him by the company and a reasonable allowance for giving up his salaried position, and that his stock be taken off his hands.⁷⁵

§ 1813. Effect of resignation. Resignation by a director, followed by acceptance of his resignation, terminates the official relation of the party resigning.⁷⁶ A director is not personally liable for a default arising after he has resigned as director even though his resignation

⁷¹ *Bruce v. Platt*, 80 N. Y. 379. Compare *Chemical Nat. Bank of New York v. Colwell*, 16 Daly (N. Y.) 28, 9 N. Y. Supp. 285.

⁷² *Briggs v. Spaulding*, 141 U. S. 132, 35 L. Ed. 662; *International Bank of St. Louis v. Faber*, 86 Fed. 443; *President, etc., of Manhattan Co. v. Kaldenberg*, 165 N. Y. 1, 58 N. E. 790; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Zeltner v. Henry Zeltner Brewing Co.*, 79 N. Y. App. Div. 136, 80 N. Y. Supp. 338; *Noble v. Euler*, 20 N. Y. App. Div. 548, 47 N. Y. Supp. 302.

⁷³ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15; *Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & Trust Co.*, 169 Ky. 840, 185 S. W. 156.

⁷⁴ *Forbes v. McDonald*, 54 Cal. 98.

⁷⁵ *Joseph v. Raff*, 82 N. Y. App. Div. 47, 81 N. Y. Supp. 546, *aff'd* without opinion in 176 N. Y. 611, 68 N. E. 1118.

⁷⁶ *Sorrentino v. Ciletti*, 75 N. Y. App. Div. 507, 78 N. Y. Supp. 322.

has not been formally accepted or though the creditors had no notice of the resignation.⁷⁷ However, a director cannot, by resigning his office, escape a liability where the duty has already attached.⁷⁸

VII. REMOVAL OF OFFICERS

§ 1814. Inherent power—In general. There is no power, either in the stockholders or the directors, to remove directors or other officers before the expiration of their term, except for cause, if the term of office is fixed by the charter of the corporation or by a general statute.⁷⁹ Applying this rule, it is held that, in the absence of any specific statutory authority or provisions in the charter or by-laws warranting it, a board of directors has no power to expel a fellow director, and hence “no power to pass a valid amendment to the by-laws under and by virtue of which the directors may assume to exercise that power.”⁸⁰ A fortiori, if an officer of a corporation has been elected or appointed, and is serving under a contract with the corporation for a fixed term, he cannot be lawfully removed at pleasure, either by the stockholders, or by the directors or other superior officers, except for incompetency or violation of the contract between him and the corporation. If he is removed without cause, his authority to represent or act for the corporation ceases, but the corporation will be liable to him for the breach of contract, as in other cases of employment.⁸¹

§ 1815. — Where term of officer not fixed by charter, statute or contract. If the term of an officer is not fixed by any contract bind-

⁷⁷ See *infra*, this chapter.

⁷⁸ *Osborn v. Gilliams*, 65 N. Y. App. Div. 614, 74 N. Y. Supp. 623.

⁷⁹ *United States*. *Toledo Traction, Light & Power Co. v. Smith*, 205 Fed. 643, 646, construing Ohio statutes; *Powers v. Blue Grass Building & Loan Ass'n*, 86 Fed. 705; *Hatch v. Johnson Loan & Trust Co.*, 79 Fed. 828.

Alabama. *Archer v. People's Sav. Bank*, 88 Ala. 249, 7 So. 53; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

Ohio. *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933.

Wisconsin. *State v. Kuehn*, 34 Wis. 229.

England. *Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. Div. 1.

Canada. *Stephenson v. Vokes*, 27 Ont. 691.

In the absence of a statute, charter provision or by-law to the contrary, a director cannot be removed or suspended from office until the end of his term, at least without cause. *People v. Powell*, 201 N. Y. 194, 94 N. E. 634, *aff'g* 140 N. Y. App. Div. 912, 125 N. Y. Supp. 1139.

⁸⁰ *Raub v. Gerken*, 127 N. Y. App. Div. 42, 111 N. Y. Supp. 319. See also § 518, *supra*.

⁸¹ *In re Griffing Iron Co.*, 63 N. J. L. 357, 46 Atl. 1097, 63 N. J. L. 163, 41 Atl. 931; *Douglass v. Merchants' Ins. Co.*, 118 N. Y. 484, 7 L. R. A. 822, 23 N. E. 806; *Bainbridge v. Smith*, 60 L. T. (N. S.) 879,

ing upon the corporation, nor by the charter or general law, he may be removed at any time, with or without cause, by the stockholders, or, generally, by the officer or officers by whom he was appointed.⁸² Thus, a board of directors may remove the secretary and treasurer elected by the board, where he holds for no fixed term.⁸³ This power of removal extends to all the officers of the corporation, including the president,⁸⁴ treasurer,⁸⁵ and general superintendent.⁸⁶ However, it has been held that the fact that a by-law provides that officers shall hold office during the pleasure of the board does not forbid a special contract for a fixed time.⁸⁷

§ 1816. — Removal for cause. The power to remove a director or other officer for cause inheres in every corporation as a part of its being.⁸⁸ As said by Judge McQuillin in his work on Municipal Corporations, "the power to remove a corporate officer from his office for reasonable and just cause is one of the common law incidents of all corporations."⁸⁹ Furthermore, even when there is a contract for a fixed term with an officer, he may, like any other agent or serv-

⁸² **United States.** *Harrington v. First Nat. Bank of Chittenango*, Thomp. Nat. Bank Cas. 760.

District of Columbia. *Adamantine Brick Co. v. Woodruff*, 11 MacArthur & M. 318.

Illinois. *People v. Higgins*, 15 Ill. 110; *Stobo v. Davis Provision Co.*, 54 Ill. App. 440.

Missouri. *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

New Jersey. *In re Griffing Iron Co.*, 63 N. J. L. 357, 57 L. R. A. 624, 46 Atl. 1097, 63 N. J. L. 168, 41 Atl. 931.

New York. *Douglass v. Merchants' Ins. Co.*, 118 N. Y. 484, 7 L. R. A. 822, 23 N. E. 806.

Oklahoma. *Badger Oil & Gas Co. v. Preston*, 152 Pac. 383.

Pennsylvania. *Field v. Girard College*, 54 Pa. St. 233.

Virginia. *Burr's Ex'r v. McDonald*, 3 Gratt. 215.

Same rule governs removal of officers of municipal corporations. See 2 McQuillin, *Municipal Corporations*, § 558.

No specific cause need be assigned. *People v. Higgins*, 15 Ill. 110.

⁸³ *Brindley v. Walker*, 221 Pa. 287, 23 L. R. A. (N. S.) 1293, 70 Atl. 794.

⁸⁴ *In re Griffing Iron Co.*, 63 N. J. L. 357, 57 L. R. A. 624, 46 Atl. 1097.

⁸⁵ *O'Neal v. F. A. Neider Co.*, 118 Ky. 62, 80 S. W. 451.

⁸⁶ *Granger v. American Brewing Co.*, 25 N. Y. Misc. 302, 55 N. Y. Supp. 590.

⁸⁷ *Martino v. Commerce Fire Ins. Co.*, 47 N. Y. Super. Ct. 520.

⁸⁸ *Toledo Traction, Light & Power Co. v. Smith*, 205 Fed. 643. To same effect, see *State v. Kuehn*, 34 Wis. 229.

Every corporation has at common law, as incident to its existence, the power of removing officers, but generally this power can be exercised only for cause and after notice and hearing. *Wolf v. Gegenseitige Unterstuetzungs Gesellschaft Germania*, 149 Wis. 576, 136 N. W. 175.

⁸⁹ 2 McQuillin, *Municipal Corporations*, § 552.

ant under contract, be removed for breach of the contract by unauthorized acts, misapplication of funds, neglect, or incompetency.⁹⁰

§ 1817. Express power—In general. In some jurisdictions there are statutes expressly giving the stockholders power to remove directors or other officers at any time, or to remove them for cause, or conferring like power upon the board of directors;⁹¹ and such power may be reserved by a by-law if it is not inconsistent with the charter or general law.⁹² Power conferred upon the directors to “discontinue” officers gives power to remove them.⁹³ However, directors cannot remove one of their own number, even though a statute authorizes them to remove “any officers”;⁹⁴ and hence they have no power to adopt a by-law for that purpose.⁹⁵ Power to remove at will “officers, agents and servants” includes, in the use of the word “servants,” employees who occupy no fiduciary capacity.⁹⁶

§ 1818. — Where officer or agent employed for definite time. It has already been noted that the term of office may be fixed as “during

⁹⁰ *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265; *Bainbridge v. Smith*, 60 L. T. (N. S.) 879. See also *People v. Higgins*, 15 Ill. 110.

⁹¹ See *Inderwick v. Snell*, 2 Macn. & G. 216.

A statute authorizing removal of directors or trustees by “two-thirds of the stockholders” has been held to mean holder of two-thirds of the stock, stockholders being given a vote for each share of stock owned by them. *State v. Horan*, 22 Wash. 197, 60 Pac. 135.

Under a statute providing that upon compliance with certain conditions specified the corporation shall be deemed to be organized and shall have power, inter alia, to appoint, remove, and elect officers, an officer may be discharged by the directors, without cause, at any time, where no contract exists by virtue of which such officer is entitled to hold office for a specified time. *O’Neal v. F. A. Neider Co.*, 118 Ky. 62, 80 S. W. 451.

In Washington, the position of book-

keeper, under the title of “secretary and treasurer” is one of “responsibility and trust,” so that the person may be removed at will. *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 51 L. R. A. (N. S.) 398, Ann. Cas. 1915 D 346, 136 Pac. 1158.

⁹² See § 518, *supra*, and see also *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265; *Douglass v. Merchants’ Ins. Co.*, 118 N. Y. 484, 7 L. R. A. 822, 23 N. E. 806; *Cuppy v. Stollwerck Bros.*, 158 N. Y. App. Div. 628, 143 N. Y. Supp. 967; *Isle of Wight Ry. Co. v. Tahourdin*, 25 Ch. Div. 320.

⁹³ *Darrah v. Wheeling Ice & Storage Co.*, 50 W. Va. 417, 40 S. E. 373.

⁹⁴ *Laughlin v. Geer*, 121 Ill. App. 534.

⁹⁵ *Laughlin v. Geer*, 121 Ill. App. 534.

⁹⁶ *Barager v. Arcadia Orchards Co.*, 91 Wash. 294, 157 Pac. 675, overruling dicta in *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319, Ann. Cas. 1913 B 667, 118 Pac. 30.

the pleasure," or the like, of the stockholders, directors or other appointing power.⁹⁷ The question naturally arises as to whether, where there is such a provision, but nevertheless an officer or other person within the terms of the provision is elected or appointed or makes a contract for services for a fixed term, the corporation may nevertheless remove or dismiss him at any time without incurring liability. It would seem that the answer should be in the affirmative.⁹⁸ Thus, a statutory provision in Washington that corporations shall have power to remove at will "officers, agents and servants," authorizes the corporation to terminate a contract employing an attorney for a term of years, before the expiration of the contract,⁹⁹ or to terminate a contract with a manager employed for a term of years, although the contract was authorized by the board of trustees and by the unanimous vote of the stockholders.¹ On the other hand it is held in New York that a by-law authorizing the board of directors to remove a "director or officer" does not authorize it to terminate a contract with a general manager or other officer whom it has employed for a definite term;² and the fact that such manager had been elected a director is immaterial, where such election was in pursuance of his contract of employment, since it did not supersede and render the contract which was for a definite term terminable at will.³

⁹⁷ See § 1800, *supra*.

⁹⁸ *Long v. United Savings & Annuity Co.*, 76 W. Va. 31, 84 S. E. 1053; *Munn v. Wellsburg Banking & Trust Co.*, 66 W. Va. 204, 135 Am. St. Rep. 1024, 66 S. E. 230; *Darrah v. Wheeling Ice & Storage Co.*, 50 W. Va. 417, 40 S. E. 373.

⁹⁹ *Llewellyn v. Aberdeen Brewing Co.*, 65 Wash. 319, Ann. Cas. 1913 B 667, 118 Pac. 30.

¹ *Murray v. MacDougall & Southwick Co.*, 88 Wash. 358, 153 Pac. 317.

So far as the vote of the stockholders was concerned, the court said: "It follows that, having no power to authorize or compel such employment, they (the stockholders) could not ratify an employment so as to take away a discretion which the law has vested in the trustees." *Murray v.*

MacDougall & Southwick Co., 88 Wash. 358, 153 Pac. 317.

² *Cuppy v. Stollwerck Bros.*, 216 N. Y. 591, 596, 111 N. E. 249, rev'g 158 N. Y. App. Div. 628, 143 N. Y. Supp. 967, where the court said that "while the by-law empowered the board of directors to remove a director or officer, it did not authorize them to terminate a contract with one whom they had employed for a definite term. * * * The power to remove him from the office to which he had been elected did not carry with it the right to discharge him from the employment of the defendant in view of the special contract for a fixed term under which he was employed."

³ *Cuppy v. Stollwerck Bros.*, 216 N. Y. 591, 597, 111 N. E. 249.

§ 1819. Who may remove. The removal must ordinarily be by the body or officer authorized to elect or appoint.⁴ Thus, except as stated above, the directors have implied authority to remove all officers appointed by them,⁵ but they have no power, unless the authority is expressly conferred, to remove officers appointed or elected by the stockholders.⁶ It is held that the vesting in an executive committee of the full powers of the full board of directors as to the "management of the business and affairs" of the company cannot be construed "to empower the executive committee to remove from office statutory officers of the company who have themselves been elected for a prescribed tenure by the full board of directors."⁷

⁴ See *People v. Higgins*, 15 Ill. 110.

The general right of removal of directors is with the stockholders. *Shulman v. Star Suburban Realty Co.*, 113 N. Y. App. Div. 759, 99 N. Y. Supp. 419.

⁵ *People v. Higgins*, 15 Ill. 110; *Stobo v. Davis Provision Co.*, 54 Ill. App. 440; *Brindley v. Walker*, 221 Pa. 287, 23 L. R. A. (N. S.) 1293, 70 Atl. 794.

Secretary and treasurer appointed by board of directors may be removed. *Brindley v. Walker*, 221 Pa. 287, 23 L. R. A. (N. S.) 1293, 70 Atl. 794.

If the articles of incorporation authorize the directors to remove an officer, they have the power to do so, as therein provided, although no by-law providing for such removal has ever been adopted. *Taylor v. Hutton*, 43 Barb. (N. Y.) 195.

An officer appointed by the directors under a by-law authorizing them to make appointments "for the time being" holds the office at the pleasure of the directors, where the charter or by-laws do not fix the term, and no term is fixed by the appointment. *Sparks v. Farmers' Bank of Delaware*, 3 Del. Ch. 274.

Under a by-law providing that "the directors shall elect from their number a president, vice president, and such other assistants as are necessary; said assistants to hold their office at

the pleasure of the directory," the president and vice president do not hold their office at the pleasure of the directors. *Archer v. People's Sav. Bank*, 88 Ala. 249, 7 So. 53.

⁶ *Brindley v. Walker*, 221 Pa. 287, 23 L. R. A. (N. S.) 1293, 70 Atl. 794.

By-laws may authorize the board of directors to remove a director or declare his office vacant and elect another in his place if he shall abandon the office or neglect for a long time to attend meetings and perform his duties. But failure of a director elected in January to attend meetings between then and the April following does not, as a matter of law, constitute such long-continued neglect as to amount to an abandonment of his office, and warrant his associates in declaring the office vacant, and thus virtually removing him, without the notice prescribed by the by-laws in case of a removal. *Halpin v. Mutual Brewing Co.*, 20 N. Y. App. Div. 583, 47 N. Y. Supp. 412.

A by-law providing that, "when any director shall die, resign, neglect to serve or remove out of the county, the board may proceed to supply the vacancy," does not give the board power to oust a director on the ground of ineligibility. *Com. v. Detwiller*, 131 Pa. St. 614, 7 L. R. A. 357, 18 Atl. 990.

⁷ *Fensterer v. Pressure Lighting*

The president of a corporation has no power, unless there is express provision therefor, to remove an officer appointed by the board of directors, as the power of removal is in the board;⁸ but a managing agent of a corporation may be removed from his position, when his term of employment has expired, by the president of the company by whom he was appointed.⁹

§ 1820. Resort to courts to obtain removal—In general. The courts ordinarily have no power to remove a corporate officer, but in some states special statutes authorize proceedings in court to remove such officers. It was said in an early case in California that "it is well settled that there is no jurisdiction in equity with regard to the removal of corporate officers of any description";¹⁰ and this rule is not controverted.¹¹ Likewise, since an injunction to restrain the officers from performing the duties of their office would be practically the same as a removal, the court will not issue such an injunction.¹² However, in South Dakota, it has been held that an action lies to restrain the general manager of a corporation, whose term of employment had expired, from further interfering with the business of such corporation as managing agent and to restrain him from incurring debts on behalf of the company, where he refuses to surrender possession of the corporate property.¹³

In a few states, the statutes expressly provide for actions to re-

Co., 85 N. Y. Misc. 621, 149 N. Y. Supp. 49.

⁸ *Mobile, J. & K. City R. Co. v. Owen*, 121 Ala. 505, 25 So. 612; *Granger v. American Brewing Co.*, 25 N. Y. Misc. 302, 55 N. Y. Supp. 590.

⁹ *Magpie Gold Min. Co. v. Sherman*, 23 S. D. 232, 20 Ann. Cas. 595, 121 N. W. 770.

¹⁰ *Neall v. Hill*, 16 Cal. 145, 148, 76 Am. Dec. 508.

¹¹ A court of equity has no jurisdiction to remove the legally elected or appointed officers of a corporation, in the absence of a statute, on the ground of mismanagement of the affairs of the corporation, or neglect, or other cause. The power of removal on this ground is in the corporation itself only.

California. *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Mississippi. *Bayless v. Orne*, *Freem. Ch.* 161, 176.

New York. *Robertson v. Bullions*, 11 N. Y. 243.

Oregon. *Hedges v. Paquett*, 3 Ore. 77.

England. *Attorney General v. Earl of Clarendon*, 17 Ves. Jr. 491.

A court of equity, in the absence of some special ground for equitable jurisdiction, has no power to reinstate or remove an officer or agent of a private corporation. *Dimmick v. Stokes*, 151 Ala. 150, 43 So. 854.

¹² *Bayless v. Orne*, *Freem. Ch. (Miss.)* 161.

¹³ *Magpie Gold Min. Co. v. Sherman*, 23 S. D. 232, 20 Ann. Cas. 595, 121 N. W. 770.

move corporate officers.¹⁴ Thus, in New York, the statute authorizes an action by the attorney general on behalf of the state against one or more trustees, directors, managers or other officers of a corporation to procure a judgment removing defendant from his office upon proof or conviction of misconduct.¹⁵ Under such statute, it is held that persons may be removed as directors for misconduct in their offices of vice president and secretary or the like.¹⁶ The fact that after the alleged misconduct the officers were re-elected directors does not serve to condone their fault or to protect them from removal, since their tenure of office must be treated as continuous.¹⁷ However, a statute providing that a director shall not be suspended or removed from office by a court or judge otherwise than by the final judgment of a competent court in an action brought by the attorney general, is not exclusive of any reasonable and lawful charter provision relating thereto and included in the articles of incorporation.¹⁸

In Wisconsin, there is also a statute authorizing a removal by the court, referred to in the next section.

It has been held in Louisiana that the corporation has the right to pay the fees of an attorney in a suit to oust its president from office, on the ground that "it was really a suit against the corporation,"¹⁹ but while this rule may be the law as applied to the facts of the particular case, the general rule no doubt is to the contrary.

¹⁴ Statutes applicable to public officers are generally not applicable to corporate officers, so far as removing them is concerned. See *Le Bosquet v. Myers*, 7 Indian T. 75, 103 S. W. 770.

¹⁵ Code Civ. Proc. § 1781; *People v. Lyon*, 119 N. Y. App. Div. 361, 104 N. Y. Supp. 319.

Statute confers a new cause of action. *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453, 457.

Such action must be in equity. A cause of action for an accounting against the same director or directors may be joined therewith. *People v. Equitable Life Assur. Soc. of United States*, 124 N. Y. App. Div. 714, 109 N. Y. Supp. 453.

If the court acquires jurisdiction to appoint a receiver because of the mismanagement of directors, the directors

may thereafter be removed and others appointed in their place by the court. *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366, 88 N. Y. Supp. 302.

¹⁶ "There is nothing in the statute to warrant the doctrine that a man who is at the same time a director and an executive officer of a corporation may, notwithstanding grave misconduct in one capacity, still insist that he is entitled to remain in partial control of the company in his other capacity." *People v. Lyon*, 119 N. Y. App. Div. 361, 104 N. Y. Supp. 319, aff'd without opinion 189 N. Y. 544, 82 N. E. 1130.

¹⁷ *People v. Lyon*, 119 N. Y. App. Div. 361, 104 N. Y. Supp. 319.

¹⁸ *People v. Powell*, 201 N. Y. 194, 94 N. E. 634.

¹⁹ *Stendell v. Longshoremen's Pro-*

§ 1821. — **Who may sue.** It has been recently held that, "the authorities are well-nigh universal to the proposition that the public has no legal interest in the question of suspension or removal of officers of private business corporations." ²⁰ It follows that corporate officers cannot be removed in an action by the attorney general in the name of the state, without a relator, unless expressly authorized by statute.²¹ Thus, a statute permitting the court to exercise the power of supervision or control over private corporations in an action by the attorney general in the name of the state does not authorize such an action when the state is not the real party in interest. For instance in a comparatively recent case in Wisconsin, action was commenced by the attorney general against directors and others to compel them to account and to remove them from office. It was contended that the action was authorized by said statute, claimed to have its origin in the legislation of New York enacted in response to the opinion, or doubt, of Chancellor Kent that no power of supervision or control over other than charitable corporations was vested in the court of chancery; and that the statute authorized suit in the name of the state, without regard to whether it has such an interest as to make it "the real party in interest." Justice Dodge, in delivering the opinion of the court, stated that said statute evinced no legislative purpose in conflict with the statute commanding that every action be prosecuted in the name of the real party in interest, but that it "merely declares that the action for the relief mentioned shall be entertained by the court when brought by either of the kinds of plaintiff described when he is the real party in interest; in other words, when the right to the relief is in him. It would be subversive of all principle to

tective Union Benev. Ass'n, 116 La. 974, 41 So. 228.

²⁰ *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 18 L. R. A. (N. S.) 672, 116 N. W. 900.

²¹ "The cause of action for the suspension or removal of recreant corporate officers is hardly less clearly primarily in the corporation. Such wrongful conduct is an injury to the corporate entity and, through it, to its stockholders, or, if insolvent, to its creditors. If the policy such officers pursue is wasteful of its property the corporation suffers the pecuniary loss.

* * * It is also obvious that the state

or public can have no direct interest in the question whether such officers should be removed." *State v. Milwaukee Elec. Railroad & Light Co.*, 136 Wis. 179, 18 L. R. A. (N. S.) 672, 116 N. W. 900. See also *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016.

"Unless a public wrong is being committed, or some fundamental principle of public policy violated, the only remedy is by private action instituted by the party or parties aggrieved." *Attorney General v. Albion Academy & Normal Institute*, 52 Wis. 469, 9 N. W. 391.

permit a creditor to demand removal of officers for misconduct which in no wise affected his interests, or even to call them to account. * * * So, also, it is anomalous for the state to sue to protect merely private rights which the real owners are entirely competent to protect either with or without suit, or to surrender them if they choose. Such mere sentimental or remote interest as the whole public may have that corporate officers, or other persons, behave well * * * is not that sort of right which constitutes the state the 'real party in interest' in a suit to relieve a private corporation of recreant officers."²² In New York, however, it is held that the statutory action to remove corporate officers may be brought by the attorney general in the name of the people, without a relator, although he has no direct interest in the action.²³

In New York, by statute, the suspension or removal of directors can be obtained only in an action brought by the attorney general.²⁴ But stockholders have an interest in the offices of the corporation which authorizes them to bring an action of quo warranto to oust directors, where the statute provides that the proceeding may be brought "by any other person on his own relation, whenever he claims an interest in the office, franchise or corporation which is the subject of the information."²⁵ In California, under a statute providing for the removal of directors where they fail to make and post the current accounts of a mining corporation, stockholders who sue to remove directors on such ground need not show that they have suffered any actual damage.²⁶

§ 1822. Resort to courts to interfere with action of corporate officers in regard thereto. If the stockholders or directors or other officer remove an officer from his office, the removed officer may resort

²² State v. Milwaukee Elec. Railroad & Light Co., 136 Wis. 179, 18 L. R. A. (N. S.) 672, 116 N. W. 900.

²³ People v. Ballard, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54, which, however, is distinguished in State v. Milwaukee Elec. Railroad & Light Co., 136 Wis. 179, 18 L. R. A. (N. S.) 672, 116 N. W. 900, as follows: "It is not here denied or affirmed that the legislature, which is empowered to declare the public policy, might, by appropriate legislation, assert a public interest in some such situation sufficiently direct to warrant the state

to bring suit. The one case in New York relied on by respondent turned upon a statute to which such effect has been given by construction." See also People v. Albany & S. R. Co., 55 Barb. (N. Y.) 344. But see People v. Lowe, 117 N. Y. 175, 22 N. E. 1016.

²⁴ Welcke v. Trageser, 131 N. Y. App. Div. 731, 116 N. Y. Supp. 166; People v. Lyon, 119 N. Y. App. Div. 361, 104 N. Y. Supp. 319.

²⁵ State v. Horan, 22 Wash. 197. 60 Pac. 135.

²⁶ Kinard v. Ward, 21 Cal. App. 92 130 Pac. 1194.

to the courts to compel reinstatement or, if the act is a breach of contract, to recover damages.²⁷ Mandamus to compel reinstatement is a proper remedy in case of an unjust removal.²⁸ In New York, however, it is held that where a director is removed and another person elected by the board to fill the vacancy, and the latter is in the actual occupation of the office claiming the right to hold by virtue of such election, there is a case of two persons each claiming to be entitled to hold an office, so that quo warranto rather than mandamus is the remedy.²⁹ Generally, equity has no power to reinstate a removed officer,³⁰ nor to restrain his removal.³¹

Proceedings of stockholders or directors are presumed regular until the contrary appears, and therefore, when, acting under a by-law or charter provision, they remove an officer, it will be presumed that they acted on sufficient grounds, until their action is impeached by proof.³² Thus, where a by-law provided that any officer might be removed by a majority vote of the entire board whenever the best interests of the company might require it, it was for the directors to determine what was for the best interests of the company, and the courts will not interfere unless for fraud or illegality.³³ Likewise, where the directors are given the power to remove officers for cause, the question whether there was good cause for the removal of an officer cannot be reviewed in an action by him for salary after his removal.³⁴ So the motives of the directors in removing an officer cannot be inquired into by the courts.³⁵

²⁷ Judicial review of proceedings for removal of officers of municipal corporations, see 2 McQuillin, *Municipal Corporations*, §§ 569-572.

²⁸ *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Welch v. Passaic Hospital*, 59 N. J. L. 142, 36 Atl. 702; *State v. Board of Officers Unterstuetzungs Gesellschaft Germania*, 144 Wis. 516, 129 N. W. 630.

General rules, see High, *Extraordinary Legal Remedies* (3rd Ed.), §§ 291-305.

²⁹ *People v. Powell*, 201 N. Y. 194, 203, 94 N. E. 634.

³⁰ *Dimmick v. Stokes*, 151 Ala. 150, 43 So. 854.

³¹ But see *Silverthorne v. Barnwell Lumber Co.*, 96 S. C. 32, 79 S. E. 519, holding that comparative injury

should be considered on application for temporary injunction.

³² *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

³³ *Griffith v. Sprowl*, 45 Ind. App. 504, 510, 91 N. E. 25.

³⁴ *Selley v. American Lubricator Co.*, 119 Iowa 591, 599, 93 N. W. 590.

In an action for salary, the right of the board of directors to discharge the vice president for sale of his stock, under power possessed by the directors to discharge an officer for cause, cannot be reviewed. *Selley v. American Lubricator Co.*, 119 Iowa 591, 93 N. W. 590.

³⁵ *Stobo v. Davis Provision Co.*, 54 Ill. App. 440.

Certiorari is not the proper remedy, even in New Jersey, where the use of the writ is much broader than in most other states, to review a resolution removing the president from office, where mandamus or quo warranto are available remedies.³⁶

§ 1823. Grounds for removal. It has already been noticed that a corporation has inherent power to remove any of its officers "for cause."³⁷ Moreover, the statutes, charter provisions or by-laws sometimes limit the right to remove to certain grounds or generally for cause, although often they give the right to remove "at pleasure." If the grounds are expressly designated, which is very rare, then of course the only question is whether the facts bring the case within the provision. Generally, however, the question arises as to what is "cause," where the removal is based on inherent power to remove or where the provision authorizing removal merely states that it shall be "for cause." If a statute fixes the grounds for removal, it seems that an officer cannot be removed on any other ground.³⁸ Malfeasance in office is ground for removal,³⁹ and misconduct as vice president and secretary warrants a removal from the office of director.⁴⁰ So a director may be removed by the board where he has sold all his stock in the company.⁴¹ On the other hand, mere indecorous language is not a ground,⁴² nor is the mere fact that contracts between the corporation and third parties have been fraudulently rescinded.⁴³ So mere neglect to attend directors' meetings for several months does not constitute such a long continued neglect of duty as to warrant the directors in declaring the office of vice president vacant and thus virtually removing such officer;⁴⁴ and absence from the state and

³⁶ Overman v. Manly Drive Co., 77 N. J. L. 290, 71 Atl. 1125.

³⁷ See § 1814, supra.

³⁸ People v. Higgins, 15 Ill. 110.

³⁹ Directors under charges of malfeasance should not be allowed to remain in charge of the situation, after the insolvency of the company, by having an influencing voice in the selection of trustees in liquidation who are to pass upon such charges. Fitzgerald v. State Mut. Building & Loan Ass'n of New Jersey, 74 N. J. Eq. 440, 69 Atl. 564.

Grounds for removal of officers of municipal corporations, see 2 Mc-

Quillin, Municipal Corporations, § 556.

⁴⁰ The reason is that "if defendants were to be removed as officers, but retained as directors, they could in the latter capacity vote to re-elect themselves to the offices from which they had been removed." People v. Lyon, 119 N. Y. App. Div. 361, 104 N. Y. Supp. 319.

⁴¹ Selley v. American Lubricator Co., 119 Iowa 591, 93 N. W. 590.

⁴² Fuller v. Plainfield Academic School, 6 Conn. 532, 546.

⁴³ Donald v. Manufacturers' Export Co., 142 Ala. 578, 38 So. 841.

⁴⁴ Halpin v. Mutual Brewing Co.,

failure to attend some of the meetings does not show a refusal to accept the office of director so as to authorize the removal.⁴⁵ It seems that where a by-law provides that when any director shall remove out of the county "the board may proceed to supply the vacancy," the mere removal out of the county is not ground for removal unless the board itself determines as a matter of fact that the removal from the county actually causes a vacancy.⁴⁶ Of course, a director cannot be removed on the ground of incompetency where the facts show the contrary.⁴⁷ Stockholders participating or acquiescing in a re-election of directors with actual or constructive notice of acts done prior to the re-election cannot have them removed for such acts.⁴⁸

§ 1824. Conditions and procedure. In order that an officer may be removed, so as to cease to hold the office, action must be taken to remove him, and any provisions in the charter or by-laws must be followed. The board of directors, by giving notice to an officer to resign, does not thereby discharge or remove him.⁴⁹ If the removal is by the board of directors, it must act as a board and at a meeting.⁵⁰ Sometimes, by-laws limit the right to remove co-directors to cases where the removal is "for cause" and also require more than a majority vote for removal.⁵¹ Where, by statute, two-thirds "of the stockholders" may expel any trustee from office, the statute means holders of two-thirds of the stock.⁵² If the by-laws authorize the removal of the secretary by the directors, provided "two-thirds of the whole board shall vote in favor of the action," he cannot be removed where four vote therefor, one refrains from voting, and the other two vote against removal.⁵³

Generally, it is held that if the removal is for cause, notice of the charges and an opportunity to defend must be given,⁵⁴ at least where

20 N. Y. App. Div. 583, 47 N. Y. Supp. 412.

⁴⁵ Alliance Co-op. Ins. Co. v. Gasche, 93 Kan. 147, 142 Pac. 882.

⁴⁶ Com. v. Detwiller, 131 Pa. St. 614, 635, 7 L. R. A. 357, 18 Atl. 990.

⁴⁷ Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754, 150 N. W. 1101.

⁴⁸ Ramsey v. Erie Ry. Co., 38 How. Pr. (N. Y.) 193.

⁴⁹ Granger v. American Brewing Co., 25 N. Y. Misc. 302, 55 N. Y. Supp. 590.

⁵⁰ People v. Minong Min. Co., 33 Mich. 2.

⁵¹ Selley v. American Lubricator Co., 119 Iowa 591, 93 N. W. 590.

⁵² State v. Horan, 22 Wash. 197, 60 Pac. 135.

⁵³ Stephany v. Liberty Cut Glass Works, 76 N. J. L. 449, 69 Atl. 967.

⁵⁴ See Alliance Co-op. Ins. Co. v. Gasche, 93 Kan. 147, 142 Pac. 882.

When the term of an officer is fixed by the charter, and it is proposed to remove him for cause, a charge must be made and a trial had, and he must

required by the by-laws,⁵⁵ although notice is not always deemed necessary, according to some decisions.⁵⁶

VIII. REMEDIES TO DETERMINE TITLE TO OFFICE

§ 1825. General considerations. What is herein considered are the remedies to determine title to office where the question involved relates to the validity of the election or appointment or to the rights of the parties to the office. The remedies in case an officer is removed have already been stated.⁵⁷

§ 1826. Quo warranto. Quo warranto is the most common remedy to try the title to office in a private corporation.⁵⁸ When any corporate office is usurped by one who has no title thereto, either because there has been no appointment or election at all, or because the appointment or election is void or voidable, or because his term of office has expired, quo warranto will lie to determine the title to the office, and to oust the incumbent from the exercise thereof.⁵⁹ And the pro-

be notified and have an opportunity to be heard. *State v. Adams*, 44 Mo. 570.

"If the removal is for cause, the accused director is entitled to a hearing." *Toledo Traction, Light & Power Co. v. Smith*, 205 Fed. 643, 646.

A director cannot be removed by stockholders without notice and an opportunity to be heard. *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882.

The stockholders cannot by a mere motion remove a director. *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882.

When authority to remove a director or other officer is vested in the directors, they can act only as a board, and on proper notice of the meeting. *People v. Minong Min. Co.*, 33 Mich. 2.

Procedure for removal of officers of municipal corporation, see 2 McQuillin, *Municipal Corporations*, §§ 563-569.

⁵⁵ *Halpin v. Mutual Brewing Co.*, 20 N. Y. App. Div. 583, 47 N. Y. Supp. 412.

⁵⁶ See *People v. Higgins*, 15 Ill. 110, where summary removal of superintendent of state hospital by board of trustees was held proper.

Where not provided for by the provision authorizing the removal, or otherwise, it seems to have been held in Missouri that no formal notice of the charges or trial is necessary. *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

⁵⁷ See § 1822, *supra*.

⁵⁸ See *Alliance Co-op. Ins. Co. v. Gasche*, 93 Kan. 147, 142 Pac. 882. See also the chapter on Quo Warranto, *infra*.

⁵⁹ *Delaware*. *State v. Brooks*, 74 Atl. 37.

Florida. *Davidson v. State*, 20 Fla. 784.

Georgia. *McCarthy v. McKinney*, 137 Ga. 392, 73 S. E. 394.

Illinois. *Place v. People*, 192 Ill. 160, 61 N. E. 354.

Indiana. *Creek v. State*, 77 Ind. 180.

Michigan. *Attorney General v. Looker*, 111 Mich. 498, 56 L. R. A. 947, 69 N. W. 929.

ceedings may be instituted either by the person who claims to be entitled to the office, or by a stockholder.⁶⁰ Quo warranto lies in case of officers of private corporations as well as in case of public officers,⁶¹ although the contrary is held in Canada.⁶² Where the statute authorizes quo warranto in relation to any "office" of a corporation "created by the laws of this state," it was held that the position of superintendent of a corporation was not such an office as was contemplated by the statute.⁶³ In quo warranto proceedings, the court has no discretion to issue the writ where the defendant's title is not shown to be defective.⁶⁴ The validity of a charter granted to a corporation cannot be inquired into in quo warranto proceedings to determine the right of persons to offices in the corporation.⁶⁵

§ 1827. Mandamus. Ordinarily mandamus does not lie to try the title to an office in a private corporation.⁶⁶ If the right to an office

Missouri. *State v. Farris*, 45 Mo. 183; *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

New Jersey. *Barna v. Kirezow*, 71 N. J. Eq. 196, 63 Atl. 611.

New York. *People v. Albany & S. R. Co.*, 57 N. Y. 161; *People v. Albany & S. R. Co.*, 55 Barb. 344; *Hartt v. Harvey*, 32 Barb. 55; *People v. Tibbits*, 4 Cow. 358.

Ohio. *State v. Bonnell*, 35 Ohio St. 10; *State v. McDaniel*, 22 Ohio St. 354.

Pennsylvania. *Com. v. Jankovic*, 216 Pa. 615, 65 Atl. 1099; *Com. v. Stevenson*, 200 Pa. 509, 50 Atl. 91; *Com. v. Stevens*, 168 Pa. St. 582, 32 Atl. 111; *Jenkins v. Baxter*, 160 Pa. St. 199, 28 Atl. 682; *Com. v. Graham*, 64 Pa. St. 339, 342; *Com. v. Smith*, 45 Pa. St. 59; *Com. v. Arrison*, 15 Serg. & R. 127, 16 Am. Dec. 531; *Com. v. Gill*, 3 Whart. 228.

As to the discretion of the court on application for leave to file an information in the nature of quo warranto, see *State v. Lockerby*, 57 Minn. 411, 59 N. W. 495; *State v. Stewart*, 32 Mo. 379; *State v. Lehre*, 7 Rich. (S. C.) 234.

A superintendent of a corporation,

holding at the will of the directors, does not hold an office in the corporation, within a statute providing that an information in the nature of quo warranto may be filed against one holding an office in a corporation: *State v. Cronan*, 23 Nev. 437, 49 Pac. 41.

See generally the chapter on Quo Warranto, *infra*, and High, *Extraordinary Legal Remedies* (3rd Ed.), § 653.

⁶⁰ *Com. v. Stevens*, 168 Pa. St. 582, 32 Atl. 111.

⁶¹ *Brooks v. State*, 3 Boyce (Del.) 1, Ann. Cas. 1915 A 1133, 79 Atl. 790; *McCarthy v. McKinney*, 137 Ga. 392, 73 S. E. 394; *Beard v. Beard*, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797; *Com. v. Jankovic*, 216 Pa. 615, 65 Atl. 1099.

⁶² *Reg. v. Hespeler*, 11 U. C. Q. B. 222; *Ex parte Gilbert*, 15 N. Brunsw. 29.

⁶³ *State v. Cronan*, 23 Nev. 437, 446, 49 Pac. 41.

⁶⁴ *Clark v. Wild*, 85 Vt. 212, 221, Ann. Cas. 1914 C 661, 81 Atl. 536.

⁶⁵ *Com. v. Yetter*, 190 Pa. St. 488, 43 Atl. 226.

⁶⁶ *People v. Powell*, 201 N. Y. 194,

has been adjudicated or is clear, mandamus will lie to seat the person entitled; but this remedy is generally held not appropriate if there is a question as to the right to the office.⁶⁷ However, mandamus will lie to compel one who, as an officer of a corporation, obtained possession of the books and records of the corporation, to deliver them to his successors,⁶⁸ although the title to the office may be incidentally involved.⁶⁹

The tendency is to increase the use of the writ in cases relating to title to corporate offices,⁷⁰ at least where the statute provides that the writ shall be issued in all cases where there is not a plain, speedy and adequate remedy at law.⁷¹ In Massachusetts, the use of the writ of mandamus has been carried further than in most states, and it is held that mandamus lies to compel corporate officers to refrain from acting as such where it is claimed that they were ineligible to the office.⁷² However, even in that state, the internal management of the affairs of a foreign corporation will not be interfered with by mandamus to command certain persons to refrain from acting as directors.⁷³

§ 1828. Jurisdiction in equity—General rule. By the overwhelming weight of authority, when there is an adequate remedy at law by quo warranto, or under a statute, a court of equity cannot, in the absence of a statute,⁷⁴ assume jurisdiction to declare an election void, or remove or enjoin officers, unless some other ground of equitable

203, 94 N. E. 634; *People v. New York Infant Asylum*, 122 N. Y. 190, 197, 10 L. R. A. 381, 25 N. E. 241; *High, Extraordinary Legal Remedies* (3rd Ed.), § 288. See generally the chapter on *Mandamus*, *infra*.

Quo warranto and not mandamus is the remedy of a director who claims to have been illegally removed and whose place has been filled by the election of another. *People v. Powell*, 201 N. Y. 194, 94 N. E. 634.

⁶⁷ *American Railway Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377; *Cross v. West Virginia Cent. & P. Ry. Co.*, 35 W. Va. 174, 12 S. E. 1071. And see *J. H. Wentworth Co. v. French*, 176 Mass. 442, 57 N. E. 789; *Leeds v. Atlantic City*, 52 N. J. L. 332, 8 L. R. A. 697, 19 Atl. 780;

In re Journal Pub. Club, 30 N. Y. Misc. 326, 63 N. Y. Supp. 465.

⁶⁸ *State v. Riedy*, 50 La. Ann. 258, 23 So. 327; *In re Journal Pub. Club*, 30 N. Y. Misc. 326, 63 N. Y. Supp. 465.

⁶⁹ *Potomac Oil Co. v. Dye*, 10 Cal. App. 584, 539, 102 Pac. 677; *Ward v. Sasser*, 98 Md. 281, 57 Atl. 208.

⁷⁰ See *J. H. Wentworth Co. v. French*, 176 Mass. 442, 57 N. E. 789.

⁷¹ *State v. Cronan*, 23 Nev. 437, 446, 49 Pac. 41.

⁷² *Longyear v. Hardman*, 219 Mass. 405, Ann. Cas. 1916 D 1200, 106 N. E. 1012.

⁷³ *Wason v. Buzzell*, 181 Mass. 338, 63 N. E. 909.

⁷⁴ See § 1830, *infra*, as to summary proceedings.

jurisdiction is presented. It has no inherent jurisdiction when the mere right to office is involved.⁷⁵ "Suits to remove or to institute corporation officers do not belong to the original jurisdiction of chancery, and the right to be such officer cannot, in general, and in the absence of special legislation affording this remedy, be tested by means of an injunction."⁷⁶ But when officers who have been legally elected or appointed, or who are de facto officers, are in possession, a

75 Alabama. *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401; *Elliott v. Sibley*, 101 Ala. 344, 13 So. 500; *Perry v. Tuscaloosa Cotton Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

California. *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

District of Columbia. *Hayes v. Burns*, 25 App. Cas. 242, 4 Ann. Cas. 704, aff'd without opinion in *Burns v. Hayes*, 201 U. S. 650, 50 L. Ed. 905 (mem. dec.).

Illinois. *Blinn v. Gillett*, 208 Ill. 473, 100 Am. St. Rep. 234, 70 N. E. 704; *Blinn v. Riggs*, 110 Ill. App. 37.

Indiana. *Carmel Natural Gas & Improvement Co. v. Small*, 150 Ind. 427, 50 N. E. 476, 47 N. E. 11; *Newcastle & A. Turnpike Co. v. Bell*, 8 Blackf. 584.

Maryland. *Supreme Lodge, Order of Golden Chain v. Simering*, 88 Md. 276, 41 L. R. A. 720, 71 Am. St. Rep. 409, 40 Atl. 723.

Massachusetts. *New England Mut. Life Ins. Co. v. Phillips*, 141 Mass. 535, 6 N. E. 534.

New Jersey. *Barna v. Kirezow*, 71 N. J. Eq. 196, 63 Atl. 611; *Kean v. Union Water Co.*, 52 N. J. Eq. 813, 46 Am. St. Rep. 538, 31 Atl. 282, rev'g 52 N. J. Eq. 111, 27 Atl. 1015; *Mechanics' Nat. Bank of Newark v. H. C. Burnet Mfg. Co.*, 32 N. J. Eq. 236; *Johnston v. Jones*, 23 N. J. Eq. 216; *Owen v. Whitaker*, 20 N. J. Eq. 122; *Kearney v. Andrews*, 10 N. J. Eq. 70.

New York. *People v. Albany & S. R. Co.*, 57 N. Y. 161; *Hartt v. Harvey*, 32 Barb. 55, 19 How. Pr. 245; *Mickles v. Rochester City Bank*, 11 Paige 118, 42 Am. Dec. 103.

Ohio. *Hullman v. Honcomp*, 5 Ohio St. 237.

Oregon. *Hedges v. Paquett*, 3 Ore. 77.

Pennsylvania. *Bedford Springs Co. v. McMeen*, 161 Pa. St. 639, 29 Atl. 99; *Jenkins v. Baxter*, 160 Pa. St. 199, 28 Atl. 682.

Wisconsin. *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. 84.

England. *Mozley v. Alston*, 1 Phil. 790.

Compare Gilchrist v. Collopy, 119 Ky. 110, 26 Ky. L. Rep. 1003, 82 S. W. 1018.

Equity will not interfere where there is an adequate remedy at law. *McCarthy v. McKinney*, 137 Ga. 392, 73 S. E. 394.

Where directors have been elected, the validity of the election cannot be attacked by a bill for an injunction and to order a new election, since quo warranto is the proper remedy. *Deal v. Miller*, 245 Pa. 1, 90 Atl. 1070.

In Nebraska, however, it is said that "in this state suits in equity seem to be maintainable for such purposes." *Haskell v. Read*, 68 Neb. 107, 113, 96 N. W. 1007, 93 N. W. 997.

76 New England Mut. Life Ins. Co. v. Phillips, 141 Mass. 535, 6 N. E. 534.

court of equity may enjoin wrongful interference by others claiming title to the offices.⁷⁷

§ 1829. — Exceptions to rule. A court of equity has jurisdiction to determine the right to an office, and to remove or enjoin an incumbent who is not entitled thereto, when it has jurisdiction of the suit on other grounds, and such relief is merely incidental to the other relief sought—as in a case where an injunction is necessary to prevent fraud or a waste or misapplication of assets, or where an accounting is sought, etc.⁷⁸ The court may inquire into the validity of the election, and pass upon the title to corporate offices when necessary to do complete justice in a suit of which it has jurisdiction upon other grounds.⁷⁹ While title to office cannot be tried in a court of equity, yet, “if the title arises in an equitable case, the court will determine the question for the purpose of administering in that case its equitable jurisdiction.”⁸⁰ Where a palpable fraud has been practiced in the election, and usurpers are about to take possession of the property, courts of equity will sometimes interfere to prevent them from doing so.⁸¹

§ 1830. Statutory remedies—In general. In many jurisdictions, the statutes expressly provide a more or less summary remedy to try

⁷⁷ *Reis v. Rohde*, 34 Hun (N. Y.) 161; *Toronto Brewing & Malting Co. v. Blake*, 2 Ont. (Can.) 175.

⁷⁸ *United States*. *Clarke v. Central Railroad & Banking Co.*, 54 Fed. 556; *Pond v. Vermont Valley R. Co.*, Fed. Cas. No. 11,264.

Alabama. *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401; *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747.

California. *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70.

Illinois. *Blinn v. Gillett*, 208 Ill. 473, 100 Am. St. Rep. 234, 70 N. E. 704; *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E. 17, modifying 99 Ill. App. 509; *Blinn v. Riggs*, 110 Ill. App. 37.

Nebraska. *Haskell v. Read*, 68

Neb. 107, 96 N. W. 1007, 93 N. W. 997; *Reynolds v. Bridenthal*, 57 Neb. 280, 77 N. W. 658; *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568.

New Jersey. *Johnston v. Jones*, 23 N. J. Eq. 216.

South Carolina. *State v. Port Royal & A. Ry. Co.*, 45 S. C. 470, 23 S. E. 383.

Utah. *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940.

Wisconsin. *Putnam v. Sweet*, 1 Chand. 286, 2 Pinney 302.

⁷⁹ *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

⁸⁰ *Sheehy v. Barry*, 87 Conn. 656, 89 Atl. 259.

⁸¹ *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801. See also *Johnston v. Jones*, 23 N. J. Eq. 216.

the title to corporate offices;⁸² and the court may, under these statutes, review and determine the legality of an election, whether any ground of equitable jurisdiction exists or not.⁸³ The purpose of such statutes is to give the courts "power to proceed in a summary manner to test the title of officers of corporations without recourse to the more cumbersome proceeding under the writ of quo warranto."⁸⁴

The New York statute provides that "the supreme court shall, upon the application of any person or corporation aggrieved by or complaining of any election of any corporation or any proceeding, act or matter touching the same, upon notice thereof to the adverse party, or to those to be affected thereby, forthwith and in a summary way hear the affidavits, proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and establish the election or order a new election, or make such order and give such relief as right and justice may require."⁸⁵ This statute has

82 California. *Wickersham v. Brittan*, 93 Cal. 34, 15 L. R. A. 106, 29 Pac. 51, 28 Pac. 792; *Chollar Min. Co. v. Wilson*, 66 Cal. 374; *In re Boston Mining & Milling Co.*, 51 Cal. 624.

Delaware. *In re Powell*, 5 Pennew. 7, 58 Atl. 831.

Indiana. See *Beckett v. Houston*, 32 Ind. 393.

New Jersey. *Dunster v. Bernards Land & Sand Co.*, 74 N. J. L. 132, 65 Atl. 123; *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347.

New York. *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54; *In re Northern Dispensary*, 26 Misc. 147, 56 N. Y. Supp. 784; *Hudson River West Shore R. Co. v. Kay*, 14 Abb. Pr. (N. S.) 191; *People v. Albany & S. R. Co.*, 55 Barb. 344, 38 How. Pr. 228; *Ramsey v. Erie Ry. Co.*, 38 How. Pr. 193; *In re Cecil*, 36 How. Pr. 477; *In re Pioneer Paper Co.*, 36 How. Pr. 111; *People v. Albany & S. R. Co.*, 5 Lans. 25.

Notice must be served on corporation of application to set aside election, but it is unnecessary to issue a rule to show cause. *In re Vernon*, 1 Pennew. (Del.) 202, 40 Atl. 60.

83 *Whitehead v. Sweet*, 126 Cal. 67,

58 Pac. 376; *Wickersham v. Crittenden*, 106 Cal. 329, 39 Pac. 603; *Wickersham v. Murphy*, 93 Cal. 41, 28 Pac. 793; *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70; *In re Cedar Grove Cemetery Co.*, 61 N. J. L. 422, 39 Atl. 1024; *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388; *Strong v. Smith*, 15 Hun (N. Y.) 222; *People v. Albany & S. R. Co.*, 55 Barb. (N. Y.) 344, 57 N. Y. 161; *Ex parte Willecocks*, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; *Ex parte Holmes*, 5 Cow. (N. Y.) 426; *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

84 *In re George Ringler & Co.*, 204 N. Y. 30, 40, Ann. Cas. 1913 C 1036, 97 N. E. 593.

85 Section 32 of the General Corporation Law of New York.

History of statute, see *In re George Ringler & Co.*, 204 N. Y. 30, 40, Ann. Cas. 1913 C 1036, 97 N. E. 593.

Under New York statute, relief may be had on motion. *In re Northern Dispensary*, 26 N. Y. Misc. 147, 56 N. Y. Supp. 784.

There may be an estoppel to move to set aside the election of directors, as where during a long series of years

recently been held to be applicable to elections by directors as well as to elections by stockholders,⁸⁶ contrary to an earlier decision in California.⁸⁷

In New Jersey, the statute is nearly identical with the New York statute except that it adds that the court "may, if the case require it, either order an issue to be made up in manner and form as it may direct to try the rights of the respective parties to the office or franchise in question, or may give leave to exhibit, or direct the attorney-general to exhibit, an information in the nature of a quo warranto in relation thereto."⁸⁸ In California, the statute is to the same general effect as the other statutes,⁸⁹ and the same is true in North Dakota.⁹⁰

The statutory remedy may be limited to a particular class of corporations, or a particular class may be excepted.⁹¹ Sometimes the

all parties interested in the company have recognized their eligibility. In *re George Ringler & Co.*, 145 N. Y. App. Div. 361, 130 N. Y. Supp. 62, modifying 70 N. Y. Misc. 581, 127 N. Y. Supp. 938.

⁸⁶ In *re George Ringler & Co.*, 204 N. Y. 30, 41, Ann. Cas. 1913 C1036, 97 N. E. 593, distinguishing *In re Mohawk & H. R. Co.*, 19 Wend. (N. Y.) 135, as involving merely a de facto inspector of election.

⁸⁷ An appointment by the board of directors of a corporation is not an "election" by the corporation, within the meaning of a statute authorizing a court to inquire into "any election held by any corporate body," etc. *Wickersham v. Brittan*, 93 Cal. 34, 15 L. R. A. 106, 29 Pac. 51, 28 Pac. 792.

⁸⁸ Section 42 of the Corporation Act of 1896.

Costs, see *In re Jersey City Paper Co.* (N. J. L.), 59 Atl. 565.

⁸⁹ Civil Code, § 315. See also Civil Code, § 312, providing that "any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent, or any stockholders or members, and may be set aside by petition

to the superior court of the county where the same is held," and construed in *Wright v. Central California Colony Water Co.*, 67 Cal. 532, 8 Pac. 70.

Stockholder is not entitled to relief unless he can show that the election was illegal. *Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 37 Pac. 207, 35 Pac. 1045.

Statute does not apply where a director is regularly appointed to fill a vacancy and merely complains that the other members of the board refuse to recognize his right to the office. *Wickersham v. Murphy*, 93 Cal. 41, 28 Pac. 793.

As to the sufficiency of a complaint in an action by stockholders to review the election of directors and oust them from office, see *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376.

A general demurrer to the complaint may be filed. *Clopton v. Chandler*, 27 Cal. App. 595, 150 Pac. 1012.

⁹⁰ In *re Argus Printing Co.*, 1 N. D. 434, 12 L. R. A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

⁹¹ In *re New York Exp. Co.*, 23 Hun (N. Y.) 615, holding that a statute exempting a particular class of cor-

statutory remedy is exclusive.⁹² When proceedings are brought under a statute conferring upon a particular court jurisdiction to inquire into a corporate election, or to remove or seat officers, etc., the case must, of course, come within the terms of the statute.⁹³ In New York, the proceeding is not an action and is inappropriate "for determining equitable claims or questions not necessarily involved in deciding the primary question."⁹⁴ A stockholder who was not a stockholder at the time of the election cannot institute the proceeding nor intervene therein, at least where no rights as assignee of the stock are shown.⁹⁵

The proceeding does not abate because of the sale of plaintiff's shares of stock by the board of directors pending the suit, where the sale is alleged to be void because of illegality of the assessment and because made by a board of directors claimed to have been illegally elected.⁹⁶

§ 1831. — Relief granted and matters which may be determined.

Where the statute authorizes the court to make such order or grant such relief as right and justice may require, it is proper to order a new election rather than determine that the minority candidates were properly elected.⁹⁷ A new election will be ordered where the notice of the meeting was not given for the time nor in the manner required

porations from the operation of a general statute providing for proceedings to determine the right to office operated retrospectively so as to prevent further prosecution of proceedings theretofore commenced.

New York statute now applies to all corporations. *In re George Ringler & Co.*, 204 N. Y. 30, 40, Ann. Cas. 1913 C 1036, 97 N. E. 593.

The New Jersey statute is not confined in its application to corporations organized for profit, but "its language is broad enough to embrace all corporations in which there are shares of capital stock held by individuals as private property, the ownership of which may be registered in the corporate books, and will entitle the holder to vote for directors of the corporation." *Rankin v. Newark Library Ass'n*, 64 N. J. L. 265, 45 Atl. 622.

⁹² See *In re Northern Dispensary*, 26 N. Y. Misc. 147, 56 N. Y. Supp. 784; *Hudson River West Shore R. Co. v. Kay*, 14 Abb. Pr. N. S. (N. Y.) 191.

⁹³ See *Wickersham v. Brittan*, 93 Cal. 34, 15 L. R. A. 106, 29 Pac. 51, 28 Pac. 792; *In re Bank of Dansville*, 6 Hill (N. Y.) 370.

⁹⁴ *In re Utica Fire Alarm Tel. Co.*, 115 N. Y. App. Div. 821, 101 N. Y. Supp. 109.

⁹⁵ *In re Scheel*, 134 N. Y. App. Div. 442, 119 N. Y. Supp. 295.

⁹⁶ *Whitehead v. Sweet*, 126 Cal. 67, 74, 58 Pac. 376.

⁹⁷ *In re Election of Directors of New York & W. Town Site Co.*, 145 N. Y. App. Div. 623, 130 N. Y. Supp. 414.

by statute, although the result will be the same upon a new election.⁹⁸ In New Jersey, the court, upon determining that the directors elected were ineligible, cannot declare that the petitioners were elected but must order a new election,⁹⁹ or, at least, the court "may" do so.¹ The court cannot, in such a proceeding, determine the right of certain alleged stockholders to vote at the new election.²

§ 1832. Collateral attack. The validity of the election of corporate officers cannot be questioned in a collateral proceeding.³ Thus,

⁹⁸ *In re Keller*, 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133. See Chap. 39, *supra*.

⁹⁹ *In re Jersey City Paper Co.*, 69 N. J. L. 594, 55 Atl. 280.

¹ "It requires a clear case to justify the court in installing into office those who have received a minority of votes, on the ground that the majority voted for ineligible candidates." *Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347.

² *In re Election of Directors of New York & W. Town Site Co.*, 145 N. Y. App. Div. 630, 130 N. Y. Supp. 419.

³ *United States. Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. 164.

Colorado. *Humphreys v. Mooney*, 5 Colo. 282.

Kansas. *Hunt v. Pleasant Hill Cemetery Ass'n*, 27 Kan. 734.

Louisiana. *Louisiana State Bank v. Flood*, 3 Mart. (N. S.) 341.

Massachusetts. *Charitable Ass'n in Middle Parish in Granville v. Baldwin*, 1 Metc. 359.

New Hampshire. *Hughes v. Parker*, 20 N. H. 58.

New Jersey. *Mechanics' Nat. Bank v. H. C. Burnet Mfg. Co.*, 32 N. J. Eq. 236.

New York. *Langan v. Francklyn*, 29 Abb. N. Cas. 102, 20 N. Y. Supp. 404.

North Carolina. *Atlantic, T. & O. R. Co. v. Johnston*, 70 N. C. 348.

Ohio. *First Presbyterian Society v. Smithers*, 12 Ohio St. 248.

"The act of January 7, 1867 (P. L. 1368), provides that any citizens of the United States shall be eligible to the office of director of a railroad company, but requires a majority of the board of directors to be citizens of Pennsylvania. Plaintiff contends that, since the board of directors of defendant company was not made up as required by this act, so far as residence is concerned, their act in passing the resolution condemning his property was void. Plaintiff is not in a position to raise this question in the present proceeding. Defendant is incorporated, and its officers, so far as appears, have been duly elected, and are at least officers *de facto*, and so long as their right to hold office is not being contested their acts in the exercise of the duties of their office cannot be attacked in a collateral proceeding. *Baird v. Bank of Washington*, 11 Serg. & R. 411; *McGargell v. Hazleton Coal Co.*, 4 Watts & S. 424. In such case the remedy is by *quo warranto* to try the title to office, and the question cannot be raised by proceedings for an injunction. *Bedford Springs Co. v. McMeen et al.*, 161 Pa. 639, 29 Atl. 99; *Spahr v. Farmers' Bank, Carlisle*, 94 Pa. 429; *Pittsburgh, Shawmut & Northern R. R. Co. v. Keating & Smethport R. R. Co.*, 233 Pa. 71, 81 Atl. 935." *Williams v. Delaware, L. & W. R. Co.*, 255 Pa. 133, 99 Atl. 477.

where an officer has been elected at a corporate meeting and has acted as such, the legality of his election cannot be tried in a collateral proceeding brought to enforce a contract in behalf of the corporation entered into by such officer.⁴ So, in an action of replevin to secure the possession of books and papers belonging to a corporate office, the question of title to the office cannot be tried.⁵ Likewise, where the election of directors was certified in due form, and they are in actual control of the affairs of the corporation, the question of the validity of the election cannot be adjudicated upon a petition for removal of a suit from a state to a federal court.⁶ A collateral attack cannot be based on the claim that the officer is ineligible,⁷ that he was elected at a meeting held outside the state,⁸ that there was irregularity in giving notice of the meeting at which the officer was elected,⁹ or the like. These questions are further considered in the following subdivision of this chapter relating to *de facto* officers.

IX. DE FACTO OFFICERS

§ 1833. General considerations. Nearly all the decisions relating to *de facto* officers pertain to directors. In a few cases the question has arisen in case of other officers. However, the rules governing are the same regardless of whether the alleged *de facto* officer is a director or some other officer. Much of the law relating to *de facto* officers has been decided in connection with public officers, and while the law may not be the same in all respects, without regard to whether the officer is a public one or merely an officer of a private corporation, yet in connection herewith it is often advisable to consult the law governing *de facto* public officers.¹⁰ As to whether the law governing is based on the same principles, Mr. Morawetz, in his valuable work on Private Corporations, comments as follows: "It has sometimes been suggested that a *de facto* officer of a private corporation occupies a position similar to that of a *de facto* government officer, or other public official, in possession of his office under color of right. But

⁴ *Humphreys v. Mooney*, 5 Colo. 282; *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

⁵ *Standard Gold Min. Co. v. Byers*, 31 Wash. 100, 71 Pac. 766.

⁶ *Consolidated Interstate Callahan Min. Co. v. Callahan Min. Co.*, 228 Fed. 528, 530.

⁷ *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. 164.

⁸ *Humphreys v. Mooney*, 5 Colo. 282; *Ohio & M. Ry. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128. Contra, see *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

⁹ *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225.

¹⁰ See *Mechem, Public Officers*, §§ 315-346; *Constantineau, De Facto Doctrine*.

the two cases rest on different principles. Directors and other managers of a private corporation are merely agents, and the corporation can be charged with their acts only in accordance with the established doctrines of the law of agency."¹¹ On the other hand, it has been decided in Pennsylvania that while a distinction between the two classes of *de facto* officers "appears to be recognized in some of the cases cited and relied on by him, we are not convinced that it is sound. The weight of authority, in this country especially, is decidedly against it. In the case of public corporations the reasons for holding the acts of *de facto* officers binding on the corporation they represent are doubtless stronger than in the case of private corporations, but, to some extent at least, they are the same in both, differing only in degree."¹²

The *de facto* doctrine has been characterized by Justice Werner of the New York Court of Appeals as "one of those legal makeshifts by which unlawful or irregular corporate and public acts are legalized for certain purposes on the score of necessity."¹³ For the most part the rule applies only to protect third persons dealing with such officers. And in reading the decisions it must be kept in mind that there is a clear distinction between rulings as to who are *de facto* officers and rulings as to when, by whom and under what circumstances the *de facto* rule may be set up, the failure to observe which has been the result of some confusion in the statement of the law by textbook writers and the courts in particular instances.

§ 1834. Definition. It has been said that "technically speaking, the term '*de facto* officer' applies to a public officer only."¹⁴ However that may be, the term is constantly used in connection with officers of a private corporation, and such an officer is defined to be "one who has the reputation of being the officer he assumes to be in the exercise of the functions of the office, and yet is not a good officer in point of law."¹⁵

¹¹ 2 Morawetz, *Private Corporations* (2nd Ed.), § 640.

¹² *Richards v. Farmers' & Mechanics' Institute of Northampton County*, 154 Pa. St. 449, 454, 35 Am. St. Rep. 848, 26 Atl. 210.

¹³ *In re George Ringler & Co.*, 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593.

¹⁴ *Umatilla Water Users' Ass'n v.*

Irvin, 56 Ore. 414, 425, 108 Pac. 1016.

¹⁵ *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016. See also *Barlow v. Stanford*, 82 Ill. 298; *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236. See, generally, for definitions where officers were public ones, *Mechem, Public Officers*, §§ 316-318.

§ 1835. To what officers applicable—Necessity for color of title.

"A de facto officer is distinguished on the one hand from a mere usurper of an office, and on the other hand from an officer de jure. He is one who is in actual possession of an office under the claim and color of an election or appointment, and is in the exercise of its functions and in the discharge of its duties."¹⁶ In short, in order to be a de facto officer, there must be color for the claim and a colorable title to the office.¹⁷ To be an officer de facto one must be in actual possession of the office under claim and color of an election or appointment, and in the exercise of its functions and discharge of its duties. He must hold office under some degree of notoriety, and exercise continuous acts of an official character.¹⁸ A board of directors is not a de facto board where it is not publicly exercising the functions of directors nor recognized generally by the public or by those having dealings with the corporation, as a legitimate board of directors.¹⁹ For instance, directors are not de facto officers where, at the time of holding a meeting, they have neither possession nor control of the seal, record books or corporate papers; no possession or control of the corporate property; had never before exercised any functions or performed any acts incident to a board of directors; did not meet in or have possession of the place which had the character and reputation of being the office of the company.²⁰

¹⁶ *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 665, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689, aff'g 34 Ill. App. 268.

¹⁷ *Alabama*. *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763.

Maine. *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440, 10 Atl. 250.

Nevada. *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev. 166, 30 Pac. 695; *State v. Curtis*, 9 Nev. 325.

New York. *Rochester & G. V. R. Co. v. Clarke Nat. Bank*, 60 Barb. 234.

Oregon. *Hamlin v. Kassaffer*, 15 Ore. 456, 3 Am. St. Rep. 176, 15 Pac. 778 (a case involving a public office).

Texas. *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

And see *Meechem*, *Public Officers*, § 319.

De facto common council, see *McQuillin*, *Municipal Corporations*, § 581.

¹⁸ *Waterman v. Chicago & I. R. Co.*,

139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689, aff'g 34 Ill. App. 268.

Where all the property of the corporation has been sold and delivered by the trustees of the company, and the possession of the purchaser is open and notorious, the trustees, some three years thereafter, are not de facto trustees. *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev. 166, 30 Pac. 695.

¹⁹ *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

²⁰ *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689, aff'g 34 Ill. App. 268, where a pretended board of directors of a railroad company, which was neither a de jure nor a de facto board, because elected at a time and place other than that fixed by the by-laws, without notice to or the presence of a minority of the de jure

There is some authority contrary to what has just been said as to the necessity for an appointment or election to constitute color of title; and, while it has been said, in distinguishing a mere usurper or intruder from a de facto officer, that the latter has color of title to the office by virtue of some appointment or election,²¹ the better rule seems to be that "the reason of public policy, upon which it is held that the acts of an officer de facto are not to be called in question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder."²² It is said in support of this rule that "third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority; if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question."²³ So it has been held that a stockholder who agrees with other stockholders that he should be elected secretary and treasurer, and who in pursuance thereof acts as general manager, is a de facto officer although the election of officers has not taken place and he has not been formally declared secretary and treasurer.²⁴

Mere election of one as an officer does not make him a de facto officer where he neither accepts the office nor acts as such officer.²⁵ And

directors, and without the possession of the records, papers or seal of the corporation, and whose right of office had been disputed, and against whom litigation existed to oust them from office, met and appointed one of their number president of the company. It was held that the appointee was neither a de jure nor a de facto officer, although a majority of the persons present at the meeting were the de jure directors of the corporation holding over after the expiration of their term of office.

²¹ *Fitchburg R. Co. v. Grand Junction Railroad & Depot Co.*, 1 Allen (Mass.) 552, 557.

²² *Petersilea v. Stone*, 119 Mass. 465,

20 Am. Rep. 335, which, however, was a case involving a public officer.

In an early case in North Carolina, in case of a public officer, it is said that there must be either (1) some colorable election and induction into office ab origine, or (2) so long an exercise of the office and acquiescence therein as to afford to third persons a presumption that the person was duly appointed or elected. *Burke v. Elliott*, 26 N. C. 355, 360, 368.

²³ *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335.

²⁴ *Welker v. Anheuser-Busch Brewing Ass'n*, 103 Minn. 189, 114 N. W. 745.

²⁵ *Rozeerans Gold Min. Co. v. Morey*, 111 Cal. 114, 43 Pac. 585.

forcible intrusion into an office does not make the intruder an officer de facto, where not acquiesced in by the corporation.²⁶

Where the color of authority notoriously ceases, as where it is held by a court of last resort, in a direct proceeding to determine the title of officers de facto, that they have no rightful title to the office but are mere usurpers, such persons are no longer de facto officers, at least as to persons who have notice of the judgment.²⁷ But a judgment ousting de facto officers does not terminate the powers of such officers to contract on behalf of the corporation until it is filed with the clerk.²⁸ An order ousting corporate trustees, although the decision has been rendered, is not effective until signed, and until so signed they remain trustees de facto, and therefore competent to participate in a board meeting, accept the resignation of a trustee, and re-elect him.²⁹

§ 1836. — Officers holding over. The tenure of office generally is until the election of successors, and the officer holds over after the end of his term until a successor is elected. No good reason is apparent why such officer, when holding over, is not a de jure officer.³⁰ However that may be, there is no question but what directors or other officers holding over after the expiration of their term, and until the election or appointment of their successors, are at least de facto officers, if not officers de jure.³¹ They must perform the duties enjoined by law with the same fidelity as regularly elected officers, and they are likewise subject to the same statutory liability for any failure of duty occurring during the term for which they may be holding over.³²

²⁶ *First African M. E. Zion Church v. Hillery*, 51 Cal. 155; *State v. Curtis*, 9 Nev. 325.

²⁷ *Rochester & G. V. R. Co. v. Clarke Nat. Bank*, 60 Barb. (N. Y.) 234.

²⁸ *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. 255, Fed. Cas. No. 392, aff'd 104 U. S. 192, 26 L. Ed. 707.

²⁹ *Ehret v. George Ringler & Co.*, 144 N. Y. App. Div. 480, 129 N. Y. Supp. 551, rev'g 70 N. Y. Misc. 627 129 N. Y. Supp. 546.

³⁰ See *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350, 367.

³¹ *Alabama*. *Thorington v. Gould*, 59 Ala. 461.

Georgia. *Milliken v. Steiner*, 56 Ga. 251.

Kansas. *Ft. Scott v. Schulenberg*, 22 Kan. 648.

Maine. *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

New York. *Trustees of Vernon Society v. Hills*, 6 Cow. 23, 16 Am. Dec. 429.

³² *Kinard v. Ward*, 21 Cal. App. 92, 130 Pac. 1194.

§ 1837. — **Irregularities connected with election.** A person is a de facto officer where he thus acts as such, under color of an election or appointment, although the meeting may have been irregularly called, or held without proper notice, or irregularly conducted;³³ or, according to some cases, although he may have been elected at a meeting of the stockholders held beyond the limits of the state.³⁴ However, in a case of election at a meeting outside the state, the Supreme Court of Texas has held the contrary on the theory that "a de facto authority cannot arise when there has been absolutely no election or appointment, or, what is equivalent, one that is absolutely null and void, and not merely irregular or informal; and where there has been no assertion of the right to exercise the office except in the very instance where it is questioned; and where there has been no acquiescence in the official acts of the person claiming such authority, either on the part of the body for whom he professes to act, or of any one else. Otherwise the simple bold assertion of a right to an office would bind such corporation or body by the acts of the usurper, and parties suffering from his unlawful acts could never question them."³⁵ And directors of a company are not even de facto officers, it has been held in Texas, as against the rights of stockholders before organization of the corporation, where the directors are not selected on the organization of the company in the manner pointed out by the act authorizing the incorporation.³⁶

So directors chosen under an unconstitutional statute reducing the number of directors are de facto officers as to acts done by them under color of their office before the unconstitutionality of the act has been declared.³⁷

³³ **United States.** *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. 255, Fed. Cas. No. 392, aff'd 104 U. S. 192, 26 L. Ed. 707.

California. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594.

Maryland. *Burgess v. Pue*, 2 Gill 254.

Massachusetts. *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083.

Missouri. *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

Pennsylvania. *Baird v. Bank of*

Washington, 11 Serg. & R. 411.

Washington. *Baggot v. Turner*, 21 Wash. 339, 58 Pac. 212.

³⁴ **Ohio & M. R. Co. v. McPherson**, 35 Mo. 13, 86 Am. Dec. 128; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706.

³⁵ *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339, 344.

³⁶ *Exline-Reimers Co. v. Lone Star Life Ins. Co.*, — Tex. Civ. App. —, 171 S. W. 1060.

³⁷ *Bradford v. Frankfort, St. L. & T. R. Co.*, 142 Ind. 383, 41 N. E. 819, 40 N. E. 741.

Where directors are elected before the act of the stockholders in increasing the number of directors had become binding by filing a certificate showing the increase as required by statute, and they act as such without objection, they are de facto directors.³⁸ So failure to file a certificate of election does not prevent the elected officers becoming de facto officers.³⁹

§ 1838. — Persons not eligible or who become disqualified. There is some authority having a tendency to support the contention that if a person who is not eligible as a director or other officer is elected, he does not, properly speaking, become a de facto officer.⁴⁰ It is submitted, however, that there is no good reason why such persons, if performing the duties of the office, should not be considered de facto officers, and it is generally so held, under ordinary circumstances, where the rights of innocent persons dealing with the corporation through him are involved.⁴¹ Thus, it has been held that the fact that some of the directors are not residents of the state, as required by statute, does not invalidate a mortgage given by them on land in another state.⁴² So it has been held in Utah that if at the time of election a director was not qualified because not holding sufficient stock, but thereafter, and before the directors levied an assessment on the stock, he held sufficient shares to qualify him, he was at least a de facto officer until removed, so as to be entitled to vote on the assess-

³⁸ *Lewis v. Matthews*, 161 N. Y. App. Div. 107, 146 N. Y. Supp. 424.

³⁹ *Roberts v. Hill*, 137 Ind. 215, 36 N. E. 843.

⁴⁰ *Schmidt v. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 1 L. R. A. 781, 19 N. E. 353; *In re Newcomb*, 42 N. Y. St. Rep. 442, 18 N. Y. Supp. 16; *Jenner's Case*, 7 Ch. Div. 132; *Hamley's Case*, 5 Ch. Div. 705.

Compare, however, *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179; *Wallace & Sons v. Walsh*, 125 N. Y. 26, 11 L. R. A. 166, 25 N. E. 1076; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131.

⁴¹ *New Hampshire. Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. Kuser v. Wright, 52

N. J. Eq. 825, 31 Atl. 397, rev'g 52 N. J. Eq. 392, 28 Atl. 719.

New York. *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380; *Hamilton Trust Co. v. Clemes*, 17 App. Div. 152, 157, 45 N. Y. Supp. 141; *Lord v. Equitable Life Assur. Society*, 57 Misc. 417, 108 N. Y. Supp. 67.

Pennsylvania. *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131.

England. *In re Staffordshire Gas & Coke Co.*, 66 L. T. (N. S.) 413.

In Arizona, nonresident directors were held to be de facto directors. *Copper Belle Min. Co. v. Costello*, 12 Ariz. 318, 100 Pac. 807.

⁴² *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. 164; *Copper Belle Min. Co. v. Costello*, 12 Ariz. 318, 100 Pac. 807.

ment.⁴³ Moreover, the fact that directors or other officers have not the qualifications prescribed by the by-laws of the corporation does not prevent them from being *de facto* officers, since a corporation may waive its by-laws and third persons are not bound to take notice of them.⁴⁴

If the officer, after his election, becomes disqualified, but continues to act as such, he is a *de facto* officer.⁴⁵ Thus, the fact that one of the directors ceases to be a stockholder, after his election, does not prevent his being thereafter a *de facto* officer;⁴⁶ and if the director continues to act as such, notwithstanding the transfer of his stock, his acts are valid as to third persons dealing with the corporation, and his title to office cannot be impeached collaterally.⁴⁷ This rule is not necessarily inconsistent with the rule existing in many jurisdictions that the disposing of the stock by the director *ipso facto* terminates the term of the officer.⁴⁸

§ 1839. — Persons who have failed to take oath or give bond. An officer is a *de facto* officer although he has not been sworn, as required by the charter.⁴⁹ The same would be true of an officer who has failed to give a bond as required.

§ 1840. De jure office as essential to de facto officer. There can be no *de facto* officer unless there is a *de jure* office for him to hold.⁵⁰

⁴³ *Jones v. Bonanza Mining & Milling Co.*, 32 Utah 440, 91 Pac. 273.

⁴⁴ See *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203. See also § 502, *supra*.

⁴⁵ *Atlas Nat. Bank v. F. B. Gardner Co.*, Fed. Cas. No. 635; *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179.

⁴⁶ *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179.

⁴⁷ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

⁴⁸ See § 1806, *supra*.

⁴⁹ *Simpson v. Garland*, 76 Me. 203; *Schwab v. Frisco Mining & Milling Co.*, 21 Utah 258, 60 Pac. 940.

⁵⁰ "The bank was incorporated under the general laws of the state about eight years before the trial of the defendant, which was had in

March, 1915. Under the act approved October 2, 1903 (General Acts 1903, p. 310, incorporated in section 3481 of the Code of 1907), conferring and limiting the powers of business corporations, and providing for their organization and regulation, express power was conferred upon the bank as a corporation to appoint and employ such officers and agents as its business might require, and also to make all needful by-laws, rules, and regulations for the transaction of its business and the control of its property and affairs. Here we find express authority conferred upon the stockholders of the bank to provide for the appointment and employment of officers and agents, and to make all needful by-laws, rules, and regulations for the transaction of its business, etc. The power here conferred was exer-

However, where a statute makes the number of directors, in excess of three, entirely dependent on the will of the majority of the stockholders, and that majority meets and increases the number of directors to seven, and such directors elected in pursuance thereof are permitted to transact the business of the corporation without objection, the corporation is bound by their acts, as to third persons dealing with them, notwithstanding irregularity in the notice of the stockholders' meeting when the increase was voted.⁵¹

§ 1841. Powers and rights of de facto officers—In general. It is hardly necessary to state that de facto officers have the same powers

cised by the stockholders in the enactment of by-laws in which the officers of the bank were created, and their duties defined, conferring upon directors of the bank the authority to select the officers designated, to appoint other employees, and to fix their salaries. The offices created were those of president, vice president, and cashier. No such office as assistant cashier was created or established. It therefore had no legal existence, unless it be held that the directors possessed the power of creating such an office. Directors of a corporation are simply agents selected by the stockholders of the corporation, limited in the exercise of power by the by-laws in matters pertaining to the internal management of the affairs of the corporation. Being mere agents they can exercise no powers except those conferred by the by-laws instituted by the stockholders. * * * If it was the purpose of the directors, by electing defendant assistant cashier, and by fixing his salary to be paid jointly with that of his father as cashier, to create the office of assistant cashier, which is by no means clear, then their act in carrying out that purpose was a clear usurpation of authority not binding upon the bank, and the defendant was never a de jure officer of the bank. Was he a de facto officer? He was not. There can be no de facto officer, unless there is a cor-

responding office in existence. * * * But it may be said that the act of the directors in electing the defendant assistant cashier impliedly created the office of assistant cashier. If this be conceded, the answer is that, as they were without authority to create that office, it has never had any legal existence, and can have no de facto existence. It has been very correctly said by an eminent jurist and law-writer: 'The notion that there can be a de facto office has been characterized as a political solecism, without foundation in reason and without support in law.' 1 Dillon on Municipal Corporations (4th Ed.) § 276. The view that there may be a de facto office under a constitutional government is wholly untenable and unsound. 8 Am. & Eng. Encyc. Law (2d Ed.) 801, and cases cited in notes. And this is true here. The by-laws enacted by the stockholders, so far as the directors are concerned, is the law of the corporation, and just as solemn as is the constitution of a sovereign state, or the charter under which the bank derived its corporate existence and powers. Without a legally constituted office there can be no officer, either de jure or de facto." *Kramer v. State*, — Ala. App. —, 75 So. 185.

⁵¹ *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913 B 1094, 119 Pac. 516.

as de jure officers, but not the same rights. When filling the office, they act the same as if de jure officers, but their rights are not the same since they may be ousted from office in a proper proceeding and they cannot recover the salary of the office.⁵² A de facto board of directors may legally perform such acts as are within the scope of the business of the corporation;⁵³ and a de facto president may do such acts, pending a determination of who are the lawful officers of the company, as are necessary to keep its machinery in motion.⁵⁴ Thus, a de facto board of directors may call a special meeting of the stockholders to consider and act upon any matter pertaining to the corporation, as to which, under the law, the stockholders may act at a special meeting.⁵⁵ If stock is registered in one's name on the books of the corporation, de facto directors have power to issue a certificate of such stock to the owner.⁵⁶ A de facto board of directors may, by the weight of authority, make a call on unpaid subscriptions on capital stock.⁵⁷

§ 1842. — Acts in favor of de facto officers themselves as invalid.

Acts of de facto officers are not valid in so far as for their own benefit, for the reason that they cannot take advantage of their own want of title, which they must be cognizant of.⁵⁸ In other words, a person cannot enforce rights dependent upon his legal position as an officer, where he is merely an officer de facto,⁵⁹ as a claim for

⁵² See chapter on Compensation of Officers, *infra*.

⁵³ *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

Acts of a de facto board of directors in making a contract of employment cannot be annulled by the action of the president alone. *Collier v. Consolidated Railway Lighting & Refrigerating Co.*, 70 N. J. L. 313, 57 Atl. 417.

⁵⁴ *Walker v. Flemming*, 70 N. C. 483.

⁵⁵ *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191, meeting to vote on increase of stock.

⁵⁶ *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

⁵⁷ See § 673, *supra*.

⁵⁸ *Shellenberger v. Patterson*, 168 Pa. St. 30, 40, 31 Atl. 943; *Keyser v. McKissan*, 2 Rawle (Pa.) 139 (case of

public officer); *Groveland Improvement Co. v. Farmers' Supply Co.*, 25 Wash. 344, 87 Am. St. Rep. 755, 65 Pac. 529.

"They cannot invoke the aid of their own acts as officers de facto to promote their own individual interests, hence the allotment of stock by the complainants to themselves was illegal, invalid, and void, even if they had paid for it." *Shellenberger v. Patterson*, 168 Pa. St. 30, 40, 31 Atl. 943.

⁵⁹ *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689, *aff'g* 34 Ill. App. 268; *Lebanon & R. Gravel Road Co. v. Adair*, 85 Ind. 244; *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943; *Riddle v. Bedford County*, 7 Serg. & R. (Pa.) 386.

salary, for example.⁶⁰ So where a de facto officer sues upon a note executed to himself, and signed by him as the principal officer of the corporation, he cannot rely on the de facto rule, since "it would be a perversion of the doctrine upon the subject of de facto officers to allow him to use it as a shield."⁶¹ Of course, a de facto officer cannot restrain a regularly elected director from exercising the duties of his office.⁶²

§ 1843. Right to sue former officers and directors. A de facto board of directors, representing a minority of the stockholders, cannot sue in tort in the name of the corporation to recover damages for alleged wrongful acts of former officers and directors, where the action is "in substance a factional controversy between rival boards of directors, where a minority of the stockholders, mainly for the purpose of affecting the property rights of, or imposing a liability upon, the majority, are attempting to appropriate the name and rights of a corporation which is without assets or business."⁶³

§ 1844. — Effect of appointments. The general rule is that appointment of an agent or subordinate officer by a de facto board of directors has the same effect as if made by a de jure board.⁶⁴ However, while it is admitted that the general rule is that a de facto officer may make valid appointments and that the appointee is not merely an appointee de facto but one de jure, the most of the decisions relate to public officers,⁶⁵ and in case of officers of private corporations there is some authority denying that the appointee is a de jure one. Thus, it has recently been held in New York that directors who are merely de facto officers cannot, while in office, create directors de jure to fill vacancies.⁶⁶ The theory of the New York Court of

⁶⁰ See chapter on Compensation of Officers, *infra*.

⁶¹ *Lebanon & R. Gravel Road Co. v. Adair*, 85 Ind. 244.

⁶² *Umatilla Water Users' Ass'n v. Irvin*, 56 Ore. 414, 108 Pac. 1016.

⁶³ *Stratton - Massachusetts Gold Mines Co. v. Davis*, 222 Mass. 549, 111 N. E. 375.

⁶⁴ *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *Smith v. Erb*, 4 Gill (Md.) 437; *People v. Northern R. Co.*, 42 N. Y. 217; *Ellis v. North Carolina Inst. for Deaf, Dumb & Blind*, 68 N. C. 423.

⁶⁵ See extensive note in Ann. Cas. 1913 C 1042.

For reasoning in favor of appointee of de facto public officer being considered a de jure officer, see *People v. Staton*, 73 N. C. 546, 21 Am. Rep. 479.

⁶⁶ *In re George Ringler & Co.*, 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593, rev'g 145 N. Y. App. Div. 361, 130 N. Y. Supp. 62, and aff'g 70 N. Y. Misc. 581, 127 N. Y. Supp. 938.

For note on validity of appointment by de facto officer of public or private corporation, see Ann. Cas. 1913 C 1042.

Appeals was that the appointing de facto directors, "as between themselves and the corporation, were never directors or trustees, either in fact or in law. They became officers de facto only as to the public and third persons dealing with the corporation"; that their election to fill vacancies in the board made the persons so elected directors or trustees de facto, but that "as to the corporation and its stockholders they acquired no more right or title to the office than [those] * * * who assumed, without power or authority, to elect them. They were all in office under mere color of title, which has been defined 'to be that which in appearance is title, but which in reality is not title.' " The court further held that inasmuch as the election of the appointing directors was clearly invalid, their attempt to appoint others to fill vacancies was equally illegal as regards the corporation and its stockholders, on the theory that "to hold otherwise would produce the incongruous result that mere intruders into a corporate board could legally elect others of their own choosing, who in turn could accept the resignations of the intruders and legally elect their successors, thus usurping the powers which of right belong to the real stockholders, who by such means might be excluded from all participation in the affairs of the corporation. The courts should not lend themselves to such a consummation, unless the letter of the law plainly commands it, and we can find no such command." ⁶⁷

§ 1845. De facto rule not applicable in case of direct attack. If directors are merely de facto directors, then of course they may be ousted from their offices by a direct and proper proceeding brought for that purpose.⁶⁸ The doctrine of de facto officers can have no application as between two sets of officers claiming title to the same offices.⁶⁹ Thus, it was said, in a Kentucky case, that "this was a direct proceeding by one set of officers claiming to be the legal and de jure officers of the company, to obtain possession of the books and papers. The other set of officers were actually in the exercise of the powers and duties of the offices claimed by them. In a proceeding affecting the rights of third persons, they, and not the appellants would be the officers de facto. * * * We do not think the doctrine as to so-called de facto officers has application in a direct proceeding to try the title to the offices." ⁷⁰

⁶⁷ In re George Ringler & Co., 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593.

⁶⁸ In re George Ringler & Co., 204 N. Y. 30, Ann. Cas. 1913 C 1036, 97 N. E. 593.

⁶⁹ Ellsworth Woolen Mfg. Co. v. Faunce, 79 Me. 440, 444, 10 Atl. 250.

⁷⁰ Schmidt v. Mitchell, 101 Ky. 570, 589, 72 Am. St. Rep. 427, 41 S. W. 929.

§ 1846. Acts as binding in favor of third persons—General rules.

A corporation "may act by means of an officer de facto as fully and effectually, as regards the public and third persons, as by an officer de jure," in all matters within the scope of the corporate business.⁷¹ The acts of de facto officers as such, in so far as third persons are concerned, are just as valid and binding upon the corporation as if they were officers de jure.⁷² And the validity of their acts is not in any way affected by the fact that a court afterwards declares the election or appointment void, and ousts them from the office.⁷³ The

⁷¹ *Richards v. Farmers' & Mechanics' Institute of Northampton County*, 154 Pa. St. 449, 35 Am. St. Rep. 848, 26 Atl. 210; *McGargell v. Hazleton Coal Co.*, 4 Watts & S. (Pa.) 424.

⁷² *United States. Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. 164; *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. 255, Fed. Cas. No. 392, aff'd 104 U. S. 192, 26 L. Ed. 707.

California. Chandler v. Hart, 161 Cal. 405, Ann. Cas. 1913 B 1094, 119 Pac. 516; *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594; *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.

Georgia. Milliken v. Steiner, 56 Ga. 251.

Indiana. Bradford v. Frankfort, St. L. & T. R. Co., 142 Ind. 383, 41 N. E. 819, 40 N. E. 741

Kansas. Ft. Scott v. Schulenberg, 22 Kan. 648.

Maine. Simpson v. Garland, 76 Me. 203.

Massachusetts. Lamb v. McIntire, 183 Mass. 367, 67 N. E. 320; *Hudson v. Parker Mach. Co.*, 173 Mass. 242, 53 N. E. 867; *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083.

Missouri. Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128.

New Jersey. Collier v. Consolidated Railway Lighting & Refrigerating Co., 70 N. J. L. 313, 57 Atl. 417; *Savage v. Miller*, 56 N. J. Eq. 432, 39 Atl.

665, 36 Atl. 578; *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548.

New York. People v. Northern R. Co., 42 N. Y. 217; *Hamilton Trust Co. v. Clemes*, 17 App. Div. 152, 45 N. Y. Supp. 141, aff'd 163 N. Y. 423, 57 N. E. 614; *Trustees of Vernon Society v. Hills*, 6 Cow. 23, 16 Am. Dec. 429.

Pennsylvania. Beltz v. Garrison, 254 Pa. 145, 98 Atl. 956; *Richards v. Farmers' & Mechanics' Institute of Northampton County*, 154 Pa. St. 449, 35 Am. St. Rep. 848, 26 Atl. 210; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131; *Baird v. Bank of Washington*, 11 Serg. & R. 411.

South Carolina. St. Luke's Church v. Mathews, 4 Desauss. 578, 6 Am. Dec. 619.

South Dakota. Wright v. Lee, 2 S. D. 596, 51 N. W. 706.

Virginia. Burr's Ex'r v. McDonald, 3 Gratt. 215.

Washington. Davis v. Edwards, 41 Wash. 480, 84 Pac. 22; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141; *Baggot v. Turner*, 21 Wash. 339, 58 Pac. 212.

England. Webb v. Shropshire Rys. Co., 69 L. T. (N. S.) 533; *In re Staffordshire Gas & Coke Co.*, 66 L. T. (N. S.) 413.

⁷³ *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. 255, Fed. Cas. No. 392, aff'd 104 U. S. 192, 26 L. Ed. 707.

rule is thus stated in a recent decision in Massachusetts: "The general proposition is not questioned, that the acts of de facto directors of a private corporation are valid as to third persons. Where persons having color of title are permitted by the corporation to act in the position and with the reputation of being directors, third persons who deal with them in ignorance of their want, of legal right to the offices, are entitled to assume that there is no defect in their appointment."⁷⁴ It has been held that the fact that the lessor of a corporation is also a large stockholder therein does not affect his position as a third person to the company so far as this question is concerned.⁷⁵

§ 1847. — Reason for rule. In the leading case on this subject, decided in Connecticut in 1871 in relation to a public officer, but the reasoning of which applies equally well to an officer of a private corporation, Chief Justice Butler stated the reason for the rule as follows: "The de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers. It was seen * * * that the public could not reasonably be compelled to inquire into the title of an officer, nor he compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons, on the ground that, as to them, although not officers de jure, they were officers in fact, whose acts public policy required should be considered valid."⁷⁶ The reason for the rule was also well stated by Justice Clopton in Alabama as follows: "The doctrine of the validity of the acts of officers de facto rests on public policy and justice. The official dealings of directors de facto with third persons are sustained as rightful and valid, on the ground of continuous acquiescence by the corporation, and suffering them to hold themselves out as having such authority; thereby inducing others to deal with them in such capacity. The theory of the doctrine of officers de facto, and the principles sus-

⁷⁴ *Stratton v. Massachusetts Gold Mines Co. v. Davis*, 222 Mass. 549, 111 N. E. 375. *Ann. Cas.* 1913 B 1094, 119 Pac. 516.

⁷⁶ *State v. Carroll*, 38 Conn. 449, 467, 9 Am. Rep. 409.

⁷⁵ *Chandler v. Hart*, 161 Cal. 405,

taining the validity of their official acts, are that, though wrongfully in office, yet exercising power and functions appertaining to such office, justice and necessity require, for the protection and preservation of the rights and interests of third persons, that their acts, within the scope of official authority and duty, shall be sustained.”⁷⁷

§ 1848. — Exception where person dealing with officers not misled.

The de facto rule will not be extended to a case where a person dealing with alleged corporate officers is not misled, nor induced to believe that he is dealing with legal officers, but has knowledge that the person pretending to be an officer is not a de jure officer.⁷⁸

§ 1849. Acts as binding on corporation. Inasmuch as de facto officers are held out to the world by the corporation as its representatives and the corporation has it within its power to oust a de facto officer and prevent him from acting as its officer, it is unquestionably the rule that a corporation is bound by the acts of its de facto officers.⁷⁹ Furthermore, so far as third persons are concerned, the rule that the acts of de facto officers are binding in their favor is ordinarily merely another way of stating that the corporation is bound; and if a contract between de facto officers and third persons is binding on the latter then of course it cannot be attacked by the corporation as the act of de facto officers. This rule seems to be based on the principle of estoppel. The corporation cannot be permitted to contend that “the acts of a person who, under color of an election to the office, has, without protest or opposition from any source, acted as it treasurer for so long a time, are invalid, merely because the annual meeting at which he was chosen was not called in accordance with the by-laws.”⁸⁰ Thus, it is no defense to the foreclosure of a corporate mortgage that the directors authorizing the mortgage were not legally elected as such.⁸¹ It seems that where one corporation controls another and it is agreed that only such directors of the subsidiary company shall be elected as the parent company may desire, such directors may nevertheless ratify the act of its president so as to bind the corporation.⁸²

⁷⁷ *Moses v. Tompkins*, 84 Ala. 613, 620, 4 So. 763.

⁷⁸ *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev. 166, 30 Pac. 695; *State v. Curtis*, 9 Nev. 325; *Groveland Improvement Co. v. Farmers' Supply Co.*, 25 Wash. 344, 87 Am. St. Rep. 755, 65 Pac. 529.

⁷⁹ *Gleason v. Canterbury Mut. Fire Ins. Co.*, 73 N. H. 583, 64 Atl. 187.

⁸⁰ *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083.

⁸¹ *Copper Belle Min. Co. v. Costello*, 12 Ariz. 318, 100 Pac. 807.

⁸² *Massachusetts Const. Co. v. Kidd*, 142 Fed. 285.

§ 1850. Effect of acts as between corporation and its stockholders.

The general rule is that the acts of de facto officers bind the stockholders both in favor of third persons and of the corporation; that the corporation may rely on the acts of its de facto officers as against the opposition of stockholders. This question ordinarily arises in connection with calls for a payment on a stock subscription by a de facto board of directors which, by the weight of authority, are valid.⁸³ However, there is respectable authority to the contrary. Thus, the Alabama court, in discussing this question, uses the following language: "We are cognizant that some courts of the highest authority have held that the power of persons to act in behalf of the corporation, who have become directors de facto, cannot be collaterally questioned by a stockholder, without a judgment of ouster against them in a direct proceeding for that purpose. An analysis of the cases would show, we think, that in a majority of them the election was not illegal and void, but irregular and voidable, because of ineligibility, or other cause; or, if originally illegal, that the shareholder assailing its validity had affirmatively acquiesced in their acts as directors." And then, after stating the reasons why the acts of de facto officers are binding as to "third persons," the court states that the stockholders are not "third persons in their relation to the corporation. If persons undertake to exercise the functions and discharge the duties of directors in opposition to the will of a majority of the stockholders, they are mere usurpers, and their acts cannot be deemed valid, when invoked for their own protection. Otherwise, the wrongful assumption of official authority and its exercise would operate to constitute the usurpers, as between themselves and the corporation and shareholders, a board invested with the power to transact its business and administer its affairs. In such case, the necessity and justice of the rule as to the validity of the acts of directors de facto do not exist, and the rule itself is inapplicable. The acts of officers de facto are only valid when third persons have rights and interests to be protected."⁸⁴ And in those states adopting the Alabama rule, "the validity of the acts of a board of directors de facto, and their authority as such, may be called in question by any stockholder who has not acquiesced therein, whenever such acts are detrimental to his interests, affect property rights, or impose liability upon him, and the rights of third parties do not intervene."⁸⁵ As "between the corporation and its stockholders, in matters pertaining to the internal man-

⁸³ See § 673, *supra*.

⁸⁵ *Schwab v. Frisco Mining & Mill-*

⁸⁴ *Per Justice Clopton in Moses v. ing Co.*, 21 Utah 258, 60 Pac. 940.
Tompkins, 84 Ala. 613, 620, 4 So. 763.

agement of the company, and where all parties interested know that the persons pretending to be officers are not officers de jure, the reason for validating their unlawful acts fails, and oftentimes the law no longer protects them."⁸⁶ This is illustrated, as suggested by the Massachusetts court,⁸⁷ by the decisions of the courts of many jurisdictions that a call made by de facto directors is not enforceable against the shareholders,⁸⁸ and that a declaration by them of a forfeiture of shares is invalid.

§ 1851. Collateral attack by third persons. If persons are de facto officers, their title to the office cannot be impeached collaterally by third persons.⁸⁹ For instance, third persons dealing with de facto directors cannot collaterally show the illegality of the election of the de facto officers, where no other persons are claiming a right to act as directors, and the incumbents are exercising the usual functions of the office.⁹⁰ So where de facto directors move to dismiss an appeal, their title to the office cannot be attacked by the party opposing the motion.⁹¹ However, where an officer sues the corporation for his salary, his title to the office is directly involved and may be attacked.⁹² This question is further considered in a preceding section.⁹³

§ 1852. Liabilities of de facto officers. De facto officers cannot themselves set up the fact that they are not officers de jure to escape liability to the corporation or to creditors for their acts as such, or their omissions,⁹⁴ or on a bond,⁹⁵ or to avoid the doctrine in relation to dealings between an officer and the corporation.⁹⁶

⁸⁶ *Stratton-Massachusetts Gold Mines Co. v. Davis*, 222 Mass. 549, 111 N. E. 375.

⁸⁷ *Stratton-Massachusetts Gold Mines Co. v. Davis*, supra.

⁸⁸ See § 673, supra.

⁸⁹ *Jones v. Bonanza Mining & Milling Co.*, 32 Utah 440, 91 Pac. 273; *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588.

⁹⁰ *Stratton-Massachusetts Gold Mines Co. v. Davis*, 222 Mass. 549, 111 N. E. 375.

⁹¹ *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588.

⁹² *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 680, aff'g 34 Ill. App. 268.

⁹³ See § 1832, supra.

⁹⁴ *United States. Steam Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786.

Alabama. *Bank of St. Mary's v. St. John*, 25 Ala. 566.

California. *Kinard v. Ward*, 21 Cal. App. 92, 130 Pac. 1194.

New York. *McDowall v. Sheehan*, 129 N. Y. 200, 29 N. E. 299; *Easterly v. Barber*, 65 N. Y. 252; *Donnelly v. Pancoast*, 15 App. Div. 323, 44 N. Y. Supp. 104.

Pennsylvania. *Hall v. West Chester Pub. Co.*, 180 Pa. St. 561, 37 Atl. 106; *Keyser v. McKissan*, 2 Rawle 139.

⁹⁵ *Keyser v. McKissan*, 2 Rawle (Pa.) 139.

⁹⁶ *Stetson v. Northern Inv. Co.*, 104 Iowa 393, 73 N. W. 869.

X. MEETINGS OF DIRECTORS

§ 1853. General considerations. "Corporate meetings" are meetings of the members or stockholders as distinguished from directors' meetings.⁹⁷ In a preceding chapter, the rules governing stockholders' meetings are stated,⁹⁸ and the most of the rules therein stated are more or less applicable to meetings of the directors. Consequently, where authority in regard to a directors' meeting cannot be found in this chapter, the law stated in regard to stockholders' meetings may cover the question so as to be at least some authority in support of the theory relied upon.

§ 1854. Necessity for action as a board—In general. By the overwhelming weight of authority, when the power to do particular acts, or general authority to manage the affairs of the corporation, is vested in the directors or trustees, it is vested in them, not individually, but as a board, and, as a general rule, they can act so as to bind the corporation, assuming that there is no ratification or estoppel, only when they act as a board and at a legal meeting.⁹⁹ The rule and the

⁹⁷ *People v. Hoyne*, 182 Ill. App. 42, 52.

⁹⁸ See chapter 39, *supra*.

⁹⁹ **United States.** *Kansas City Hay-Press Co. v. Devol*, 72 Fed. 717; *In re St. Helen Mill Co.*, 3 Sawy. 88, Fed. Cas. No. 12,222.

Arkansas. *Merchants' & Farmers' Bank v. Harris Lumber Co.*, 103 Ark. 283, Ann. Cas. 1914 B 713, 146 S. W. 508.

California. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 633, 21 Pac. 373; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731. See also *Aetna Indemnity Co. v. Altadena Min. & Inv. Co.*, 11 Cal. App. 26, 165, 104 Pac. 470, construction of findings of court.

Colorado. *Extension Gold Mining & Milling Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198.

Delaware. *U. S. Fire Apparatus Co. v. G. W. Baker Mach. Co.*, — Del. Ch. —, 95 Atl. 294.

Georgia. *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449, 34 S. E. 176; *Spinks v. Athens Sav. Bank*, 108 Ga. 376, 33 S. E. 1003.

Idaho. *Johnson v. Sage*, 4 Idaho 758, 44 Pac. 641.

Indiana. *Junction R. Co. v. Reeve*, 15 Ind. 237; *Wright v. Floyd*, 43 Ind. App. 546, 86 N. E. 971. But see *National State Bank of Terre Haute v. Sandford Fork & Tool Co.*, 157 Ind. 10, 60 N. E. 699.

Iowa. *Ney v. Eastern Iowa Tel. Co.*, 162 Iowa 525, 144 N. W. 383; *Sanderson v. Tinkham Smoke-Consumer Co.*, 83 Iowa 446, 49 N. W. 1034; *Herrington v. District Township of Liston*, 47 Iowa 11.

Kansas. *First Nat. Bank v. Drake*, 35 Kan. 564, 57 Am. Rep. 193, 11 Pac. 445.

Kentucky. *Star Mills v. Bailey*, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077.

Louisiana. *Jeanerette Rice & Milling Co. v. Durocher*, 123 La. 160, 48 So. 780; *New Orleans Bldg. Co. v. Lawson*, 11 La. 34.

reasons therefor are well stated in a federal decision by Judge Neterer as follows: "The stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposition which is presented which involves any interest of the company, in conformity to the oath which they have subscribed. They have a right to have the individual viewpoint of the several directors expressed at a conference, for the purpose of obtaining the exchange view of the several persons in arriving at conclusions after deliberate

Maine. Peirce v. Morse-Oliver Bldg. Co., 94 Me. 406, 47 Atl. 914; Morrison v. Wilder Gas Co., 91 Me. 492, 64 Am. St. Rep. 257, 40 Atl. 542.

Massachusetts. Burrill v. Nahant Bank, 2 Metc. 163, 35 Am. Dec. 395.

Michigan. People v. Minong Min. Co., 33 Mich. 2.

Minnesota. Baldwin v. Canfield, 26 Minn. 43, 61, 1 N. W. 261, 276.

Missouri. Lyons v. Corder, 253 Mo. 539, 162 S. W. 606; Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523; State v. Manhattan Rubber Mfg. Co., 149 Mo. 181, 50 S. W. 321; Calumet Paper Co. v. Haskell Show Printing Co., 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115.

Nevada. Edwards v. Carson Water Co., 21 Nev. 469, 34 Pac. 381; Hillyer v. Overman Silver Min. Co., 6 Nev. 51; Yellow Jacket Silver Min. Co. v. Stevenson, 5 Nev. 224.

New Hampshire. Hamlin v. Union Brass Co., 68 N. H. 292, 44 Atl. 385; Buttrick v. Nashua & L. R. Co., 62 N. H. 413, 13 Am. St. Rep. 578; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Despatch Line of Packets v. Belamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. But see Tenney v. East Warren Lumber Co., 43 N. H. 343, 355.

New Jersey. First Nat. Bank of Hightstown v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Audenried v. East Coast Milling Co., 68 N. J. Eq. 450, 59 Atl. 577; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49; Schumm v. Seymour, 24 N. J. Eq. 143.

New York. Columbia Bank v. Gospel Tabernacle Church, 127 N. Y. 361, 28 N. E. 29; People's Bank City of New York v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408; Filon v. Miller Brewing Co., 60 Hun 582, 15 N. Y. Supp. 57; Constant v. St. Alban's Church, 4 Daly 305; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 186.

North Carolina. Duke v. Markham, 105 N. C. 131, 135, 18 Am. St. Rep. 889, 10 S. E. 1017.

Ohio. State v. People's Mut. Benefit Ass'n, 42 Ohio St. 579.

Pennsylvania. Twelfth St. Market Co. v. Jackson, 102 Pa. St. 273; Stoystown & G. Turnpike Road Co. v. Craver, 45 Pa. St. 386.

Tennessee. Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Texas. Nicholstone City Co. v. Smalley, 21 Tex. Civ. App. 210, 51 S. W. 527; Austin City R. Co. v. Swisher, 1 White & W. Civ. Cas. Ct. App. § 77.

Utah. Lochwitz v. Pine Tree Mining & Milling Co., 37 Utah 349, 108 Pac. 1128.

West Virginia. First Nat. Bank of New Martinsville v. Lowther-Kaufman Oil & Coal Co., 66 W. Va. 505, 28 L. R. A. (N. S.) 511, 66 S. E. 713; Limer v. Traders Co., 44 W. Va. 175, 28 S. E. 730.

Wisconsin. North Hudson Mut. Building & Loan Ass'n v. Childs, 82 Wis. 460, 33 Am. St. Rep. 57, 52 N.

consideration of any issue. It is fundamental that officers of boards can only act as such constituted boards when assembled as such, and by deliberate and concerted action dispose of the issue under consideration, and that they cannot act in an individual capacity outside of a formal meeting, and a majority of the individual expressions be the action of the board. The law believes that the greatest wisdom results from conference and exchange of individual views, and it is for that reason that the law requires the united wisdom of a majority

W. 600; *Leonard v. Lent*, 43 Wis. 83; *Dennison v. Austin*, 15 Wis. 334, 336.

England. In *re Marseilles Extension Ry. Co.*, L. R. 7 Ch. App. 161; *D'Arcy v. Tamar, Kit Hill & C. Ry. Co.*, L. R. 2 Exch. 158.

Compare, however, *Wadhams v. Litchfield & C. Turnpike Co.*, 10 Conn. 416; *Hubbard v. Camperdown Mills*, 26 S. C. 581, 2 S. E. 576; *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 159.

Stockholders are entitled to the benefit of the united wisdom of the directors. Their individual assent to a proposition submitted may be directly contrary to that which would be arrived at upon discussion and mature consideration. *Wolf v. Erwin & Wood Co.*, 71 Ark. 438, 75 S. W. 722; *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577; *Arkansas Pass Harbor Co. v. Manning*, 94 Tex. 558, 63 S. W. 627.

Rule applied to resolution to deliver bonds to a creditor as collateral, where no meeting was held, but resolution was signed by two directors at one time, and thereafter by two other directors, there being seven directors. *Chavelle v. Washington Trust Co.*, 226 Fed. 400.

Where the agent is to have express power to bind the corporation on a contract, it is essential that the action appointing him be by the directors as a board, and not by individual assent of a majority of the directors. *Cann v. Rector, Wardens &*

Vestrymen of Church of Redeemer, 111 Mo. App. 164, 190, 85 S. W. 994.

An obligation is not established as against a corporation by a showing that three directors have acknowledged its justice and have agreed that it shall be paid, where no showing is made that the directors acted formally, or that they constituted a majority of the board. *Farrell v. Gold Flint Min. Co.*, 32 Mont. 416, 80 Pac. 1027.

The board of directors, as a board, must authorize a mortgage, and it is not sufficient for one director to authorize the president to execute it. *Frederick v. Letteney*, 214 Mass. 46, 101 N. E. 59. Directors cannot mortgage corporate property except when in session at a meeting lawfully assembled. *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731.

Where the power to authorize the execution of notes for a corporation is vested in the board of directors or trustees, a note executed by the president and secretary without a resolution of the board is not authorized, although they constitute a majority of the board. *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381.

However, if two directors sign a mortgage and the other, being consulted in regard thereto, did not object, it has been held sufficient in Colorado, the court merely stating the conclusion without going into details. *Denver & C. Inv. Co. v. Rudolph*, 47 Colo. 380, 107 Pac. 816.

of the several members of the board in determining the business of a corporation."¹ "It is the board duly convened and acting as a unit that is made the representative of the company. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members."² The "governing body of a corporation, as such, are agents of the corporation only as a board, and not individually. Hence it follows that they have no authority to act, save when assembled at a board meeting. The separate action, individually, of the persons composing such governing body, is not the action of the constituted body of men clothed with corporate powers."³ It is not sufficient for the majority of the directors acting individually and not collectively, to agree to a contract, especially where the contract is intentionally kept a secret from the minority of the board of directors.⁴

For instance, calls or assessments on stock subscriptions must be made by the directors officially as a board.⁵ So if the directors may authorize a disposition of all the property of the corporation, "they can do so only at a duly warned meeting of the board, or one at which all are present."⁶ Likewise, in delegating a delegable power, the directors should act in an official meeting.⁷ In regard to contracts of employment, however, it has been held that the employment need not be made by action of the board at a meeting, but that the separate assent of a majority of the board is all that ought to be required, at least where the employment was of a physician to attend an injured employee.⁸ So it has been held that, in order for the

¹ *Ames v. Goldfield Merger Mines Co.*, 227 Fed. 292, 301.

² *First Nat. Bank v. Drake*, 35 Kan. 564, 57 Am. Rep. 193, 11 Pac. 445.

³ *Baldwin v. Canfield*, 26 Minn. 43, 54, 1 N. W. 261, 276.

⁴ *Commercial Brewing Co. v. McCormick*, — Mass. —, 114 N. E. 812.

⁵ *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128.

Assessments can be levied "only at a regular meeting of the board or at a special meeting thereof regularly called." *Cheney v. Canfield*, 158 Cal.

342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

⁶ *In re Wm. S. Butler & Co., Inc.*, 207 Fed. 705, 713.

⁷ *Paducah & I. Ferry Co. v. Robertson*, 161 Ky. 485, 171 S. W. 171.

⁸ *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817.

The authority of an agent to contract may be conferred by a corporation "at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing

directors to remove an officer of the company, it is not necessary to have a formal meeting, but it is sufficient that a majority of the directors agree thereto and instruct the president to discharge such officer.⁹

Whether it is necessary to act as a board in ratifying acts, or whether the ratification may be by all or a part of the directors acting separately, is considered in a subsequent subdivision of this chapter relating to ratification.

§ 1855. — Effect of consent of all of directors. Whether the assent of "all" the directors to some contract or act is sufficient although given separately and not at a board meeting is the subject of some conflict in the decisions. The rule supported by the weight of authority seems to be that such assent is not sufficient.¹⁰ Thus, it has been held in California¹¹ and Minnesota¹² that a conveyance of land of a corporation, not authorized by the directors as a board, but signed by all of them separately, although it is in the name of the corporation, is not good, either as a conveyance by the corporation, or as a contract to convey. And in Wisconsin the same rule was applied to a corporate note signed by all the trustees of a church but not authorized at any meeting of the board.¹³ So there are dicta in Missouri that the same rule applies to an assignment for the benefit of creditors authorized by the directors separately, and not as a board.¹⁴ So it has been held in California¹⁵ and New York¹⁶ that

such acts." *Crowley v. Genesee Min. Co.*, 55 Cal. 273.

⁹ *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

¹⁰ See *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449, 34 S. E. 176; *Besch v. Western Carriage Mfg. Co.*, 56 Mo. App. 333.

"Mere street conversations between the president and the directors of an incorporated company, in which they 'agree' that he may call in subscriptions as needed, in a legal sense amounted to nothing." *Branch v. Augusta Glass Works*, 95 Ga. 573, 579, 23 S. E. 128.

"When the law authorizes an act to be done only by a board of directors at a stated or called meeting, the act cannot be done by the members acting severally at different times and places, nor can validity be

given to the act by the members all signing a paper falsely reciting that they were all present at a meeting of the board and consented." *Brinkerhoff Zinc Co. v. Bqyd*, 192 Mo. 597, 613, 91 S. W. 523.

¹¹ *Gashwiler v. Willis*, 33 Cal. 11, 18, 91 Am. Dec. 607.

¹² *Baldwin v. Canfield*, 26 Minn. 43, 54, 1 N. W. 261, 276.

¹³ *Dennison v. Austin*, 15 Wis. 334, 341.

¹⁴ *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 338, 66 Am. St. Rep. 425, 45 S. W. 1115.

¹⁵ *Gashwiler v. Willis*, 33 Cal. 11, 18, 91 Am. Dec. 607.

¹⁶ *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. (N. Y.) 186, 228.

Rule applied to consent of church trustees given at a general meeting of

the assent of directors given at a stockholders' meeting is not equivalent to an assent of the board.

On the other hand, there is some authority in support of the contention that unanimous consent does away with the necessity of action at a meeting of the board.¹⁷ Thus, in Indiana there are dicta that power may be conferred upon corporate officers, such as the president, at a regular meeting of the board of directors, "or by their separate assent," or by "any other mode of doing such acts by individuals."¹⁸ However, all that is meant by this last statement is that power may be delegated either expressly at a meeting of the directors, or by implication, as where the directors acquiesce in the exercise of power by officers or agents.

§ 1856. — Exception where custom or usage to the contrary. The necessity for directors to act as a board and at a meeting is based upon the ground that they are not authorized to act in any other way than by meeting and conferring, and not on the ground that they cannot act in any other way; and the stockholders and the corporation, therefore, may be estopped to deny the validity of their action. For this reason, it has been held that the general rule does not apply where it is the custom or usage of the directors to act separately, and not as a board.¹⁹ In other words, "a corporation, its board of directors and shareholders, may waive any necessity of a meeting of its board of directors for the transaction of the business of the company. * * * 'by permitting the directors to establish a habit or usage of assenting separately to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way.'"²⁰ A

members of the church. *Landers v. Frank Street M. E. Church of Rochester*, 114 N. Y. 626, 21 N. E. 420.

¹⁷ *Sampson v. Bowdoinham Steam Mill Corporation*, 36 Me. 78, 84; *Magowan v. Groneweg*, 16 S. D. 29, 91 N. W. 335.

¹⁸ *National State Bank of Terre Haute v. Sanford Fork & Tool Co.*, 157 Ind. 10, 60 N. E. 699.

¹⁹ *United States. American Exch. Nat. Bank of New York v. First Nat. Bank of Spokane Falls*, 82 Fed. 961.

Arkansas. *Winer v. Bank of Blytheville*, 89 Ark. 435, 446, 131 Am. St. Rep. 102, 117 S. W. 232.

Colorado. *Longmont Supply Ditch Co. v. Coffman*, 11 Colo. 551, 19 Pac. 508.

Vermont. *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 159.

Washington. *National Bank of Commerce of Seattle v. Puget Sound Biscuit Co.*, 61 Wash. 192, 112 Pac. 265.

²⁰ *Winer v. Bank of Blytheville*, 89

corporation is bound by a release of two directors from liability for an alleged fraudulent conspiracy, where made and signed by all the other directors who represented all the stock, and purporting to be made by the corporation itself, although not signed by the corporation, especially where the corporation was conducted as a joint venture of the stockholders and without regular meetings of the directors.²¹

§ 1857. — Exception where directors own all the stock. If the directors own all the stock, a conveyance, mortgage or contract authorized by them when not assembled at a meeting is valid.²²

§ 1858. — Effect of provisions in articles of incorporation. In New Jersey, where a statute authorizes the incorporators to insert in the certificate of incorporation any provision "creating, defining, limiting, and regulating the powers" of directors, it is held that there is no power to incorporate a provision that "any resolution in writing signed by all the members of the board of directors or executive committee shall be and constitute action by such board or executive committee * * * with the same force and effect as if the same had been duly passed by the same vote at a duly called meeting of such bodies."²³

§ 1859. — Effect of statutes. Of course, a statute may authorize particular acts to be done by the directors acting otherwise than as a board and at a formal meeting.²⁴

§ 1860. — Effect of ratification by stockholders. The stockholders may waive the necessity for a meeting of the board for the transaction of business.²⁵ Thus, it has been held that a sale of corporate assets

Ark. 435, 131 Am. St. Rep. 102, 117 S. W. 232.

²¹ *Tanana Trading Co. v. North American Trading & Transportation Co.*, 220 Fed. 783.

²² *Jordan v. Collins*, 107 Ala. 572, 18 So. 137. And see *Teitig v. Boesman*, 12 Mont. 404, 31 Pac. 371.

²³ *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 466, 59 Atl. 577.

²⁴ Under a New York statute providing that, when a corporation desires to change the number of its trustees, "the existing trustees, * * * or a majority of them, shall make

and sign a certificate, declaring how many trustees the corporation shall have in the future management of its business," which shall be filed, etc., it was held that no formal meeting of the trustees, for the purpose of making such certificate, was necessary. *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17, aff'g 8 N. Y. App. Div. 160, 40 N. Y. Supp. 499.

²⁵ *Merchants' & Farmers' Bank v. Harris Lumber Co.*, 103 Ark. 283, Ann. Cas. 1914 B 713, 146 S. W. 508; *Estes v. German Nat. Bank*, 62 Ark. 7, 34 S. W. 85.

with a view to winding up corporate affairs made upon the assent of directors acting separately, there having been acquiescence and assent of all stockholders informally, is good. The court said: "All having been done with the knowledge and consent of those in whom the ultimate authority rested, and from whom the board of directors derived its power, the transaction, however irregular, is not open to attack by any one other than the state."²⁶

§ 1861. Regular or special meetings. Regular meetings of the board are those provided for by by-laws or otherwise at fixed times, such as on a specified day of each month. Special meetings are those called by officers authorized to do so, where any special business requires attention between the times of holding the regular meetings. The day of regular meetings may be fixed in any way, by by-law or otherwise, where not otherwise provided by statute or the charter.²⁷ The right to call special meetings is not precluded by the fixing of dates for regular meetings.²⁸ The only difference between regular and special meetings is in regard to giving notice of the meeting.²⁹ If there is no evidence as to whether a meeting was regular or special, it will not be presumed to have been special.³⁰

§ 1862. Time of meetings—In general. Where the charter or by-laws of corporations provide for regular meetings of the directors or trustees, and fix the time therefor, the stated meetings must be held at the time fixed.³¹ The fact, however, that regular meetings are thus required to be held at stated times does not prevent the directors or trustees from holding special meetings, whenever the business of the company renders it necessary or expedient for them to do so.³² If the day fixed by the by-laws for the monthly meeting

²⁶ *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756. To same effect, see *Aransas Pass Harbor Co. v. Manning*, 94 Tex. 558, 63 S. W. 627.

²⁷ "It was wholly immaterial in what way the day of the regular meetings was fixed. If it had been fixed by usage, a tacit understanding of the members, or in any other way, it was enough." *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252, 269.

²⁸ *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545.

²⁹ See §§ 1867, 1868, *infra*.

³⁰ *Barrell v. Lake View Land Ob.*, 122 Cal. 129, 54 Pac. 594.

³¹ See *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252.

³² *Corbett v. Woodward*, 5 Sawy. 403, Fed. Cas. No. 3,223; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906; *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. (Tenn.) 545.

of the board falls on a legal holiday, the board cannot hold the regular monthly meeting on the next day;³³ and this is so notwithstanding a general statute providing that when an act is appointed "by law or contract" to be performed on a holiday it may be performed on the next business day, since a by-law is not a "law or contract" within the meaning of such a statute.³⁴ If the day for a regular meeting falls on a holiday, the board may, it seems, meet on that day, or may meet and merely adjourn to another day;³⁵ but if it does not meet on that day but does meet on the next day, such meeting is not a regular meeting but is a special meeting and invalid where no notice of the meeting is given to directors.³⁶ It would seem that if a meeting of directors be held on Sunday, but the acts done thereat are subsequently affirmed on a week day, such acts are valid.³⁷

§ 1863. — Adjournments. When directors meet, they may adjourn to a future day,³⁸ and the adjourned meeting will have the same power to act as the original meeting³⁹ but no more extensive power.⁴⁰ At an adjourned meeting, any business may be transacted which might have been transacted at the original meeting.⁴¹ In such a case, however, if some of the directors meet before the day to which they have adjourned without notice to or the presence of others, their action will be invalid.⁴²

If there is less than a quorum present, they cannot adjourn the

³³ *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

³⁴ *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

³⁵ *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

³⁶ *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

³⁷ *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551.

³⁸ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657; *Smith v. Law*, 21 N. Y. 296.

³⁹ *Smith v. Law*, 21 N. Y. 296.

⁴⁰ *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383

While unquestionably all directors

were present at a meeting, it did not appear that they were present at the time that an adjournment was taken. Notice of the adjourned meeting was not otherwise given and not all directors were present thereat. The court refused to sustain a resolution passed at the adjourned meeting to institute action to collect assessments on stock, this being business which could not have been transacted legally at the original meeting by reason of the fact that delinquency had not then occurred. *Bank of National City v. Johnston*, 133 Cal. 185, 65 Pac. 383.

⁴¹ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

⁴² *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

meeting to any date whatever,⁴³ at least where a statute provides that "unless a quorum is present and acting, no business performed or act done is valid as against the corporation."⁴⁴

No notice need be given of an adjourned meeting, if the adjournment was authorized.⁴⁵ However, if the day and hour to which the adjournment is made is not stated, notice of the meeting must be given.⁴⁶

§ 1864. Place of meeting—Within the state. In the absence of provision to the contrary in the charter or by-laws, the directors or trustees may hold meetings at any reasonably convenient place within the state;⁴⁷ but if the charter or by-laws require that meetings shall be held at the domicile or principal office of the corporation, or other specified place, the provision must be complied with.⁴⁸ The fact that the place of holding regular or stated meetings is thus fixed, however, does not prevent special meetings from being held elsewhere.⁴⁹ A statute may require directors' meetings to be held at the principal office of the corporation, in which case meetings held at other places are ineffective as authority to do any act.⁵⁰ If a statute requires the meeting to be held at the "office" of the corporation, it is sufficient

⁴³ *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92; *Raisch v. M., K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662. But see *Smith v. Law*, 21 N. Y. 296.

By-law may provide for adjournment by less than quorum. *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 25, 24 S. W. 223; *Smith v. Law*, 21 N. Y. 296.

Minority cannot, at any event, adjourn a meeting to a place fifty miles distant. *State v. Smith*, 48 Vt. 266.

⁴⁴ *Cheney v. Canfield*, 158 Cal. 342, 32 L. R. A. (N. S.) 16, 111 Pac. 92.

⁴⁵ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15 (explaining *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153, as based on the ground that the hour to which the adjournment was taken was not fixed at the original meeting, and that a new notice was therefore required); *Bank of National City v. Johnston* (Cal.), 60 Pac. 776; *Raisch*

v. M., K. & T. Oil Co., 7 Cal. App. 667, 95 Pac. 662; *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657. And see *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; *Smith v. Law*, 21 N. Y. 296.

⁴⁶ *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153.

⁴⁷ *Corbett v. Woodward*, 5 Sawy. (U. S.) 403, Fed. Cas. No. 3,223.

⁴⁸ See *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

⁴⁹ *Corbett v. Woodward*, 5 Sawy. (U. S.) 403, Fed. Cas. No. 3,223; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

⁵⁰ *Summers v. Glenwood Gold & Silver Min. Co.*, 15 S. D. 20, 86 N. W. 749.

to convene in the hall outside the office, where the door of the office is locked, since "it cannot be under any reasonable construction of the statute, that any person who happens to be in possession of the office of the corporation has the power by excluding the directors and members, to absolutely prevent the holding of meetings."⁵¹ When the by-laws do not prescribe the place of meeting, the directors have the right to fix the place of any meeting, and they are not bound to meet at the principal place of business of the corporation.⁵²

§ 1865. — Outside the state. There can be no question as to the validity of directors' or trustees' meetings held outside of the state, where the charter or statute expressly authorizes it, as is sometimes the case.⁵³ On the other hand, the charter, statute or by-laws may expressly require meetings to be held within the state, and in such a case the directors cannot bind the corporation at a meeting held in another state.⁵⁴ A by-law, however, requiring the general or stated meetings to be held at the office of the corporation within the state, does not apply to special meetings.⁵⁵ Although a statute may permit directors to hold meetings in a foreign state upon compliance with certain conditions, complete removal of the official business to a foreign state, and attempt to perform the entire duties of the board therein, constitute an excess of powers.⁵⁶

Whether the directors or trustees can lawfully meet and act outside of the state, in the absence of any provision on the subject, depends,

⁵¹ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

⁵² *Hackler v. International Travelers' Ass'n*, — Tex. Civ. App. —, 165 S. W. 44.

⁵³ *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431; *Humphreys v. Mooney*, 5 Colo. 282; *Bassett v. Monte Christo Gold & Silver Min. Co.*, 15 Nev. 293.

⁵⁴ *State Nat. Bank of St. Joseph v. Union Nat. Bank of Chicago*, 168 Ill. 519, 48 N. E. 82, aff'g 68 Ill. App. 25; *Webb v. Midway Lumber Co.*, 68 Mo. App. 546; *Hilles v. Parrish*, 14 N. J. Eq. 380. See *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620, 15 So. 431; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179;

People v. Hoyne, 182 Ill. App. 42.

In Illinois, meetings outside the state are declared to be void unless authorized or ratified by a vote of two-thirds of the directors. Statute applied to mortgage on land in Missouri authorized at a meeting of directors of an Illinois corporation in Missouri, by holding mortgage void. *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 78 Am. St. Rep. 560, 55 S. W. 989.

⁵⁵ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179. And see *Corbett v. Woodward*, 5 Sawy. 403, Fed. Cas. No. 3,223.

⁵⁶ *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

according to the better opinion, upon the character or capacity in which they act. It is well settled that a corporation, while it has no existence outside of the state by which it was created, because the laws of a state have no operation beyond its territorial limits, may act through agents in another state, just as a natural person may.⁵⁷ And the directors, therefore, may hold meetings in other states, in the absence of provision to the contrary, and there act as the mere agents of the corporation in the management of its business.⁵⁸ It has accordingly been held that the directors may meet in another state than that by which the corporation was created, and there make, authorize, or ratify contracts,⁵⁹ conveyances of the corporate property,⁶⁰ mortgages,⁶¹ or an assignment for the benefit of creditors,⁶² on behalf of the corporation. It has also been held that the directors may appoint subordinate officers at a meeting held in another state,⁶³ or organize the corporation at such a meeting,⁶⁴ or make assessments or

⁵⁷ See § 387, *supra*, and the chapter on Foreign Corporations, *infra*.

⁵⁸ *United States*. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274.

Connecticut. *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

Delaware. *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 98 Atl. 943.

Georgia. *Wood Hydraulic Hose Min. Co. v. King*, 45 Ga. 34.

Illinois. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

Iowa. *Bellows v. Todd*, 39 Iowa 209.

Massachusetts. *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316.

Missouri. *Missouri Lead Mining & Smelting Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128.

South Dakota. *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706.

Vermont. *Arms v. Conant*, 36 Vt. 744.

See also § 393.

In a New York case, however, it was said that the acts of directors of a corporation outside of the state will not bind those who do not partici-

pate therein. *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623.

⁵⁹ *Wood Hydraulic Hose Min. Co. v. King*, 45 Ga. 34; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

⁶⁰ *Bellows v. Todd*, 39 Iowa 209; *Missouri Lead Mining & Smelting Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488; *Arms v. Conant*, 36 Vt. 744.

⁶¹ *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Wright v. Bundy*, 11 Ind. 398; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316. But see *State Nat. Bank of St. Joseph v. Union Nat. Bank of Chicago*, 168 Ill. 519, 48 N. E. 82, *aff'd* 68 Ill. App. 25, construing statute to the contrary except under certain circumstances as enacted not merely for the benefit of stockholders but that creditors might take advantage thereof.

⁶² *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706.

⁶³ *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

⁶⁴ *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128.

calls or unpaid subscriptions,⁶⁵ but this is doubtful, and there are decisions to the contrary.⁶⁶ It has been held, however, that this rule applies only to such acts as the directors may do as the mere agents of the corporation; and that, as in the case of stockholders' meetings,⁶⁷ they cannot meet and act outside of the state, unless expressly authorized, where they act, not as the mere agents of the corporation, but as the corporation itself, or, in other words, where they do strictly corporate acts.⁶⁸ And, in accordance with this doctrine, it has been held that the directors cannot meet outside of the state and make assessments or calls on unpaid subscriptions,⁶⁹ or elect or appoint officers of the corporation.⁷⁰ When a directors' meeting is illegally or improperly held outside of the state, no person who participates therein or acquiesces can object;⁷¹ and the stockholders and corporation may be estopped as against innocent third persons.⁷² Meetings of the directors held out of the state will be deemed binding on the corporation where it has accepted the benefit thereof, especially where the directors own substantially all of the corporate property.⁷³

If a statute provides that the certificate of incorporation may contain any provision for the regulation of the business of the corporation not contrary to law, and such certificate provides that directors' meetings may be held outside the state, a meeting may be held outside the state notwithstanding the statutes provide that directors may hold their meetings outside of the state "if the by-laws so provide," and there are no by-laws.⁷⁴

⁶⁵ *Ohio & M. R. Co. v. McPherson*, supra.

⁶⁶ See *infra*, this section.

⁶⁷ See § 1631, supra.

⁶⁸ *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329.

Authorizing mortgage held a "corporate act." *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 78 Am. St. Rep. 560, 55 S. W. 989.

"This distinction, however, is very shadowy, and, it is submitted, unsound." 2 Machen, *Modern Law Corporations*, § 1462.

⁶⁹ *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329.

⁷⁰ *Place v. People*, 87 Ill. App. 527, *aff'd* 192 Ill. 160, 61 N. E. 354.

Officers so elected, however, may be officers de facto. See § 1837, supra.

⁷¹ *Wood v. Boney* (N. J. Ch.), 21 Atl. 574.

Thus, if all the stockholders and directors are given notice of the meeting, and either attend in person or do not object that the place of meeting is outside the state, equity will not invalidate the acts done at such a meeting. *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 98 Atl. 943.

⁷² *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199.

⁷³ *Schultze v. Van Doren*, 64 N. J. Eq. 465, 53 Atl. 815.

⁷⁴ *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 98 Atl. 943, 95 Atl. 895.

§ 1866. Calling of meetings. A meeting of directors or trustees must be called in the mode and by the authority, if any, prescribed by mandatory provisions in the charter or by-laws.⁷⁵ If the by-laws provide that all meetings of the board of directors are to be specially called, a meeting of a part, although a majority of the members of the board, not called in pursuance of the by-laws, is not a lawful meeting of the board of directors, and acts done thereat are not the acts of the corporation.⁷⁶ In the absence of such provisions, the meeting need not be called in any particular mode, but it is sufficient if the directors are properly notified that the meeting will be held.⁷⁷ The following propositions as stated in a note collecting cases relating to both corporate and directors' meetings are without doubt well settled: "If the by-laws of a corporation require 'due notice' of a meeting but do not prescribe by whom it shall be given, any officer may give it. * * * If, however, a statute or by-law prescribes by whom the notice shall be given, a notice by any other person is ineffectual. * * * Where the power to call corporate meetings is given to the board of directors, a notice given by the president and secretary is of no effect. * * * Similarly, where the power to call meetings is in the president a notice by a director is insufficient."⁷⁸ If the president is given power to call a special meeting of the directors, the vice president, in the case of absence or inability to act of the president, may call the meeting;⁷⁹ and it is not necessary that the president shall be out of the state, or beyond the reach of mail or other communication, in order to authorize the vice president to act in his place.⁸⁰ If a statute or a by-law provides that special meetings shall be called "upon the order of the president, or if there be none, on the order of two directors," a meeting called by directors is invalid where

⁷⁵ *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *P. P. Mast Buggy Co. v. Litchfield Furniture, Hardware & Implement Co.*, 55 Ill. App. 98; *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 24 S. W. 223; *Moore v. Hammond*, 6 B. & C. 456.

⁷⁶ *P. P. Mast Buggy Co. v. Litchfield Furniture, Hardware & Implement Co.*, 55 Ill. App. 98.

⁷⁷ In the absence of express provision to the contrary, the president of a corporation has power to call a meeting of the directors when necessary. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531.

⁷⁸ Note in *Ann. Cas.* 1914 D 862.

Rules as to calling meetings of stockholders, see § 1637, *supra*.

⁷⁹ *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 703, 81 Pac. 17.

⁸⁰ *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 704, 81 Pac. 17.

It is immaterial that if the president had been requested or notified to do so, he could have traveled to the office of the corporation in four or five hours, for the purpose of considering the matter of the call. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 Pac. 17.

there is a president, although he refused to make the call.⁸¹ If the by-laws require meetings to be called by the president or a majority of the members of the board, it is held in Missouri that a meeting called by the secretary "possesses no validity."⁸² The officer authorized to call a special meeting may do so, it seems, at any time when he finds the directors together, at least if none of them dissent at the time.⁸³ If the secretary is required to call the meeting, it is sufficient that he ratify his signature to a notice of meeting of directors made by a rubber stamp in the hands of the president.⁸⁴

If the notice is required to be sent by a particular officer, and he refuses to send it, it seems that the notice is valid if sent by some other officer; and the rule has been well stated in a recent decision in Minnesota as follows: "The formalities prescribed for calling meetings of the corporation and of its managing board must be substantially followed. But it is also important that the business and conduct of corporations should not be hampered and interrupted by some wilful refusal of an officer to perform a mere clerical duty imposed upon him. If there be such refusal and the duty is, to all intents and purposes, as well performed by some other officer of the corporation, its business should not be at a standstill, unless some good reason exists therefor. A resort to mandamus to compel a recalcitrant officer to perform a ministerial act is at best a slow process because of the right of appeal. We do not think the scribe's wilful refusal to mail the notices of the call, duly issued, in the case at bar sufficient to destroy the efficacy of the notice which was thereupon mailed by the imperial good samaritan himself."⁸⁵

§ 1867. Necessity for notice of meetings—Regular meetings. What has been said in a former chapter as to notice of stockholders' meetings⁸⁶ applies in a general way to directors' meetings as well. If the meeting is a regular or stated one, the time and place being fixed by the charter or by-laws, notice of the meeting is not necessary,⁸⁷ unless

⁸¹ *Smith v. Dorn*, 96 Cal. 73, 80, 30 Pac. 1024.

⁸² *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 26, 24 S. W. 223.

⁸³ See *Stobo v. Davis Provision Co.*, 54 Ill. App. 440.

⁸⁴ *Asbley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 158, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

⁸⁵ *Whipple v. Christie*, 122 Minn.

73, Ann. Cas. 1914 D 856 with note, 141 N. W. 1107.

⁸⁶ See § 1637 et seq., supra.

⁸⁷ *California*. Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 120 Pac. 15.

Colorado. Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co., 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 Pac. 81.

Iowa. Western Improvement Co.

expressly required. Nor is it necessary to give notice of an adjourned meeting.⁸⁸ But where the statute provides that "when no provision is made in the by-laws for regular meetings of the directors * * * all meetings must be called by special notice in writing, to be given to each director," then if the by-laws name the day for regular meetings, but do not name the hour of the day, notice must be given.⁸⁹

§ 1868. — Special meetings. In some states it has been held generally that, if a quorum of the directors of a corporation meet specially, and act by a majority of the whole board, their action is valid, notwithstanding notice of the meeting was not given to the absent members of the board;⁹⁰ but this view is contrary to the very decided weight of authority. When a number of directors are elected to manage the affairs of the corporation, it is contemplated that the corporation shall have the benefit of the judgment, counsel and influence of all, and it is only right to hold that, in the absence of special circumstances or express provision to the contrary, every one of them should have an opportunity to be present at meetings of the board. The great weight of authority, therefore, is to the effect that notice of a special meeting must be given to every director, unless there is some express provision in the charter or by-laws or established usage to the contrary, or unless it is impossible or impracticable to do so. Except in these cases, a special meeting held in the absence of some of the directors, and without any notice to them, is illegal, and the action at such a meeting, although by a majority of the directors, is invalid,⁹¹ unless

v. Des Moines Nat. Bank, 103 Iowa 455, 72 N. W. 657.

New Hampshire. Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252.

New Jersey. Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78, 27 Atl. 897.

"Notice may be given by the adoption of rules fixing times for stated meetings. Constructive notice will be sufficient if some rule, legally prescribed, declares it sufficient." Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

⁸⁸ See § 1863, supra.

⁸⁹ Lowe v. Los Angeles Suburban Gas Co., 24 Cal. App. 367, 141 Pac. 399. See also Thompson v. Williams, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153.

⁹⁰ Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207. See also Bank v. Flour Co., 41 Ohio St. 558; State v. Smith, 48 Vt. 266.

The Connecticut case—Chase v. Tuttle, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874—does not support this view, for in that case it was attempted to notify all the directors, but two were inaccessible because of absence.

⁹¹ **United States.** See Farwell v. Houghton Copper Works, 8 Fed. 66. Compare American Exch. Nat. Bank of New York v. First Nat. Bank of Spokane Falls, 82 Fed. 961.

Arkansas. Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340; Stiewel v. Webb Press Co., 79 Ark. 45, 116 Am. St. Rep. 62, 94 S. W. 915; Bank of Little Rock v. Mc-

subsequently ratified or unless rights have been acquired by inno-

Carthy, 55 Ark. 473, 29 Am. St. Rep. 60, 18 S. W. 759; Simon v. Sevier Ass'n, 54 Ark. 58, 14 S. W. 1101.

California. Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383; Mills v. Boyle Min. Co., 132 Cal. 95, 64 Pac. 122; Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; Pauly v. Pauly, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; Thompson v. Williams, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; Harding v. Vandewater, 40 Cal. 77.

Delaware. Lippman v. Kehoe Stenograph Co., — Del. Ch. —, 95 Atl. 895.

Illinois. Waterman v. Chicago & I. R. Co., 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689, aff'g 34 Ill. App. 268; Donnelly v. Antiseptol Liquid Soap Co., 177 Ill. App. 61.

Iowa. Herrington v. District Township of Liston, 47 Iowa 11.

Kansas. Paola & F. River Ry. Co. v. Anderson County Com'rs, 16 Kan. 309.

Kentucky. Vaught v. Ohio County Fair Co., 20 Ky. L. Rep. 1471, 49 S. W. 426.

Michigan. Broughton v. Jones, 120 Mich. 462, 79 N. W. 691; Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968.

Missouri. Hill v. Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223; Chouteau Ins. Co. v. Holmes Adm'r, 68 Mo. 601, 30 Am. Rep. 807; Central Mfg. Co. v. Montgomery, 144 Mo. App. 494, 129 S. W. 460; State v. Perkins, 90 Mo. App. 603.

New Hampshire. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. Contra, Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207.

New Jersey. Holcombe v. Trenton

White City Co., 80 N. J. Eq. 122, 82 Atl. 618; Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78, 27 Atl. 897; Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co., 44 N. J. Eq. 568, 14 Atl. 907, 43 N. J. Eq. 626, 14 Atl. 908; Johnston v. Jones, 23 N. J. Eq. 216.

New York. In re Argus Co., 138 N. Y. 557, 34 N. E. 388; People v. Albany Medical College, 26 Hun 348, 89 N. Y. 635.

North Carolina. First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co., 116 N. C. 827, 21 S. E. 948.

Oregon. Doernbecher v. Columbia City Lumber Co., 21 Ore. 573, 28 Am. St. Rep. 766, 28 Pac. 899. And see State v. Smith, 15 Ore. 98, 15 Pac. 137, 386, 14 Pac. 814.

Pennsylvania. Mercantile Library Hall Co. v. Pittsburg Library Ass'n, 173 Pa. St. 30, 33 Atl. 744; Gordon v. Preston, 1 Watts 385, 26 Am. Dec. 75; Kersey Oil & Mineral Co. v. Oil Creek & A. River R. Co., 5 Wkly. Notes Cas. 144, 12 Phila. 374. And see Pike County v. Rowland, 94 Pa. St. 238.

South Dakota. See Summers v. Glenwood Gold & Silver Min. Co., 15 S. D. 20, 86 N. W. 749.

Utah. Hatch v. Lucky Bill Min. Co., 25 Utah 405, 71 Pac. 865; Singer v. Salt Lake Copper Mfg. Co., 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024.

England. Moore v. Hammond, 6 B. & C. 456; In re Portuguese Consol. Copper Mines, 42 Ch. Div. 160; In re Homer Dist. Consol. Gold Mines, 39 Ch. Div. 546; Halifax Sugar Refining Co. v. Francklyn, 62 L. T. (N. S.) 563.

cent third persons, as against whom the corporation must be held estopped.⁹² A provision that a majority shall form a board for the transaction of business does not change the rule.⁹³ The reason for this rule has been said to be that "each member of a corporate body has the right of consultation with the others, and has the right to be heard upon all questions considered, and it is presumed that, if the absent members had been present, they might have dissented, and their arguments might have convinced the majority of the un wisdom of their proposed action and thus have produced a different result. If, however, they had notice and failed to attend they waived their rights, likewise if they signed a waiver of notice prior to the meeting."⁹⁴ Moreover, a director cannot be deprived of his right to be notified of a special and unusual matter which is to be considered and acted upon at a directors' meeting on the ground that if such notice had been given and by reason thereof he had been present he would have been unable to have induced the directors to have refrained from the action taken.⁹⁵ So it is no excuse for failure to give notice to say that the quorum present at the meeting all voted in favor of the act under consideration, and that the presence of the directors not notified would not have changed the result.⁹⁶

A fortiori, notice is necessary in all cases, when required by the charter or by-laws,⁹⁷ unless all the directors are present.⁹⁸

Proceedings at a special meeting held by a bare majority of the board of directors, without notice to the other members, are void, although all of those present voted in favor of the action taken, and the result would have been the same if the other members had been present. *Vaught v. Ohio County Fair Co.*, 20 Ky. L. Rep. 1471, 49 S. W. 426.

⁹² See *infra*, this chapter.

⁹³ *Doernbecher v. Columbia City Lumber Co.*, 21 Ore. 573, 28 Am. St. Rep. 766, 28 Pac. 899.

⁹⁴ *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* without opinion in 82 N. J. Eq. 364, 91 Atl. 1069.

⁹⁵ *Wall v. Utah Copper Co.*, 70 N. J. Eq. 17, 62 Atl. 533.

⁹⁶ *Doernbecher v. Columbia City*

Lumber Co., 21 Ore. 573, 28 Am. St. Rep. 766, 28 Pac. 899.

⁹⁷ *United States. Farwell v. Houghton Copper Works*, 8 Fed. 66.

California. Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 130 Cal. 345, 6 L. R. A. 835, 80 Am. St. Rep. 132, 62 Pac. 552; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153.

Illinois. Waterman v. Chicago & I. R. Co., 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228, 29 N. E. 689; *P. P. Mast Buggy Co. v. Litchfield Furniture, Hardware & Implement Co.*, 55 Ill. App. 98.

Missouri. Hill v. Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223.

South Dakota. Summers v. Glenwood Gold & Silver Min. Co., 15 S. D. 20, 86 N. W. 749.

⁹⁸ See § 1873, *infra*.

§ 1869. — Meetings of executive committee. Notice must be given exactly the same, it seems, as in case of meetings of the full board of directors.⁹⁹

§ 1870. — Exception in case of emergency. The giving of notice may be excused because of an emergency which demands immediate attention, at least so far as absent or inaccessible directors are concerned.¹ To illustrate, an emergency exists where all the property of the corporation was about to be sold at public auction for only a small fraction of its value, and the corporation desires to postpone the sale.² However, the exception "rests upon necessity growing out of emergency, and not upon the caprice of corporate officers."³ In one case where three of the directors were outside the state and no notice was given to them, the Kansas Supreme Court said: "They were all outside of the state. They were beyond the reach of any notice that would be beneficial. They were really inaccessible. * * * If an effort had been made to give each of these directors notice, it would have been going through a form, without accomplishing anything. It is not usually necessary to do a vain or useless thing. * * * Unless the resident directors had acted promptly, they could not have acted at all. There was not time to properly serve notices upon the absent directors. A majority of the directors were present at the meeting and acted. They acted unanimously, and in the interest of the bank, and for the benefit of all its creditors and stockholders."⁴

§ 1871. — Exception where custom is to the contrary. It has been held that, when it is the custom to hold special meetings for the transaction of usual business, as in the case of a bank, whenever a quorum is present, and without notice, such meetings are valid.⁵

⁹⁹ *Hayes v. Canada, Atlantic & Plant S. S. Co., Ltd.*, 181 Fed. 289. And see generally §§ 2002-2005, *infra*.

¹ *Arkansas. Bank of Little Rock v. McCarthy*, 55 Ark. 473, 29 Am. St. Rep. 60, 18 S. W. 759.

Connecticut. Stafford Springs St. R. Co. v. Middle River Mfg. Co., 80 Conn. 37, 66 Atl. 775; *Chase v. Tuttle*, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874.

Kansas. National Bank of Commerce v. Shumway, 49 Kan. 224, 30 Pac. 411.

New York. Porter v. Robinson, 30 Hun 209.

England. Halifax Sugar Refining Co. v. Francklyn, 62 L. T. (N. S.) 563.

² *Paducah & I. Ferry Co. v. Robertson*, 161 Ky. 485, 171 S. W. 171.

³ See dissenting opinion in *Whipple v. Christie*, 122 Minn. 73, Ann. Cas. 1914 D 856, 114 N. W. 1107.

⁴ *National Bank of Commerce v. Shumway*, 49 Kan. 224, 227, 30 Pac. 411.

⁵ If the directors have long pur-

§ 1872. — Exception where majority who are present own all of stock. Another exception to the rule that notice must be given to all the directors exists where the directors not notified never attended any meeting or took any part in the management of the corporation, and where the majority of the board who were present comprised the real holders of all the stock of the corporation, provided there is no fraud, since to hold the act of such a board illegal would be “a mere sticking in the bark, a substitution of form for substance.”⁶ So where the directors who were the only persons really interested in the corporation are present at a meeting and authorize the execution of a mortgage by resolution, the mortgage will be deemed valid irrespective of the fact that notice of the meeting was not given and there was no consultation with a certain director who was such merely in a nominal way, and who was aware that the directors were managing the corporate affairs without consulting him.⁷

§ 1873. — Effect where all of directors attend meeting. The validity of a meeting is not affected by failure to give notice, even when notice was expressly required by the charter or by-laws, if all the directors were present and raised no objection.⁸ In other words, presence at the meeting waives the want of notice.⁹ Thus it has been held that “the fact that the meeting of the directors was held without a formal call first being had, and notice thereof given to the members, did not operate to invalidate it, or to render the proceedings which were taken at it void, for every member of the board was present, and their joint action as completely bound the corporation as if the meeting had been called with due formality, and every one

sued an established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number are present, the custom is a standing notice to each director, so as to enable those present to proceed, in the absence of a controlling statute or by-law. *American Exch. Nat. Bank of New York v. First Nat. Bank of Spokane Falls*, 82 Fed. 961.

⁶ The want of notice was immaterial “because the action taken was that of a majority of the stockholders, and in fact of all who really held any stock, and hence would be binding,

regardless of the absence of legal action on the part of the directors.” *Watts v. Gordon*, 127 Tenn. 96, 153 S. W. 483.

⁷ *Stiewel v. Webb Press Co.*, 79 Ark. 45, 116 Am. St. Rep. 62, 94 S. W. 915.

⁸ *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546. And see *Stobo v. Davis Provision Co.*, 54 Ill. App. 440.

The same is true of stockholders’ meetings. See § 1641, *supra*.

⁹ *Lippman v. Kehoe Stenograph Co.*, — Del. Ch. —, 95 Atl. 895.

of the directors had received proper notice of it.”¹⁰ Furthermore, where all the directors attend the place fixed for a special meeting of the board, although such attendance be accidental on the part of some of the directors, necessity for the giving of notice is obviated.¹¹

§ 1874. — Effect of waiver of notice. A waiver of notice may properly be executed before the meeting,¹² but a waiver subsequent to the meeting is ineffective.¹³ Thus, it has been said that “consent given subsequent to the meeting looking to ratification of what was done is without force to validate the action taken.”¹⁴ “However fully informed he may have been with everything that took place at the meeting, and every word uttered there, and though he afterwards, with this knowledge, approved of and assented to all that was there said and done, still the safe and logical principle persists that he was not validly such a participant in its deliberations and actions as to validate by a subsequent approval thereof the minutes of a meeting at which he was not in fact present in person.”¹⁵ Moreover, a statute which provided that notice may be waived before or “after the time stated therein” in case “any notice whatever is required to be given under the provisions of this act,” does not apply to notice of a special meeting of directors where not required by the statute but only by the general principles of law.¹⁶ In Connecticut, however, where three of the seven directors could not be reached in time for the meeting and had no notice of it, it was held that a waiver of notice signed by the three after the meeting was sufficient to validate the action of the board, and it was said by Chief Justice Baldwin that “the management of a corporation cannot be paralyzed by every absence of a director from its place of business or from the state at a time when a meeting of the board seems necessary. Notice to a majority, in such a case, if they, being all that can be reached, proceed to hold the meeting, will, in the absence of any by-law to the contrary, support their action, at least if, as in the present instance, the others

¹⁰ Robson v. C. E. Fenniman Co., 83 N. J. L. 453, 85 Atl. 356.

¹¹ Paducah & I. Ferry Co. v. Robertson, 161 Ky. 485, 171 S. W. 171.

¹² Las Ovas Co. v. Davis, 35 App. Cas. (D. C.) 372, 379. But see Lippman v. Kehoe Stenograph Co., — Del. Ch. —, 98 Atl. 943, 95 Atl. 895. Contra, In re Portuguese Consol. Copper Mines, 42 Ch. Div. 160.

¹³ Lippman v. Kehoe Stenograph

Co., — Del. Ch. —, 95 Atl. 895. Contra, Smith v. Sinaloa Land & Fruit Co., 42 Utah 445, 132 Pac. 556.

¹⁴ Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 613, aff'd without opinion in 82 N. J. Eq. 364, 91 Atl. 1069.

¹⁵ Lippman v. Kehoe Stenograph Co., — Del. Ch. —, 95 Atl. 895.

¹⁶ Lippman v. Kehoe Stenograph Co., — Del. Ch. —, 95 Atl. 895.

subsequently sign and file a waiver of notice, and the corporation acquiesces in what was done by making it the basis of a claim of legal right." ¹⁷

§ 1875. — To whom notice must be given. A directors' meeting is not illegal, or the action thereat invalid, because of failure to give notice to a person who has been elected a director, but has not accepted,¹⁸ or to a director who has abandoned his office,¹⁹ or to a director who would have been disqualified from taking part by reason of personal interest.²⁰ And failure to give notice to directors may be excused because of their absence and inaccessibility, and the necessity for immediate or prompt action.²¹ So a director who has disposed of his stock will not be heard to complain of failure to notify him of directors' meetings, the stockholders making no complaint in regard thereto.²²

§ 1876. Procedure relating to notice of meeting—In general. Where notice of the meeting must be given, it should be in proper form and duly served the required length of time before the meeting. These matters will now be considered.

§ 1877. — Contents of notice. The notice must designate the place of meeting ²³ and the time thereof. Obviously, whether the notice of a corporate meeting must state the purpose thereof is dependent upon the business to be transacted;²⁴ although in California it is said that it "appears to be the settled law * * * that a notice of a special meeting need not specify the object of the meeting," without making any reference to the object of the meeting.²⁵ Unless there is some express provision to the contrary, a general notice of a

¹⁷ *Stafford Springs St. R. Co. v. Middle River Mfg. Co.*, 80 Conn. 37, 66 Atl. 775.

¹⁸ *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203.

¹⁹ *Dodge v. Kenwood Ice Co.*, 204 Fed. 577, aff'g 189 Fed. 525.

²⁰ *Troy Min. Co. v. White*, 10 S. D. 475, 42 L. R. A. 549, 74 N. W. 236. But see *Doernbecher v. Columbia City Lumber Co.*, 21 Ore. 573, 579, 28 Am. St. Rep. 766, 28 Pac. 899.

²¹ See § 1870, supra.

²² *Anderson Carriage Co. v. Pungs*,

127 Mich. 543, 86 N. W. 1040.

²³ *Hackler v. International Travelers' Ass'n*, — Tex. Civ. App. —, 165 S. W. 44.

²⁴ *Wall v. Utah Copper Co.*, 70 N. J. Eq. 17, 62 Atl. 533. See also *Trendley v. Illinois Traction Co.*, 241 Mo. 73, 145 S. W. 1.

²⁵ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15; *Bank of National City v. Johnston* (Cal.), 60 Pac. 776; *Waratah Oil Co. v. Reward Oil Co.*, 23 Cal. App. 638, 139 Pac. 91.

directors' meeting, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation.²⁶ It has been held that extraordinary business may be transacted, although not specified in the notice,²⁷ but this is doubtful.²⁸ The better rule is that if a notice expressly states that the meeting is called for a particular purpose, or for ordinary business, extraordinary business outside of such purpose cannot be transacted unless all the directors are present.²⁹

A misdescription in the date of the contract which the notice stated was to be considered is immaterial where no director was misled nor objected to the notice because thereof.³⁰

§ 1878. — Form of notice. Where the form of the notice is not prescribed, any form of notice sufficient to inform the directors that a special meeting of the directors is called, and stating the exact time and place where it is to be held, is valid.³¹ If notice of the meeting is required to be in writing, then, of course, oral notice is insufficient; but where a corporation enacts no by-laws but adopts the custom of holding special meetings of the directors on informal notice, verbal notices are sufficient, it has been held, notwithstanding a statute requiring written notices.³² A requirement that the secretary shall give the notice does not require him to sign it, but it is sufficient that he mail the notices, properly addressed and postpaid.³³ If there is no provision requiring that the call be signed by the secretary, it may be signed by any officer authorized to make the call.³⁴

²⁶ **California.** Granger v. Original Empire Mill & Mining Co., 59 Cal. 678.

Connecticut. New Haven Sav. Bank v. Davis, 8 Conn. 192.

Illinois. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

New York. In re Argus Co., 138 N. Y. 557, 34 N. E. 388.

England. Compagnie de Mayville v. Whitley, [1896] 1 Ch. 788; Wills v. Murray, 4 Exch. 843.

Adoption of a new stock book is not extraordinary business which must be specified in the notice. In re Argus Co., 138 N. Y. 557, 579, 34 N. E. 388.

²⁷ Compagnie de Mayville v. Whitley, [1896] 1 Ch. 788.

²⁸ Mercantile Library Hall Co. v. Pittsburg Library Ass'n, 173 Pa. St. 30, 33 Atl. 744.

²⁹ Mercantile Library Hall Co. v. Pittsburg Library Ass'n, 173 Pa. St. 30, 33 Atl. 744.

³⁰ Trendley v. Illinois Traction Co., 241 Mo. 73, 145 S. W. 1.

³¹ Bell v. Standard Quicksilver Co., 146 Cal. 699, 705, 81 Pac. 17.

³² O'Rourke v. Grand Opera House Co., 47 Mont. 459, 133 Pac. 965.

³³ Bell v. Standard Quicksilver Co., 146 Cal. 699, 705, 81 Pac. 17.

³⁴ Bell v. Standard Quicksilver Co., 146 Cal. 699, 81 Pac. 17.

§ 1879.—Mode of serving or delivering notice. Of course, if a director attends the meeting, the method of serving him becomes immaterial. Where he does not attend, then the question may arise as to whether he was properly served with notice of the meeting. There are decisions holding that, where no provision exists in regard thereto, the notice of a directors' meeting must be a personal notice,³⁵ and that it is not sufficient merely to leave a copy at the usual place of residence of the director, at least if he is known to be temporarily absent.³⁶ However, where a by-law authorized notice to be given "by mail, or in other ways," it was held in Illinois that it was sufficient to leave either a written or verbal notice at the place of business of a director, with his brother.³⁷ Furthermore, notice by mail or otherwise may be authorized by the by-laws or by custom,³⁸ and notice may be given by mail or telegraph where by reason of absence other notice cannot be given.³⁹ Moreover, it would seem that the better rule is that service may be by mail where it is not otherwise provided.⁴⁰ Reference should be made to a preceding chapter in this volume relating to stockholders' meetings for rules governing the manner of giving notice of such meetings, which it would seem are equally applicable to directors' meetings.⁴¹

§ 1880.—Length of notice. The notice must be given a reasonable length of time before the hour or day fixed for the meeting.⁴²

³⁵ Bank of Little Rock v. McCarthy, 55 Ark. 473, 29 Am. St. Rep. 60, 18 S. W. 759; Harding v. Vandewater, 40 Cal. 77. Compare Corbett v. Woodward, 3 Sawy. 403, Fed. Cas. No. 3,223.

³⁶ Bank of Little Rock v. McCarthy, 55 Ark. 473, 29 Am. St. Rep. 60, 18 S. W. 759.

³⁷ Williams v. German Mut. Fire Ins. Co. of North Chicago, 68 Ill. 387.

³⁸ Stockton Combined Harvester & Agricultural Works v. Houser, 109 Cal. 1, 41 Pac. 809; Williams v. German Mut. Fire Ins. Co. of North Chicago, 68 Ill. 387. See Covert v. Rogers, 38 Mich. 363, 31 Am. Rep. 319.

Notice by mail is sufficient if it is shown to have been received. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; People

v. Albany Medical College, 26 Hun (N. Y.) 348, 89 N. Y. 635.

And it has been held that, when notice is sent by mail, its receipt will be presumed, in the absence of proof to the contrary. Stockton Combined Harvester & Agricultural Works v. Houser, 109 Cal. 1; Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

³⁹ Chase v. Tuttle, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874.

⁴⁰ Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

⁴¹ See §§ 1637-1649, supra.

⁴² Hayes v. Canada, Atlantic & Plant S. S. Co., Ltd., 181 Fed. 289, holding notice of meeting on next day insufficient where held at a place

What is a reasonable length of time may depend upon the places of residence of the directors and also upon the custom of the company in respect thereto; and by-laws requiring a notice of a certain number of days are not binding where a custom of sending shorter notices is shown.⁴³ A notice of one or two days may be sufficient, if it gives ample time to enable the directors to be present.⁴⁴ In Pennsylvania it has been held that "one full day in advance of the time fixed is as little as the law could presume to be reasonable, and in many cases that would be too short."⁴⁵

§ 1881. Conduct of meetings. Directors' meetings are often more or less informal, especially in case of small corporations. Generally, the only persons in attendance are the directors and the secretary who may or may not be a director. The president of the corporation usually presides at the meeting, unless it is otherwise provided by the by-laws. The presence of the president at directors' meetings may be expressly required by the charter or by-laws, but, in the absence of such a requirement, it is not necessary.⁴⁶ A third person not a stockholder or director cannot lawfully preside as president of the board.⁴⁷ The president has no casting vote aside from his vote as director.⁴⁸ A director may have counsel present at a meeting of the board of directors, when necessary, in order to obtain his advice in matters touching corporate action.⁴⁹ Generally, a formal resolution need not be passed nor a formal vote taken, in order to validate acts done at the meeting, unless so required by statute, charter or by-law.⁵⁰ A fortiori,

twenty-four hours distant by rail from the place of service on the director; *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, 173 Pa. St. 30, 33 Atl. 744; *In re Homer Dist. Consol. Gold Mines*, 39 Ch. Div. 546. Compare *In re Argus Co.*, 138 N. Y. 557, 34 N. E. 388.

⁴³ *In re New York Car Wheel Works*, 141 Fed. 430.

⁴⁴ *Hero v. Consumers' Lumber Manufacturing & Export Co.*, 123 La. 359, 48 So. 989.

⁴⁵ *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, 173 Pa. St. 30, 39, 33 Atl. 744.

⁴⁶ *Sargent v. Webster*, 13 Mete. (Mass.) 497, 46 Am. Dec. 743. See *Meyer v. Johnston*, 53 Ala. 237.

⁴⁷ *Benson v. Keller*, 37 Ore. 120, 132, 60 Pac. 918.

⁴⁸ *Toronto Brewing Co. v. Blake*, 2 Ont. (Can.) 175, 184.

⁴⁹ *Posner v. Southern Exhaust & Blow Pipe Co.*, 109 La. 658, 33 So. 641.

⁵⁰ It is not necessary that an indorsement of corporate paper by a corporation be shown to have been authorized formally by the directors. This rule is more emphatically true where it is shown that the indorsement inured to the benefit of the corporation and that an oral authority for the indorsement had been given. *Jones v. Stoddart*, 8 Idaho 210, 67 Pac. 650.

the minutes need not state the vote by which the board acted.⁵¹ Thus, in entering into a contract, if all the directors are present and assent thereto, a written contract may be executed without a formal vote or a written entry thereof.⁵² In any event, "where a corporation consists of a small number of persons, like a partnership, they may transact all their business by conversation, without formal votes, and it will be a violation of the plainest principles of justice to hold those who deal with them to prove all their acts by regular votes."⁵³ When it is said by the courts that the appointment of an agent need not be evidenced by a written vote, it is usually meant that the appointment need not be express, but may be evidenced by an adoption of the acts of the agent.

§ 1882. Quorum—What is in absence of regulatory provision. In the case of stockholders' meetings,⁵⁴ any number, provided there are at least two, constitutes a quorum for the transaction of business, unless there is some provision to the contrary; but this rule does not apply to select bodies, like a board of directors or trustees. In the absence of provision to the contrary in the charter or by-laws, a majority of the directors or trustees is necessary, and is sufficient to constitute a quorum and to transact business.⁵⁵ Less than a majority

⁵¹ See *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

⁵² *Indiana Bermudez Asphalt Co. v. Robinson*, 29 Ind. App. 59, 63 N. E. 797.

⁵³ *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, followed in *Sheridan Elec. Light Co. v. Chatham Nat. Bank*, 52 Hun (N. Y.) 575, 5 N. Y. Supp. 529.

⁵⁴ See § 1643, *supra*.

⁵⁵ *Arkansas. Blackwell v. State*, 36 Ark. 178.

Connecticut. Chase v. Tuttle, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874.

Indiana. Griffith v. Sprowl, 45 Ind. App. 504, 91 N. E. 25.

Massachusetts. Sargent v. Webster, 13 Metc. 497, 46 Am. Dec. 743.

Michigan. Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

Missouri. St. Louis Colonization Ass'n v. Hennessy, 11 Mo. App. 555.

New Hampshire. Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402.

New York. Story v. Furman, 25 N. Y. 214; *Ex parte Willcocks*, 7 Cow. 402, 17 Am. Dec. 525.

Oregon. Silsby v. Strong, 38 Ore. 36, 62 Pac. 633.

South Carolina. Ex parte Greenville Academies, 7 Rich. Eq. 471.

Utah. Gay v. Young Men's Consol. Co-operative Mercantile Inst., 37 Utah 280, 107 Pac. 237; *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah 265, 1 Pac. 356.

Virginia. Booker v. Young, 12 Gratt. 303.

cannot meet and bind the corporation by any act or resolution, unless expressly authorized.⁵⁶ This rule is often reiterated by statute, provision in the charter or by-law. Half of the directors is not a quorum.⁵⁷ Officers who are ex officio directors are to be counted in determining whether a quorum is present.⁵⁸ In any event, vacancies in the board reducing the number to less than a quorum of the number fixed by statute or otherwise preclude action by the remaining directors other than to fill the vacancies; and of course a minority of a full board cannot even meet to fill vacancies where a statute provides that "a majority of such directors shall form a board, and be competent to fill vacancies in their board."⁵⁹

The mere circumstance that one director was told that another director would not attend, and believed that a quorum would not be present, "is not enough to make it a fraud for a majority of the board,

⁵⁶ **Alabama.** Tennessee & C. R. Co. v. East Alabama Ry. Co., 73 Ala. 426.

Arkansas. Blackwell v. State, 36 Ark. 178.

California. Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; Smith v. Los Angeles Immigration & Land Co-operative Ass'n, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

Georgia. Dart v. Houston, 22 Ga. 506.

Indiana. Allemon v. Simmons, 124 Ind. 199, 23 N. E. 768; State v. Porter, 113 Ind. 79, 14 N. E. 883; Price v. Grand Rapids & I. R. Co., 13 Ind. 58.

Maine. Cram v. Bangor House Proprietary, 12 Me. 354; Trott v. Warren, 11 Me. 227.

Missouri. Calumet Paper Co. v. Haskell Show Printing Co., 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115; Hill v. Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223; Foster v. Mulvanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260; Webb v. Midway Lumber Co., 68 Mo. App. 546.

New Jersey. Coryell v. New Hope Delaware Bridge Co., 9 N. J. Eq. 457.

New York. Ex parte Willcocks, 7

Cow. 402, 17 Am. Dec. 525.

Rhode Island. Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

Vermont. State v. Smith, 48 Vt. 266.

England. Ernest v. Nicholls, 6 H. L. Cas. 401.

If there are seven directors, and five become disqualified, the two remaining have no authority to fill the vacancies, since they do not constitute a quorum. Moses v. Tompkins, 84 Ala. 613, 618, 4 So. 763.

⁵⁷ Broughton v. Jones, 120 Mich. 462, 79 N. W. 691; Leary v. Interstate Nat. Bank of Texarkana (Tex. Civ. App.), 63 S. W. 149.

Two out of four directors, without the knowledge of the others, cannot authorize a mortgage of all the property of the corporation. Broughton v. Jones, 120 Mich. 462, 79 N. W. 691.

⁵⁸ Bank of Maryland v. Ruff, 7 Gill & J. (Md.) 448; Kent County Agr. Society v. Houseman, 81 Mich. 609, 46 N. W. 15. To the same effect, see Glens Falls Paper Co. v. White, 18 Hun (N. Y.) 214.

⁵⁹ Moses v. Tompkins, 84 Ala. 613, 618, 4 So. 763.

including the director who had stated that he would be absent, to meet pursuant to proper call and notice.”⁶⁰

§ 1883. — As fixed by charter or by-laws. The number necessary to constitute a quorum may be fixed by the charter or by-laws at a greater or less number than a majority,⁶¹ provided, in case of a by-law, that it does not conflict with any statute.⁶² Thus, a by-law may provide that less than a quorum may adjourn a meeting.⁶³ If the charter requires seven directors to make a quorum, and the president is declared to be entitled to all the powers and privileges of a director, a meeting of the president and six directors constitutes a quorum.⁶⁴

§ 1884. — Effect of vacancies in board reducing number below minimum. If there are unfilled vacancies, a quorum is a majority of the entire board.⁶⁵ However, in such a case, where the number of directors is less than the minimum number fixed by the statutes, charter or by-laws, there is some conflict as to whether the board has power to act before the vacancies are filled. The weight of authority in this country seems to be that the power of a board of directors is not suspended by vacancies in the board unless the number be reduced below a quorum,⁶⁶ and that this rule also applies where there is a less number of directors who are legally qualified to act as such.⁶⁷ Thus, in California, where a statute required that the articles of incorporation should set forth the number of directors which should not be less than five, and the articles fixed the number at five, it was

⁶⁰ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

⁶¹ *Lane v. Brainerd*, 30 Conn. 565; *Stockton v. Harmon*, 32 Fla. 312, 13 So. 833; *Bank of Maryland v. Ruff*, 7 Gill & J. (Md.) 448; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Hoyt v. Shelden*, 3 Bosw. (N. Y.) 267.

⁶² See § 517, note 53, *supra*.

⁶³ *Smith v. Law*, 21 N. Y. 296, as set forth in § 518, p. 1112.

⁶⁴ *Bank of Maryland v. Ruff*, 7 Gill & J. (Md.) 448.

⁶⁵ *Erie R. Co. v. Buffalo*, 180 N. Y. 192, 197, 73 N. E. 26; *Burton v. Lithic Mfg. Co.*, 73 Ore. 605, 144 Pac. 1149.

⁶⁶ *Porter v. Lassen County Land & Cattle Co.*, 127 Cal. 261, 59 Pac. 563; *Pennington v. George W. Pennington Sons*, 27 Cal. App. 57, 148 Pac. 947;

Great Falls & T. County R. Co. v. Gannon, 48 Mont. 54, 136 Pac. 390; *Castle v. Lewis*, 78 N. Y. 131, where assignment by way of security made by two trustees was held valid; *Wright v. Com.*, 109 Pa. St. 561, 1 Atl. 794.

The claim that the number of directors was less than the number fixed by statute cannot be urged collaterally by a creditor of the corporation. *Wallace & Sons v. Walsh*, 125 N. Y. 26, 11 L. R. A. 166, 25 N. E. 1076.

⁶⁷ *Welch v. Importers' & Traders' Nat. Bank*, 122 N. Y. 177, 188, 25 N. E. 269, holding mortgage “not invalid as to subsequent creditors by reason of there being but two persons legally qualified to act as trustees when its execution was directed.”

held that four directors, during a vacancy in one of the directorships, could transact business other than the filling of such vacancy.⁶⁸ So it is held in Montana that if a certain number of directors is provided for by statute or the articles of incorporation, the failure of the stockholders to fill all the directorships does not invalidate the title of the directors who are elected or prevent them from legally representing the corporation so long as they constitute a quorum.⁶⁹ And it is held in a recent federal decision that if the statute provides that the board of directors shall consist of at least three directors and that a majority of them shall constitute a quorum, if a board consists of three and one refuses to act, the remaining two constitute the board and may act as such.⁷⁰

In New Jersey, however, it is held that if there are less than the required number of directors, they cannot act as a board, at least except in regard to the ordinary internal affairs of the corporation which must be carried on from necessity.⁷¹ However, in that state, in determining whether there are the number of directors required by statute, it has been held, at least as to third persons dealing with the corporation without notice that one of the directors has become disqualified, that such director must be counted even though merely a *de facto* director.⁷² In England, however, it has been held that a different rule applies, where the contest is between the corporation and its

⁶⁸ *Porter v. Lassen County Land & Cattle Co.*, 127 Cal. 261, 59 Pac. 563.

⁶⁹ *Great Falls & T. County R. Co. v. Ganong*, 48 Mont. 54, 136 Pac. 390.

If the articles of incorporation provide for a board of directors of five members, but only three are elected, and a statute also fixes five as the minimum number of directors, but provides that a majority of the directors is a sufficient number to form a board and a decision of a majority of the members forming such board is valid as a corporate act, acts of the three are valid, at least as between the corporation and a third person. *Great Falls & T. County R. Co. v. Ganong*, 48 Mont. 54, 136 Pac. 390.

⁷⁰ *Dodge v. Kenwood Ice Co.*, 204 Fed. 577.

⁷¹ *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719, which is not reversed, it will be noted, by

Kuser v. Wright, 52 N. J. Eq. 825, 31 Atl. 397, so far as this point is concerned.

⁷² *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397, *rev'g Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719, so far as the latter held disposal of stock prevented a director from being a *de facto* director.

"It is apparent that dealing with these corporate bodies would be in the highest degree hazardous and unsafe if the public, without notice in fact, is chargeable in law with knowledge of a latent infirmity in the title of every director of the company. A doctrine so destructive to the security of commercial transactions, now so largely conducted by corporate action, has no support in the law." *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397.

stockholders, in which case if one director has become disqualified so as to bring the number below the minimum number of directors, the act of the directors is not binding on stockholders.⁷³ And, in like manner, it is held in that jurisdiction that if the articles of association fix the minimum number of directors at five, four directors, all that are left after death of one and insolvency of another director, cannot act; that the provision is not merely directory but obligatory; and that a forfeiture of shares by such four for failure to pay calls was void.⁷⁴ But, on the other hand, it has been held in England that a provision that the board "may act notwithstanding any vacancy" authorizes action by a board where the number has been reduced below the minimum fixed by the charter.⁷⁵ In Canada it is held that acts of a board composed of less than the minimum number are ineffectual.⁷⁶

It is held in Missouri that the fact that the board of directors is composed of a greater number than allowed by the charter does not invalidate their acts.⁷⁷

§ 1885. — Trick to obtain quorum. A director cannot be trapped into attendance at a directors' meeting, against his will, by their going to his office, which was the office of the company, where he left the office in order to break up a quorum as soon as he realized that corporate action was to be taken and a meeting held.⁷⁸

§ 1886. — Delegation of power to less than a quorum. A quorum of the directors legally assembled may authorize a conveyance to be executed, seal to be affixed to an instrument, or other act done by a select committee, or by one of their number, constituting less than a quorum.⁷⁹

§ 1887. — Quorum of executive committee. In the absence of showing to the contrary, a majority will be deemed sufficient to constitute a quorum of the executive committee.⁸⁰

⁷³ Bottomley's Case, 16 Ch. Div. 681.

⁷⁴ In re Alma Spinning Co., 16 Ch. Div. 681, 690, 7 Eng. Rul. Cas. 589, with note.

⁷⁵ In re Scottish Petroleum Co., 23 Ch. Div. 413, 431; Matter of Bank of Syria, 2 Ch. Div. 272.

⁷⁶ Toronto Brewing Co. v. Blake, 2 Ont. (Can.) 175, 184.

⁷⁷ Hax v. R. T. Davis Mill Co., 39 Mo. App. 453, 459.

⁷⁸ Trendley v. Illinois Traction Co., 241 Mo. 73, 145 S. W. 1.

⁷⁹ Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 137; Berks & D. Turnpike Road v. Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402.

⁸⁰ Marshall v. Industrial Federation of America, 14 N. Y. Ann. Cas. 100, 84 N. Y. Supp. 866.

"There is sufficient precedent for holding that a majority may act, and such is the better rule." McNeil v.

§ 1888. Number necessary to decide. When there is a quorum of directors at a meeting of which proper notice has been given, a majority of the quorum has the power to decide any question coming before the meeting, although it may be less than a majority of the board, unless there is some express provision in the charter or by-laws to the contrary.⁸¹ Thus, if the by-laws fix the quorum at four, three of them are a majority of the quorum and may act.⁸² However, the number of directors necessary to decide a particular question, or matters generally, may be changed by the charter or by-laws of the corporation.⁸³

If there are enough directors present to constitute a quorum, the fact that one refuses to vote is immaterial.⁸⁴ But if a statute requires an election to be by a majority of all present, and a director who

Boston Chamber of Commerce, 154 Mass. 277, 282, 13 L. R. A. 559, 28 N. E. 245.

⁸¹ **Arkansas.** Bank of Little Rock v. McCarthy, 55 Ark. 473, 29 Am. St. Rep. 60, 18 S. W. 759.

California. Harding v. Vandewater, 40 Cal. 77.

Connecticut. Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99.

Illinois. Western Cottage Piano & Organ Co. v. Burrows, 144 Ill. App. 350.

Iowa. Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

Massachusetts. Sargent v. Webster, 13 Metc. 497, 46 Am. Dec. 743.

Michigan. Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905; Cahill v. Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

Missouri. Foster v. Mullanphy Planing-Mill Co., 92 Mo. 79, 4 S. W. 260.

New Hampshire. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620, 29 Atl. 195; Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402.

New York. Ex parte Willcocks, 7

Cow. 402, 17 Am. Dec. 525.

South Carolina. Ex parte Greenville Academies, 7 Rich. Eq. 471.

Utah. Singer v. Salt Lake City Copper Mfg. Co., 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024; Leavitt v. Oxford & G. Silver Min. Co., 3 Utah 265, 1 Pac. 356.

⁸² Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co., 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 Pac. 81.

⁸³ Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 137.

A by-law changing the number of directors necessary to constitute a quorum does not abrogate another by-law requiring a vote of two-thirds of the directors to decide a particular question, unless the by-laws are irreconcilably conflicting. Stockton v. Harmon, 32 Fla. 312, 13 So. 833.

⁸⁴ People v. Conklin, 7 Hun (N. Y.) 188; Mercantile Library Hall Co. v. Pittsburg Library Ass'n, 173 Pa. St. 30, 33 Atl. 744, 25 Pittsb. Leg. J. (N. S.) 345.

"It is not necessary to the binding action of a board of directors that each member should take part in its deliberations." Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226, 3 L. R. A. 378, 16 Am. St. Rep. 633, 41 N. W. 905.

is present does not vote at all on a resolution, he is to be counted in the negative for the purpose of determining whether the resolution has been carried by a majority vote.⁸⁵

- • If a statute requires the unanimous vote of the board of directors to create a bonded indebtedness, it means the unanimous vote of a quorum present at a meeting of the board.⁸⁶ So it will be presumed that a majority vote of directors means a majority of a quorum.⁸⁷

It is immaterial, it seems, as far as the validity of acts of a board of directors is concerned, that the directors are under the domination and control of one of their number.⁸⁸

§ 1889. Counting interested or disqualified directors. A director who is disqualified by reason of personal interest in the matter before a directors' meeting loses, *pro hac vice*, his character as a director, and he cannot be counted for the purpose of making out a quorum.⁸⁹ Thus, if the grantee of a deed is a director, and his presence at the meeting authorizing the conveyance was necessary to make a quorum, the deed is voidable although not void, even where there was no fraud.⁹⁰

⁸⁵ *Com. v. Wickersham*, 66 Pa. St. 134. See also *People v. Conklin*, 7 Hun (N. Y.) 188.

⁸⁶ *Tidewater Southern R. Co. v. Jordan*, 163 Cal. 105, 41 L. R. A. (N. S.) 130, Ann. Cas. 1913 E 1293, 124 Pac. 716.

⁸⁷ *Foster v. Mullanphy Planing-Mill Co.*, 92 Mo. 79, 4 S. W. 260.

⁸⁸ *Zeekendorf v. Steinfeld*, 12 Ariz. 245, 100 Pac. 784.

⁸⁹ *California*. *Bassett v. Fairchild*, 132 Cal. 637, 52 L. R. A. 611, 64 Pac. 1082; *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 52 L. R. A. 611, 80 Am. St. Rep. 132, 62 Pac. 552; *Smith v. Los Angeles Immigration & Land Co-op. Ass'n*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Lowe v. Los Angeles Suburban Gas Co.*, 24 Cal. App. 367, 141 Pac. 399.

Colorado. *Paxton v. Heron*, 41 Colo. 147, 124 Am. St. Rep. 123, 92 Pac. 15.

Delaware. *Lippman v. Kehoe Stenograph Co.* (Del. Ch.), 95 Atl. 895.

Illinois. *Federal Life Ins. Co. v. Griffin*, 173 Ill. App. 5, 18.

Missouri. *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 24 S. W. 223.

Montana. *O'Rourke v. Grand Opera House Co.*, 47 Mont. 459, 133 Pac. 965.

New Jersey. *Wall v. Utah Copper Co.*, 70 N. J. Eq. 17, 62 Atl. 533; *Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co.*, 44 N. J. Eq. 568, 14 Atl. 907, 43 N. J. Eq. 626, 14 Atl. 908.

New York. *Sturndorf v. Samurai Co.*, 121 N. Y. Supp. 217.

Oregon. *Burton v. Lithic Mfg. Co.*, 73 Ore. 605, 144 Pac. 1149.

Texas. *Leary v. Interstate Nat. Bank of Texarkana* (Tex. Civ. App.), 63 S. W. 149.

West Virginia. *Flanagan v. Flanagan Coal Co.*, 88 S. E. 397.

See also the chapter on Compensation of Officers, *infra*.

⁹⁰ *Mobile Land Improvement Co. v. Gass*, 142 Ala. 520, 39 So. 229.

Nor can the vote of a director who is so disqualified be counted for the purpose of determining whether a resolution has been passed by a majority vote.⁹¹ Thus, if there are four directors present, who constitute a quorum, a member of the board may be removed by the vote of two, since the member removed is disqualified to vote.⁹² This rule is often applied to voting salaries or compensation to directors.⁹³ This rule does not apply, however, to the execution of a demand note to some of the directors for a debt which was then past due and which might have been sued on at once;⁹⁴ and it has been held that the mere fact that the resolution authorizing a mortgage was adopted by the votes of the owners of the claim to be secured thereby is not fatal to the validity of the mortgage, where most of the indebtedness was already secured by mortgage and the rate of interest was reduced.⁹⁵

But the validity of a resolution or other action is not affected by the fact that a disqualified director was present or voted, if there was a quorum without him, and the necessary majority vote in favor of the resolution or act without counting his vote.⁹⁶ His vote, in other words, is a mere nullity.

91 California. *Wickersham v. Crittenden*, 110 Cal. 332, 42 Pac. 893, 106 Cal. 327, 39 Pac. 602, 93 Cal. 17, 28 Pac. 788; *Smith v. Los Angeles Immigration & Land Co-operative Ass'n*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

Michigan. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218; *Doyle v. Mizner*, 42 Mich. 332, 3 N. W. 968.

Minnesota. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

Missouri. *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 24 S. W. 223; *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846.

New York. *Butts v. Wood*, 37 N. Y. 317; *Copeland v. Johnson Mfg. Co.*, 47 Hun 235.

Since a sale of corporate property and the disposition of the proceeds are distinct acts, a director may be qualified to vote on a proposition to ratify the sale, although disqualified from voting upon a particular application of the proceeds. *German Nat.*

Bank of Hastings v. First Nat. Bank of Hastings, 59 Neb. 7, 80 N. W. 48.

However, a director cannot complain that a resolution authorizing a corporate mortgage, for which he voted, was not regularly adopted because one of the directors voting therefor was the indorser of paper secured by the mortgage, and two other directors so voting had indemnified him in writing as such indorser. *Lucas v. Friant*, 111 Mich. 426, 69 N. W. 735.

92 *Pennington v. George W. Pennington Sons*, 27 Cal. App. 57, 148 Pac. 947.

93 See chapter on Compensation of Officers, *infra*.

94 *Campau v. Detroit Driving Club*, 135 Mich. 575, 585, 10 Det. L. N. 870, 98 N. W. 267.

95 *Rittenhouse v. Winch*, 57 Hun (N. Y.) 587, 11 N. Y. Supp. 122, *aff'd* 133 N. Y. 678, 31 N. E. 623.

96 *Clark v. American Coal Co.*, 86 Iowa 436, 53 N. W. 291; *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 74 Mich.

§ 1890. Voting by proxy. The directors of a corporation cannot vote at directors' meetings by proxy, but must be personally present and act themselves.⁹⁷ "His personal judgment is necessary, and he cannot delegate his duties, or assign his powers."⁹⁸ "A director of a corporation cannot delegate his power to vote in the board of directors by giving his proxy to another person. He must be present in person for the purpose of consultation. Directors are elected to meet and confer and interchange ideas. They cannot vote or act in any other manner. A director, of course, cannot act or vote by proxy."⁹⁹

§ 1891. Presumptions in favor of meeting. In the absence of express charter or statutory provision to the contrary, whenever an act purports to have been done or authorized by the board of directors, it will be presumed, until the contrary is shown, that they acted at a meeting, that proper notice of the meeting was given to all the directors, that a quorum of the directors was present, that the meeting was held and conducted in accordance with any special provision in the charter or by laws, and that the act was done or authorized by a majority, etc.¹ In other words, any illegality or irregularity in the

226, 16 Am. St. Rep. 633, 41 N. W. 905; Keans v. New York & C. Point Ferry Co., 17 N. Y. Misc. 272, 40 N. Y. Supp. 366.

⁹⁷ Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 So. 217; State v. Perkins, 90 Mo. App. 603; First Nat. Bank v. East Omaha Box Co., 2 Neb. (Unoff.) 820, 90 N. W. 223; Craig Medicine Co. v. Merchants' Bank, 59 Hun (N. Y.) 561, 14 N. Y. Supp. 16.

⁹⁸ Lippman v. Kehoe Stenograph Co. (Del. Ch.), 95 Atl. 895.

⁹⁹ First Nat. Bank of Omaha v. East Omaha Box Co. (Neb.), 90 N. W. 223.

1 California. Stockton Combined Harvester & Agricultural Works v. Houser, 109 Cal. 1, 41 Pac. 809.

Connecticut. Chase v. Tuttle, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874; Lane v. Brainerd, 30 Conn. 565.

Iowa. Rollins v. Shaver Wagon & Carriage Co., 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. 1037; Hardin v.

Iowa Ry. & Const. Co., 78 Iowa 726, 6 L. R. A. 52, 43 N. W. 543.

Louisiana. Ross v. Crockett, 14 La. Ann. 811.

Maryland. Baile v. Calvert College Educational Society, 47 Md. 117.

Massachusetts. Sargent v. Webster, 13 Mete. 497, 46 Am. Dec. 743.

Minnesota. Fletcher v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 339, 69 N. W. 1085; Heintzelman v. Druids' Relief Ass'n, 38 Minn. 138, 36 N. W. 100.

Missouri. Chouteau Ins. Co. v. Holmes' Adm'r, 68 Mo. 601, 30 Am. Rep. 807.

New Hampshire. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. 137.

Utah. Singer v. Salt Lake City Copper Mfg. Co., 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024; Leavitt v. Oxford & G. Silver Min. Co., 3 Utah 265, 1 Pac. 356.

Thus it will be presumed that a

action of the directors must be affirmatively shown, all presumptions being in favor of its legality, in accordance with the maxim, *omnia acta rite esse praesumuntur*. For instance, it will be presumed that proper notice of a meeting was given to all the directors, in the absence of proof to the contrary, particularly when the records or minutes of the corporation recite that notice was given.²

§ 1892. Effect of irregularity or illegality—In general. Proceedings by directors at a meeting which was illegal because it was not called by the authority or in the mode prescribed by the charter or by-laws, or because notice was not given to absent members of the board, or because a quorum was not present, or for any other reason, as explained in the preceding sections, are absolutely void, unless afterwards ratified, or unless the corporation is estopped as against innocent third persons.³ However, no one but stockholders or creditors

note and mortgage were authorized at a lawful meeting of the board of directors. *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122; *Aetna Indemnity Co. v. Altadena Min. & Inv. Co.*, 11 Cal. App. 26, 104 Pac. 470.

² **California.** *Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258; *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122; *Balfour-Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594; *Stockton Combined Harvester & Agricultural Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

Connecticut. *Chase v. Tuttle*, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874; *Lane v. Brainerd*, 30 Conn. 565.

Iowa. *Hardin v. Iowa Ry. & Const. Co.*, 78 Iowa 726, 6 L. R. A. 52, 43 N. W. 543.

Louisiana. *Ross v. Crockett*, 14 La. Ann. 811.

Massachusetts. *Sargent v. Webster*, 13 Metc. 497, 46 Am. Dec. 743.

Minnesota. *Fletcher v. Chicago, St. P., M. & O. Ry. Co.*, 67 Minn. 339, 69 N. W. 1085.

Missouri. *Gate City Nat. Bank v.*

Elliott, — Mo. —, 181 S. W. 25; *Chouteau Ins. Co. v. Holmes' Adm'r*, 68 Mo. 601, 30 Am. Rep. 807.

Utah. *Singer v. Salt Lake Copper Mfg. Co.*, 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024; *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah 265, 1 Pac. 356.

When all the directors are present and participate in the meeting, notice will be presumed, in the absence of evidence to the contrary. *Illinois Commercial Men's Ass'n v. Perrin*, 139 Ill. App. 543, 547.

³ **United States.** *Farwell v. Houghton Copper Works*, 8 Fed. 66.

Arkansas. *Bank of Little Rock v. McCarthy*, 55 Ark. 473, 29 Am. St. Rep. 60, 18 S. W. 759.

California. *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Smith v. Los Angeles Immigration & Land Co-operative Ass'n*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153.

Kentucky. *Vaught v. Ohio County Fair Co.*, 49 S. W. 426.

can attack an assignment by a corporation on the ground that it was not authorized at a regular meeting of the directors; such defect in authorization is not available as a defense in an action by the assignee against third persons.⁴

§ 1893. — Ratification by directors or stockholders. Proceedings by the directors, or some of them, at an illegal or irregular meeting may be ratified by them at a subsequent legal meeting, and thereby rendered valid.⁵ Thus, acts of directors at a meeting which was illegal because of want of notice may be ratified by the directors at a subsequent legal meeting,⁶ as may also action taken at a meeting of directors which was illegal because of the absence of a quorum.⁷ Likewise, the proceedings may be expressly ratified by the stockholders, or the illegality or irregularity cured by their acquiescence with knowledge of the facts, if the acts are such as they could have done or authorized in the first instance.⁸ Thus, where a mortgage was authorized at a

Michigan. *Broughton v. Jones*, 120 Mich. 462, 79 N. W. 691.

Minnesota. *Baldwin v. Canfield*, 26 Minn. 43, 61, 1 N. W. 261, 276.

Missouri. *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115; *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 24 S. W. 223.

North Carolina. *First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co.*, 116 N. C. 827, 21 S. E. 948.

Oregon. *Doernbecher v. Columbia City Lumber Co.*, 21 Ore. 573, 28 Am. St. Rep. 766, 28 Pac. 899.

Pennsylvania. *Mercantile Library Hall Co. v. Pittsburg Library Ass'n*, 173 Pa. St. 30, 33 Atl. 744; *Gordon v. Preston*, 1 Watts 385, 26 Am. Dec. 75.

Rhode Island. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

⁴ *Dunshee v. Standard Oil Co.*, 165 Iowa 625, 146 N. W. 830.

⁵ *Taylor County Court v. Baltimore & O. R. Co.*, 35 Fed. 161; *In re Portuguese Consol. Copper Mines*, 45 Ch. Div. 16.

⁶ *Taylor County Court v. Baltimore & O. R. Co.*, 35 Fed. 161; *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754; *In re Portuguese Consol. Copper Mines*, 45 Ch. Div. 16.

⁷ *In re Portuguese Consol. Copper Mines*, 45 Ch. Div. 16.

⁸ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; *Johnson Co. v. Miller*, 174 Pa. St. 605, 52 Am. St. Rep. 833, 34 Atl. 316; *Gordon v. Preston*, 1 Watts (Pa.) 385, 26 Am. Dec. 75.

This rule has been applied where there was want of notice of the meeting. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179. And see *Johnson Co. v. Miller*, 174 Pa. St. 605, 52 Am. St. Rep. 833, 34 Atl. 316.

A record of the meetings of directors is notice to the stockholders. *Ashley Wire Co. v. Illinois Steel Co.*, supra.

A contract entered into when a quorum was not present may be ratified by subsequent acts of the directors and stockholders. *Greensboro*

directors' meeting alleged to be illegal for irregularities relating to the notice and place of meeting, it was held, in a suit to foreclose the mortgage, that the defense that the meeting was illegal was not available, and the court said: "The act sought to be impeached was within the general powers of the board of directors, and it has never been disavowed by the corporation. * * * No meeting of directors or stockholders has been held, and no action has been taken by the corporation or any director or stockholder in disaffirmance of the proceedings at that meeting, or in repudiation of the note or mortgage. The record of the meeting in the book of the corporation was notice to its members, and the mortgage was recorded on the day of its execution. * * * Those affected by the act unquestionably may, and apparently do prefer to ratify it as just and proper even if irregularly done, and, of course, if that is the case, the other defendants have no right to interfere. All that has been done in the way of questioning the act of the agents of the corporation is the filing of an answer by a solicitor presumably employed and directed by the president, who executed the note and mortgage. The repudiation of its obligation has never been authorized by the directors or stockholders, and we think that the mortgage is binding by acquiescence and ratification." ⁹ So failure to give notice of a meeting is cured by the attendance of all the directors at the meeting.¹⁰ So the insufficiency of the notice is immaterial where all the directors attend and no one objects thereto.¹¹ If the action of a directors' meeting has been acquiesced in by the corporation and its stockholders, creditors cannot raise the objection that a quorum was not present.¹² So while a resolution passed at a special meeting of which some of the directors did not have timely notice is voidable, yet if no officer or stockholder of the company objects thereto, their acquiescence must be accepted as a ratification of the resolution, and no creditor of the company can question its validity.¹³

Ratification, however, can give no effect to an unauthorized act, unless the person or body ratifying the same could have authorized it in the first instance. If a statute, therefore, requires action both by

Gas Co. v. Home Oil & Gas Co., 222 Pa. 4, 128 Am. St. Rep. 790, 70 Atl. 943.

⁹ Ashley Wire Co. v. Illinois Steel Co., 60 Ill. App. 179, aff'd on opinion of lower court in 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410.

¹⁰ See § 1873, supra.

¹¹ O'Rourke v. Grand Opera House Co., 47 Mont. 459, 133 Pac. 965.

¹² El Cajon Portland Cement Co. v. Robert F. Wentz Engineering Co., 165 Fed. 619.

¹³ Moller v. Keystone Fibre Co., 187 Pa. St. 553, 41 Atl. 478.

the board of directors and by the stockholders in the execution of a mortgage or other act, so that neither can alone do or authorize the act, the void act of the directors at an illegal meeting cannot be aided or cured by a ratification by the stockholders. Since the action of the directors is void, to allow it to be ratified by the stockholders would be equivalent to allowing the stockholders alone to do the act.¹⁴

This question of ratification is considered at length in a subsequent subdivision of this chapter.^{14a}

§ 1894. — Estoppel against innocent third persons. It is doubtless true that where a contract is executory, it cannot be specifically enforced¹⁵ nor can an action for damages for breach thereof be brought, where it was authorized at an irregular meeting of directors, unless it has been duly ratified, or the acts of the stockholders are such as to constitute an estoppel. But where the contract has been executed by the other party thereto, a different question arises. In such a case the rule laid down in a former chapter as to the effect of informalities in executing a corporate contract¹⁶ governs, and it is held that the corporation which has received the benefits of the contract cannot set up that the directors' meeting which authorized it was irregular in some respect. The rule is that illegality or irregularity in a directors' meeting cannot be set up to defeat the rights of innocent third persons dealing with the corporation, since, in the absence of notice to the contrary, they have a right to assume that the proceedings were legal and regular—that notice was given, that a quorum was present, that the meeting was called in the mode prescribed by the charter or by-laws, etc.¹⁷ Thus, want of notice of a special meeting to one or more directors does not affect the validity of acts or contracts of the corporation at such a meeting, so far as third persons dealing with the corporation are concerned, since they have a right to assume that the meeting was regular.¹⁸ In other words, one dealing with a corporation

¹⁴ *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552.

^{14a} See § 2177 et seq., *infra*.

¹⁵ *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9, 24 S. W. 223.

¹⁶ See § 1449 et seq., *supra*.

¹⁷ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; *Tenney v. East Warren Lumber Co.*,

43 N. H. 343; *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397.

¹⁸ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; *Kuser v. Wright*, 52 N. J. Eq. 825, 31 Atl. 397.

“That is a subject into which those who are dealing with a corporation are not bound to inquire. That duty falls on the company alone, when it holds out its officers as its accredited

cannot be affected by a failure of the corporate agents to observe the rules and regulations enacted for the internal management of the corporate affairs,¹⁹ especially where such regulations are contained in by-laws as distinguished from those contained in statutes or the charter,²⁰ on the theory already noticed in a preceding chapter that mere informalities cannot be availed of by the corporation where the other party to the contract has performed his part of the contract.²¹ However, there may be constructive notice of the defect.²²

On the other hand, it has been held in New Jersey that a mortgage authorized at a meeting of less than a quorum²³ or where the number of directors was under the minimum fixed by law,²⁴ was invalid because of the irregularity.

§ 1895. Vote or resolution as constituting a contract. It has been held that a vote of an amusement company granting an exclusive privilege to sell ice cream, candy, etc., for a specified time, at a fixed price per year is not, of itself, a completed contract, "but rather a preliminary to a contract to be made and carried out in the future, in some mode to be subsequently agreed upon by the parties, and is so uncertain and indefinite in its nature that in itself it is not a subject which equity will protect by means of an injunction."²⁵ How-

agents. Nothing like an approach to safety could exist in transactions with corporate bodies if such an obligation was laid upon third parties contracting with them. After the most careful inquiry, the question would still be open to controversy." *Kuser v. Wright*, 52 N. J. Eq. 825, 830, 31 Atl. 397.

Want of notice of a special meeting of directors to one or more directors cannot be relied on by the corporation as a defense to an action on a contract authorized at such meeting where the failure to give the notice was not known to the other contracting party. *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187.

¹⁹ "We do not think that complainant was bound to know what provisions or regulations had been made by the Ashley Wire Company for convening the meeting of its agents or

governing body, but had a right to assume that they had been complied with." *Ashley Wire Co. v. Illinois Steel Co.*, 60 Ill. App. 179, aff'd on opinion of Appellate Court in 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410.

²⁰ *Ashley Wire Co. v. Illinois Steel Co.*, 60 Ill. App. 179, aff'd on opinion of Appellate Court in 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410. See also Chap. 16, *supra*.

²¹ See § 1543, *supra*.

²² *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 399, 28 Atl. 719.

²³ *Coryell v. New Hope Delaware Bridge Co.*, 9 N. J. Eq. 457.

²⁴ *Wright v. First Nat. Bank*, 52 N. J. Eq. 392, 28 Atl. 719. See also § 1884, *supra*.

²⁵ *Hazard v. Hope Land Co. (R. I.)*, 18 L. R. A. (N. S.) 293, 69 Atl. 602. See also *Cope v. Thames Haven Dock & R. Co.*, 3 Exch. 841.

ever, there is no doubt that a resolution may be so specific and in such terms as itself to constitute a contract where accepted and relied on by the other party.²⁶

XI. POWERS OF OFFICERS AND AGENTS IN GENERAL

§ 1896. General rules. The officers of a corporation are generally a president, vice president, secretary and treasurer, and, in case of a bank, a cashier. Other offices are sometimes created by the charter or by-laws. Whether a person is an officer of the corporation or merely an agent is not always clear.²⁷ However, so far as his power to bind the corporation is concerned, this question is usually immaterial since, without regard to whether he occupies a corporate office or is merely a corporate agent, his powers are governed by the general rules applicable to agents of individuals.²⁸ The question then is usually merely one of agency, governed by the rules relating to agents in general. The president, treasurer, secretary and other officers of a corporation are merely its agents, appointed by the stockholders or the board of directors or trustees, and vested with such powers, and such powers only, as may be conferred upon them by the corporation, subject, of course, to any express charter or statutory provisions. Their power to bind the corporation is determined by the extent of the authority expressly or impliedly conferred upon them by resolution of the stockholders or directors, by the by-laws of the corporation, or otherwise, and by application of the general principles governing the relation of principal and agent. The general rule is that the officers and agents of a corporation, like the agents of a natural person, have such authority only as has been conferred upon them by their principal, the corporation; and contracts or acts in excess of their authority will not bind the corporation, in the absence of estoppel or ratification.²⁹ However, if a corporation intentionally

²⁶ *Newport News, H. & O. P. Development Co. v. Newport News St. Ry. Co.*, 97 Va. 19, 32 S. E. 789.

²⁷ See §§ 1740, 1747, *supra*.

²⁸ See § 1897, *infra*.

²⁹ *Connecticut. Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565, 38 Atl. 310.

Illinois. Michigan Cent. R. Co. v. Gougar, 55 Ill. 503.

Indiana. Louisville, E. & St. L. Ry. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770.

Iowa. Hardin v. Iowa Ry. & Const. Co., 78 Iowa 726, 6 L. R. A. 52, 43 N. W. 543.

Maine. Peirce v. Morse-Oliver Building Co., 94 Me. 406, 47 Atl. 914.

Massachusetts. Slattery v. North End Sav. Bank, 175 Mass. 380, 56 N. E. 606; *Bi-spool Sew. Mach. Co. v. Acme Mfg. Co.*, 153 Mass. 404, 26 N. E. 991; *Holden v. Phelps*, 135 Mass. 61.

Michigan. Kendall v. Bishop, 76 Mich. 634, 43 N. W. 645.

or negligently clothes a particular officer or agent with apparent authority to act for it in a particular matter, it cannot deny his authority as against persons dealing with him in good faith.³⁰ And a corporation may render itself liable for unauthorized acts of its officers or agents by subsequently ratifying them.³¹ When there is no question, however, as to the clothing of an officer or agent with apparent authority, all persons dealing with him are bound to ascertain his authority, and, if they deal with him without inquiry, they act at their peril and cannot hold the corporation liable if the officer or agent was without authority in fact, unless they can establish an estoppel against the corporation, or show a ratification.³²

In this subdivision are considered the powers of officers and agents in general, while in succeeding subdivisions the powers of particular officers, such as the president, vice president, secretary, treasurer,

Mississippi. *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116.

New Jersey. *Beach v. Palisade Realty & Amusement Co.*, 86 N. J. L. 238, 90 Atl. 1118; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237; *Titus v. Cairo & F. R. Co.*, 37 N. J. L. 98; *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263.

North Carolina. *First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co.*, 116 N. C. 827, 21 S. E. 948; *Rumbough v. Southern Improvement Co.*, 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. 536.

Oregon. *Luse v. Isthmus Transit Ry. Co.*, 6 Ore. 125, 25 Am. Rep. 506.

Pennsylvania. *Moshannon Land & Lumber Co. v. Sloan*, 109 Pa. St. 532, 7 Atl. 102; *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 269.

Texas. *Green v. Hugo*, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79; *Houston & T. Cent. R. Co. v. McKinney*, 55 Tex. 176.

Wisconsin. *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325.

The powers of an officer of a bank to bind it with respect to the acceptance of a deposit and the giving of instructions with reference to the distribution thereof are to be determined

not by mere opinions of witnesses but by the relation of the officer to the bank and the principles incident thereto. *Burnell v. San Francisco Sav. Union*, 136 Cal. 499, 69 Pac. 144.

It is not within the implied power of officers of a subordinate chapter of a benevolent society to waive the rules and regulations constituting an essential element of the contract between the society and its members. *Royal Highlanders v. Scovill*, 66 Neb. 213, 4 L. R. A. (N. S.) 421, 92 N. W. 206.

Generally speaking, a bank is not bound by acts of its officers performed away from its place of business which the bank has not previously authorized or subsequently ratified. *Jones v. First Nat. Bank of Lincoln (Neb.)*, 90 N. W. 912.

³⁰ See §§ 1916-1925, *infra*.

³¹ See *infra*, this chapter.

³² *Peirce v. Morse-Oliver Bldg. Co.*, 94 Me. 406, 47 Atl. 914; *Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606; *Rice v. Peninsular Club*, 52 Mich. 87, 17 N. W. 708; *Alexander v. Cauldwell*, 83 N. Y. 480; *De Bost v. Albert Palmer Co.*, 35 Hun (N. Y.) 386; *Smith v. Co-operative Dress Ass'n*, 12 Daly (N. Y.) 304.

See §§ 1926, 1932, *infra*.

cashier and general manager, are stated, as well as the powers of the board of directors. That a corporation can act only through agents is too elementary a proposition to require the citation of authority. Whether a particular officer or agent may bind the corporation, and under what circumstances any officer or agent may bind the corporation is the important question.

Whether acts of an officer or agent are within the scope of his authority, so as to make the corporation liable for the torts of the officer or agent, is considered in a subsequent chapter.³³

The powers of general agents of insurance companies are so peculiar to those companies that reference should be made to standard works on the law of insurance.

The rule that a contract may be invalid for mental incapacity of one of the parties thereto applies where the officer acting in behalf of a corporation is wanting in mental capacity as well as in cases of contracts between individuals; but if the corporation is represented in making the contract by two or more officers authorized to contract, the fact of the mental incapacity of one of them is immaterial.³⁴

§ 1897. Rules of agency as applicable. In the nature of things, a corporation, since it is impersonal, cannot act at all except through persons representing it—the stockholders as a body and at a corporate meeting, the board of directors and other officers and agents. A corporation, therefore, must have the power to appoint officers and agents and authorize them to act for it; and it is a general principle that a corporation, subject to any express restrictions, may authorize an officer or other agent to do in its behalf and name any act which is within the powers expressly or impliedly conferred upon it by its charter. And in determining whether a corporation is liable for the acts of persons as its agents, precisely the same principles apply, except as hereafter explained, as determine the liability of natural persons under similar circumstances.³⁵ Thus, it is said that “in either

³³ See Chap. 47, *infra*.

³⁴ *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 21 Ann. Cas. 611, 123 S. W. 271.

³⁵ *United States*. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73.

Kentucky. *Covington v. Covington & C. Bridge Co.*, 10 Bush 69.

Louisiana. *Knabe v. Ternot*, 16 La. Ann. 13; *Ware v. Baratavia & L. Ca-*

nal Co., 15 La. 169, 35 Am. Dec. 189.

Maryland. *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246.

Mississippi. *Metzger v. Southern Bank*, 98 Miss. 108, 54 So. 241.

New York. *Story v. Furman*, 25 N. Y. 214.

Ohio. *Bradford Belting Co. v. Gibson*, 68 Ohio St. 442, 67 N. E. 888.

West Virginia. *Union Bank &*

case, the principal is bound only by the authorized acts of his agent. The extent of the agent's authority may be shown by the terms of the appointment, if they are explicit, or it may be shown by a course of dealing by which the agent is held out as having an authority which would include the act in question."³⁶ "The ordinary rules governing the scope of an agent's authority apply to the agents and officers of a corporation just as they do to the agents of a private individual."³⁷ "The officers, principal and subordinate, are but agents, created and granted all their powers by the board of directors. In respect to being commissioned to act for the principal, the agent of the corporation, of whatever station or rank, is governed by the same general rules and principles of the law as the agent of an individual."³⁸ In order to bind the corporation by his acts, there need be no express authority from the board of directors, but it may be implied, since "the corporation is as much bound as a natural person by duly implied authority of its agents, as well as by authority expressly given."³⁹

§ 1898. Classification and enumeration of powers—In general. In order clearly to understand what is hereinafter stated in regard to the powers of officers generally and of particular officers, it is necessary first to classify and consider the source of the power.⁴⁰ In determining whether a corporation is bound by the acts or contracts of a particular officer or agent, it is necessary to consider the kinds of powers and under what circumstances the corporation is bound where the officer or agent has no authority to act. First, as to the various kinds of powers, and their derivation, the rule is that the corporation is bound where the officer or agent exercises any one of the following powers: 1. Powers expressly conferred by a statute, the charter or valid by-laws. These are called express powers. 2. Powers conferred on particular officers or agents by resolution or other express act of the board of directors, where the powers are subject to delegation by the board. These powers are also classed as express powers. 3. Powers incidental to the express powers. 4. Apparent powers, as hereafter

Trust Co. v. Long Pole Lumber Co., 70 W. Va. 558, 41 L. R. A. (N. S.) 663, 74 S. E. 674.

Wisconsin. Chicago & N. W. Ry. Co. v. James, 22 Wis. 194.

³⁶ Bradford Belting Co. v. Gibson, 68 Ohio St. 442, 448, 67 N. E. 888.

³⁷ Gilbert v. Sharkey, 80 Ore. 323, 157 Pac. 146, 156 Pac. 789.

³⁸ Cushman v. Cloverland Coal & Mining Co., 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759.

³⁹ Metzger v. Southern Bank, 98 Miss. 108, 54 So. 241.

⁴⁰ See Western Investment & Land Co. v. First Nat. Bank of Denver, 23 Colo. App. 143, 128 Pac. 476.

defined.⁴¹ 5. Inherent powers which, however, are in reality one form of apparent powers, i. e., powers apparent from the very nature of the office.

Furthermore, in determining the powers of officers it is also necessary to keep in mind that they vary somewhat according to the kind of corporation involved. Thus the powers of officers of trading corporations are in some respects broader than those of officers of nontrading corporations.⁴²

§ 1899. — Powers expressly conferred. Powers may be directly conferred upon corporate officers or agents either by statute, the charter, by-laws, resolution or other act of the board of directors, and sometimes by act of officers other than the directors. Such powers are referred to as express powers, and in determining the extent of such powers⁴³ much aid is often obtained by referring to standard textbooks on the law of agency.⁴⁴ As to this matter, speaking in regard to agents in general, Professor Mechem, in his well known work on Agency, says: "In determining the question of the existence and extent of the agent's authority, the starting point must, of course, always be to ascertain the authority, if any, which was expressly, consciously and intentionally conferred by the principal upon the agent. Any act so authorized binds the principal upon the clearest doctrines of agency, and for this reason questions in this field very rarely arise."⁴⁵ In other words, as far as corporate officers and agents are concerned, the first question, where their powers are questioned, is what power, if any, is conferred upon them by express provisions of the charter, or by-laws, or resolutions or acts of the board of directors or their contract with the corporation.

Where officers of a corporation are duly authorized by the board of directors to enter into contract in the corporate behalf, and so do, it

⁴¹ See §§ 1916-1922, *infra*.

⁴² *Sedalia Nat. Bank v. Economy Steam Heating & Electric Co.*, 145 Mo. App. 319, 130 S. W. 377.

⁴³ See *Alabama Nat. Bank v. O'Neil*, 128 Ala. 192, 29 So. 688; *Moll v. Roth Co.*, 77 Ore. 593, 152 Pac. 235.

The particular officers who may sell the output of the corporation are sometimes fixed by the charter or by-

laws. *Burley Tobacco Society v. Monroe*, 148 Ky. 289, 146 S. W. 725, society incorporated for pooling tobacco crop.

⁴⁴ See 1 Mechem, Agency (2nd Ed.), §§ 794-1078, under chapter on the "Construction of Authorities of Certain Kinds," and see 1 Clark & Skyles, Agency, §§ 225-287.

⁴⁵ 1 Mechem, Agency (2nd Ed.), § 714.

is not necessary that the contract be further accepted by the corporation.⁴⁶

Oftentimes, a statute or the by-laws expressly authorize certain officers of the corporation to "sign and execute" certain papers. It is well to keep in mind that this merely authorizes the manual act of signing and executing and confers no authority to negotiate and enter into contracts as the representative of the corporation.⁴⁷

§ 1900. — Powers incidental to express powers conferred. It is a fundamental principle in the law of agency that every delegation of authority, whether general or special, carries with it, unless the contrary be expressed, implied authority to do all of those acts, naturally and ordinarily done in such cases, which are reasonably necessary and proper to be done in order to carry into effect the main authority conferred. "This doctrine," says Professor Mechem in his valuable work on Agency, "rests upon the presumed intention of the principal that the main authority shall not fail because of the lack of express authority to do the incidental acts reasonably necessary to make that authority effective, and also upon the presumption that the principal expects the business to be done in the usual and ordinary way."⁴⁸ As to this class of powers, the general law of agency applies, and only the application of the rules to corporate officers or agents is of value so far as the law of corporations is concerned.⁴⁹

As illustrating incidental powers, it has been held that power conferred to settle a claim of an employee for personal injuries includes power to agree to pay not only a sum in cash but also to agree to care for him until he should be able to care for himself;⁵⁰ that authority to sign "all contracts and conveyances made by this company" includes

⁴⁶ *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127.

⁴⁷ See *infra*, this chapter, and also see § 1896, *supra*.

⁴⁸ 1 Mechem, Agency (2nd Ed.), § 715.

⁴⁹ See *Huntington Park Improvement Co. v. Park Land Co.*, 165 Cal. 429, 132 Pac. 760, construing authority to "sign any and all necessary escrow instructions relative to the delivery" of a deed and other papers.

See 1 Mechem, Agency (2nd Ed.), §§ 794-1078, where the learned author considers successively the implied

powers of such agents as those authorized to sell land, to lease land, to purchase land, to sell personal property, to purchase personal property, to collect or receive payment, to make or indorse negotiable paper, to manage business, to settle, to borrow money, to lend money, to bind principal as surety, to employ, to ship goods, to care for property and to represent insurers.

⁵⁰ *Maloney v. Hudson River Water Power Co.*, 133 N. Y. App. Div. 499, 117 N. Y. Supp. 601.

power to sign an assignment of an account;⁵¹ that power to execute mortgages includes power to execute bonds;⁵² and that express authority to compromise a claim includes apparent authority to agree on the terms, not affected by secret instructions.⁵³ But implied authority to receive money does not include power to admit the correctness of a claim against the corporation.⁵⁴ Of course power to execute notes does not include power to execute corporate notes to pay personal debts of the officer so executing.⁵⁵ An engineer superintending the construction of a railroad, with limited authority to order changes in the work, has no apparent authority to act as surety for the construction company to a subcontractor.⁵⁶

§ 1901. — Inherent powers or powers arising merely by virtue of the office. A common expression of the courts is that a particular officer of a corporation has or has not "inherent" power, or "power merely by virtue of his office" to do a certain thing. There is no difficulty in understanding what is meant by these terms. For the most part, corporate officers, such as the president, vice president, secretary or treasurer, have very few inherent powers. On the other hand, there are some powers which may be said to go with the office. For instance, it seems that the president has inherent power to preside at directors' meetings;⁵⁷ that the vice president has inherent power to step into the shoes of the president and act in his stead where the president is absent or disqualified;⁵⁸ that the secretary has inherent power to keep the seal and records of the corporation and to act as such at stockholders' and directors' meetings;⁵⁹ and that the treasurer has inherent power to receive money on behalf of the corporation.⁶⁰ The trend of the later decisions with respect to the inherent authority of the officers of business corporations, when the interests of third persons dealing with the corporation come in question, has been to extend rather than to restrict their powers.⁶¹

⁵¹ *Imbrie v. Schlicht Combustion Process Co.*, 130 N. Y. App. Div. 675, 115 N. Y. Supp. 333.

⁵² *Pomeroy v. New York Smelting & Refining Co. (N. J. Ch.)*, 48 Atl. 395.

⁵³ *Van Noy v. Central Union Fire Ins. Co.*, 168 Mo. App. 287, 153 S. W. 1090.

⁵⁴ *McAveigh v. Pelham Park R. Co. (N. Y. Misc.)*, 120 N. Y. Supp. 102.

⁵⁵ *First Nat. Bank of Rice Lake, Wisconsin v. Flour City Trunk Co.*, 118 Minn. 151, 136 N. W. 563.

⁵⁶ *Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295.

⁵⁷ See § 2009, *infra*.

⁵⁸ See § 2063, *infra*.

⁵⁹ See § 2072, *infra*.

⁶⁰ See § 2087, *infra*.

⁶¹ *Bacon v. Montauk Brewing Co.*, 130 N. Y. App. Div. 737, 115 N. Y. Supp. 617.

"The powers of officers of a building and loan association are the same as those of similar officers in ordinary corporations."⁶²

§ 1902.— Apparent powers. A corporation may, by its acts, create an apparent authority on the part of its officers or agents in excess of their actual authority as fixed, as hereafter explained.⁶³

§ 1903.— Miscellaneous powers. Professor Mechem, in his work on Agency, adds to the powers already enumerated, those conferred by custom or usage,⁶⁴ and those arising in case of emergency.⁶⁵ So far as these powers are concerned, there is nothing in the law, it would seem, making the rules as to corporate officers or agents different from those governing agents of individuals.

§ 1904. How authority conferred. In order to confer authority on persons to bind the corporation it is not necessary that there be a writing or a vote or resolution of the board of directors or trustees.⁶⁶ A special resolution of the board of directors is not necessary to authorize a corporate officer to act for it, but he may be authorized to act by parol and proof of his authority may be shown by parol.⁶⁷ No

⁶² Domestic Bldg. Ass'n v. Guadiano, 195 Ill. 222, 226, 63 N. E. 98.

⁶³ See §§ 1916-1922, *infra*, and see generally 1 Mechem, Agency (2nd Ed.), § 720.

⁶⁴ 1 Mechem, Agency (2nd Ed.), § 716.

This class of powers is included in this work together with apparent powers.

⁶⁵ 1 Mechem, Agency (2nd Ed.), § 718.

⁶⁶ United States. Eureka Co. v. Bailey Co., 11 Wall. 488, 20 L. Ed. 209.

California. Crowley v. Genesee Min. Co., 55 Cal. 273.

Florida. St. Andrews Bay Land Co. v. Mitchell, 4 Fla. 192, 54 Am. Dec. 340.

Massachusetts. Topping v. Bickford, 4 Allen 120.

New Jersey. State v. Morris & E. R. Co., 23 N. J. L. 360.

Appointment of agents, see § 1756 et seq., *supra*.

"Agency for a corporation may be proved as for a natural person, and authority conferred by it may be implied as in other cases." Brown v. British & American Mortg. Co., 86 Miss. 388, 397, 38 So. 312.

When the directors are all present and assent to the execution of a contract, it is sufficient, and a written contract may be entered into without formal vote or a written entry thereof by the directors. Indiana Bermudez Asphalt Co. v. Robinson, 29 Ind. App. 59, 63 N. E. 797.

⁶⁷ Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445; Jones v. Stoddart, 8 Idaho 210, 67 Pac. 650; Smith v. Bank of New England, 72 N. H. 4, 54 Atl. 385; Mann v. W. A. Gordon Co., 77 Ore. 457, 151 Pac. 704; Markham v. Loveland, 69 Ore. 451, 138 Pac. 483.

"It is well settled that a formal resolution of the directors of a cor-

formality is required to confer authority upon an officer by the board of directors.⁶⁸ Thus, it is not necessary that an understanding between the directors that one of their number shall be the active agent of the board in the management of the property and the conduct of the business affairs of the corporation, shall "be created by a formal vote passed at a formal meeting or proved by a formal record. It may be inferred from the situation and conduct of the parties."⁶⁹ It is immaterial that the minute books of the corporation show no authority on the part of the president to enter into a contract;⁷⁰ and "the failure to preserve in the minutes or other writing the evidence of a corporation's act conferring authority upon its agent to borrow money would not invalidate authority conferred."⁷¹

The directors may delegate their powers, at least to some extent.⁷² However, they cannot delegate all their powers, either expressly or by acquiescence, so as to entirely escape personal liability, as hereinafter stated. Oftentimes they are mere dummies who hold no meetings for years and acquiesce in the entire management of the corporation by one or more of their number or by some officer not a director or by some stockholder; and where directors permit certain persons to control and conduct the affairs of the company, without protest or objection, the law presumes that all of them knew of and acquiesced in what was done, and treats such acquiescence as equivalent to formal authority.⁷³

§ 1905. Statements of officer or agent as to his powers. It is a general rule of agency that the powers of an agent cannot be shown merely by his statements in regard thereto, made at the time the act relied on to bind the principal was performed.⁷⁴ This rule applies equally well to statements by officers or agents of corporations as to their powers. Their powers cannot be enlarged by their unauthorized representations in regard thereto.⁷⁵ Moreover, the statements

poration is not essential to their authorization of an act by an agent."

Aetna Explosives Co. v. Bassick, — N. Y. App. Div. —, 163 N. Y. Supp. 917.

⁶⁸ *Wait v. Homestead Bldg. Ass'n*, 76 W. Va. 431, 85 S. E. 637.

⁶⁹ *York v. Mathis*, 103 Me. 67, 68 Atl. 746.

⁷⁰ *Edwards v. Plains Light & Water Co.*, 49 Mont. 535, 143 Pac. 962.

⁷¹ *Alton Mfg. Co. v. Garrett Bibli-*

cal Institute, 243 Ill. 298, 90 N. E. 704.

⁷² See § 1952, *infra*.

⁷³ *McCormick v. Unity Co.*, 142 Ill. App. 159, *aff'd* 239 Ill. 306, 87 N. E. 924.

⁷⁴ See 1 *Mechem, Agency* (2nd Ed.), § 285. But see, on same subject, 2 *Mechem*, § 1800.

⁷⁵ *Spelman v. Gold Coin Mining & Milling Co.*, 26 Mont. 76, 79, 55 L.

of an alleged officer of a corporation that he held such office are not binding upon the corporation.⁷⁶

§ 1906. Powers conferred on board of directors as excluding right of other persons to act. A provision in a statute, charter, articles of incorporation or by-laws, that the corporate powers shall be exercised by the board of directors or trustees, does not preclude corporate liability for acts of officers where the power to contract or otherwise act has been expressly or impliedly conferred on officers by resolution, conduct or otherwise.⁷⁷ Thus a statutory or charter provision that the corporate powers shall be exercised by the board of directors or trustees does not preclude corporate liability for the acts and contracts of one whom the corporation allows to control, wholly or to a considerable extent, its business transactions.⁷⁸ As stated by Justice Marshall of Wisconsin, "technically speaking, a corporation cannot act contractually, except by its board of directors, or their authority; but that has so many exceptions as to be of little use in practical affairs. A corporation may be bound by its custom of doing business. It may be bound by acquiescence; it may be bound by accepting and retaining the fruits of a transaction and in other ways without any action of its board of directors."⁷⁹ The rule has also been well stated as follows: The duties of officers "may be prescribed or limited by the charter of the incorporation or by by-laws and regulations of the body corporate; but in the absence of specific limitations brought home to the knowledge of those who deal with them, or of which those who deal with them are bound to take notice, the officers of a corporation, as its agents, are authorized to bind the corporation so long as they act within the ordinary scope of their duties. While the board of directors or trustees, or by whatever name it may be called, is the usual

R. A. 640, 91 Am. St. Rep. 402, 66 Pac. 597; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, 632; *Bradford Belting Co. v. Gibson*, 68 Ohio St. 442, 449, 67 N. E. 888.

However, it has been held that since the records of the action of corporate boards of directors are not open to public inspection, a party contracting with an officer or agent of a corporation has the right to rely upon his representations, express or implied, as to the extent of the authority which had been conferred upon

him. *Groeltz v. Armstrong*, 125 Iowa 39, 45, 99 N. W. 128, in which case, however, it was sought to hold agent personally liable.

⁷⁶ *Witt v. Carlton Dress Goods Co.* (N. Y. Misc.), 156 N. Y. Supp. 693. See also § 2161, *infra*.

⁷⁷ *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495.

⁷⁸ *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495.

⁷⁹ *First Trust Co. v. Miller*, 160 Wis. 336, 151 N. W. 813.

governing body of all private corporations and entitled to direct and control all its business, great or small, and to give direction to its other officers, yet the president and other officers, and not the board of directors, are those who are usually brought into contact with third parties in the conduct of the business of the organization; and custom and usage, and the necessities of the social order, demand that these executive officers should be regarded as entitled to bind the organization in all matters which such organizations are accustomed to transact through such officers. This is elementary law in regard to corporations, but it seems proper to recall it in this case."⁸⁰ Moreover, a by-law providing that the corporation may act only by the formal act of its trustees, does not invalidate a lease for business purposes not formally submitted to, nor accepted by, the trustees, where the stockholders were all trustees and all officers except one, and they all took part in what was done.⁸¹ In Ohio it is held that where a statute provides that the corporate powers "must" be exercised by the board of directors, unless delegated by them, that "in the absence of express authority, and of such a course of dealing with the world as clearly implies authority to do the controverted act, the corporation can be bound only by its board of directors."⁸² Of course if one dealing with officers of a corporation knows that it is necessary for the board of directors to agree to the proposed contract, he cannot recover on a contract entered into with such officers where not in accordance with the contract authorized by the board of directors and not afterwards ratified by them.⁸³

§ 1907. Powers as substitute for board of directors. It often happens, especially in case of a close corporation with a very few stockholders or where practically all the stock is owned by one or two persons, that the board of directors wholly abandon their functions and duties and permit one or more of the executive officers to assume and exercise the entire control and management of the affairs and business of the corporation. In such a case, such executive officers become at least general managers with the powers of such managers,⁸⁴ and probably have even greater powers than ordinary general managers. Such a course of conduct, says Justice Smith in a recent case

⁸⁰ Russell v. Washington Sav. Bank, 23 App. Cas. (D. C.) 308, 407.

68 Ohio St. 442, 67 N. E. 888.

⁸¹ Starwich v. Washington Cut Glass Co., 64 Wash. 42, Ann. Cas. 1913 A 262, 116 Pac. 459.

⁸³ Lawrence v. Washington-Detroit Theatre Co., 190 Mich. 44, 155 N. W. 738.

⁸⁴ See § 2097, *infra*.

⁸² Bradford Belting Co. v. Gibson,

in South Dakota, “estops, not only the corporation, but its directors and stockholders, from questioning the validity of acts of its executive officers, performed in the usual and ordinary course of business and without fraud, to the detriment of third parties, who have acted in good faith and without notice of actual want of authority on the part of such executive officers”; and it was further held that it was immaterial that a statute provided that the corporate power, business and the property of corporations must be exercised, conducted and controlled by its board of directors.⁸⁵ The Kentucky Court of Appeals, speaking by Justice O’Rear, says of a like condition: “The directors had long since ceased to act. They suffered the other officers to perform for the corporation all those administrative functions that might have fallen within their own province, and the latter’s also. Therefore it was the custom, the course of dealing of this corporation for its officers—i. e., its president and its secretary—to perform all the duties pertaining to the management of the corporation that the board might have done. This course was known to the stockholders. They suffered it. Therefore they ratified it. * * * If the corporations chose not to provide an acting board of directors, or other officers, but suffered one to act on its behalf exclusively, and the public dealt with him, the corporation is bound as if he had the most ample authority.”⁸⁶ “The rule is that where, by the direction or acquiescence of the stockholders, the executive officers of a corporation assume and exercise the functions of the board of directors, the corporation and those deriving rights from it while it is so managing its affairs are bound by the acts of its officers to the same extent as if they had been directed by the board. In so far as the duties of the directors are not expressly prescribed by the charter, they derive their powers from the stockholders, who may, if they see fit, select other agencies for the transaction of the corporate business.”⁸⁷

§ 1908. Express powers conferred on two or more jointly. As a general rule, if powers are vested by statute, the charter, a by-law, or

⁸⁵ American Nat. Bank v. Wheeler-Adams Auto Co., 31 S. D. 524, 141 N. W. 396.

⁸⁶ Nelson-Bethel Clothing Co. v. Pitts, 141 Ky. 242, 132 S. W. 430.

⁸⁷ Cunningham v. German Ins. Bank, 101 Fed. 977, 980.

“If it was within the power of the corporation * * * to create the debt through the agency of the man-

aging officers vested with the ordinary functions of the board of directors, a mortgage of its property, executed in its behalf by such officers while exercising such authority, must be held valid also, notwithstanding there was no authority from the board of directors.” Cunningham v. German Ins. Bank, 101 Fed. 977, 981.

by resolution, in two or more officers, such powers cannot be exercised by one of them alone,⁸⁸ unless the provision be considered merely directory.⁸⁹

§ 1909. Power to perform incidental services as distinguished from making of contracts. In determining the powers of officers, it is necessary to distinguish between the making of contracts binding on the company, and the mere performance of an act ancillary to a contract already made, which ancillary act is inherently and inevitably beneficial to the corporation. For instance, a particular officer of a corporation may have no power to make or accept a mortgage and yet have power to make an affidavit of consideration. In a late New Jersey case, the court said: "The contract, viz., the mortgage, was good as between the parties without this affidavit. It had been executed. The affidavit was but a statutory condition precedent to recording the mortgage, and thus obtaining the wider benefits of a public record. The action of the vice president in making the affidavit, as well as the act of recording it, were alike, to use the term employed in Angell & Ames on Corporations, 'incidental services,' as distinguished from acts creating a liability on the part of the company."⁹⁰

§ 1910. Ultra vires acts—General rules. A corporation clearly has no power, in the sense of right, to authorize its officers or agents to engage in ultra vires transactions. It can properly confer authority to do such acts only as are within the powers expressly conferred upon it by its charter. And the same is true of ratification.⁹¹ Corporate officers or agents have no authority to make contracts not within the corporate powers.⁹² "It is settled," said the New Hamp-

⁸⁸ *Pond v. Vermont Val. R. Co.*, Fed. Cas. No. 11,264, where resolution authorized execution of lease by president and treasurer, and it was held that execution by one alone was not sufficient; *Reeder v. Lewis & Mason Turnpike Road Co.*, 7 Ky. L. Rep. 364 (abstract).

⁸⁹ See § 1450, *supra*.

⁹⁰ *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822, 68 Atl. 1078.

⁹¹ See *infra*, this chapter.

⁹² *United States. West Penn Chemical & Manufacturing Co. v. Prentice*,

236 Fed. 891; *Stephens v. Gall*, 179 Fed. 938.

Alabama. *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353.

Illinois. *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 243, aff'g 62 Ill. App. 435.

Kentucky. *Sandford v. McArthur*, 18 B. Mon. 411.

Maryland. *Weckler v. First Nat. Bank of Hagerstown*, 42 Md. 581, 20 Am. Rep. 95.

New York. *McCorry v. John C. Wiarda & Co.*, 149 App. Div. 863, 134 N. Y. Supp. 667.

shire court, in substance, "that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. * * * The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which it has power to transact, he, as its agent, may be authorized to act for it, but beyond that he cannot be authorized, for its powers extend no further."⁹³ A corporation, however, is capable of exceeding the powers conferred upon it by its charter; and if it does in fact authorize or permit its officers or other agents to make ultra vires contracts, or engage in ultra vires transactions, it cannot always set up its want of power to escape liability either ex contractu or ex delicto.⁹⁴ And authority on the part of officers or agents to engage in ultra vires transactions in the name of the corporation may be implied, if it appears that the stockholders or directors have allowed them to do so.⁹⁵ Thus, although a bank may not have the power under its charter to receive special deposits as bailee, it may exceed its powers in this respect; and if the stockholders and directors habitually suffer the cashier to receive special deposits, authority on his part to do so will be implied, so as to render the bank liable for his act.⁹⁶

It is well settled, however, that no such authority will be implied merely from the fact that an officer or agent has been authorized or allowed to manage the business of the corporation, since it is to be presumed, in the absence of evidence to the contrary, that it was intended that he should manage it within the limits imposed by its charter.⁹⁷ For example, the general manager of a corporation or-

⁹³ *Downing v. Mt. Washington Road Co.*, 40 N. H. 230.

⁹⁴ See Chap. 37, *supra*.

⁹⁵ *State v. Commercial Bank of Manchester*, 6 Smedes & M. (Miss.) 218, 45 Am. Dec. 280; *Lloyd v. West Branch Bank*, 15 Pa. St. 172, 53 Am. Dec. 581.

In the absence of ratification or acquiescence, a corporation will not be bound by an ultra vires act of an agent. *Shavaliar v. Grand Rapids Bark & Lumber Co.*, 128 Mich. 230, 87 N. W. 212.

⁹⁶ *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; *First Nat. Bank of Monmouth v. Strang*, 138 Ill. 347,

27 N. E. 903, *aff'd* 28 Ill. App. 325; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106, 21 Am. Rep. 49, *aff'd* 100 U. S. 699, 25 L. Ed. 750; *Lloyd v. West Branch Bank*, 15 Pa. St. 172, 53 Am. Dec. 581.

⁹⁷ *California*. *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75.

Illinois. *Dobson v. More*, 62 Ill. App. 435, *aff'd* 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 243.

Iowa. *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 59 Am. Rep. 449, 30 N. W. 771.

ganized for the purpose of "conversion and disposal of agricultural products by means of mills, elevators, stores, or otherwise," has no implied authority to purchase flour for sale.⁹⁸ So the president, cashier or teller of a bank, unless he has been allowed to do so by the stockholders,⁹⁹ has no implied or apparent authority to receive special deposits so as to bind the bank as bailee, where the receipt of special deposits is not within the powers of the bank.¹ And since a national bank has no power to act as agent in the purchase or sale of stocks or bonds for third persons, its president or cashier cannot bind it by an agreement to do so, in the absence of special authority.² So an officer, even if he has power to execute notes, can issue them only for corporate purposes;³ and an officer or agent of a corporation, although he may have actual or implied authority to issue or indorse commercial paper in the course of the business of the corporation, has no implied or apparent authority, from this fact alone, to issue or indorse paper for the mere accommodation of another, although, if he does so in excess of his authority, bona fide purchasers of the paper may hold the corporation liable.⁴ Nor has an officer or agent any implied or apparent authority, except for a consideration and in a legitimate transaction, to bind the corporation by assuming or promising to pay the debt of another,⁵ or by a contract of suretyship

Kansas. *Getty v. C. R. Barnes Milling Co.*, 40 Kan. 281, 19 Pac. 617.

Michigan. *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321.

Pennsylvania. *First Nat. Bank of Allentown v. Hoch*, 89 Pa. St. 324, 33 Am. Rep. 769.

⁹⁸ *Getty v. C. R. Barnes Milling Co.*, 40 Kan. 281, 19 Pac. 617.

⁹⁹ See *supra*, this section.

¹ *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Lloyd v. West Branch Bank*, 15 Pa. St. 172, 53 Am. Dec. 581; *Wiley v. First Nat. Bank of Brattleboro*, 47 Vt. 546, 19 Am. Rep. 122.

² *First Nat. Bank of Allentown v. Hoch*, 89 Pa. St. 324, 33 Am. Rep. 769.

³ *In re Lance Lumber Co.*, 224 Fed. 598.

⁴ *Simmons Nat. Bank v. Dilley Foundry Co.*, 95 Ark. 368, 130 S. W.

162; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; *Aetna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Usher v. Raymond Skate Co.*, 163 Mass. 1, 39 N. E. 416; *Odiorne v. Maxey*, 13 Mass. 178; *Faneuil Hall Bank v. Bank of Brighton*, 16 Gray (Mass.) 534; *National Park Bank v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567; *City Bank of New Haven v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw. (N. Y.) 275; *Wahlig v. Standard Pump Mfg. Co.*, 9 N. Y. Supp. 739.

⁵ **Arkansas.** *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 763.

California. *Hamilton v. Bates*, 35 Pac. 304.

or guaranty not authorized by the charter.⁶ The general agent of a corporation, while he may bind the corporation by employing a physician or surgeon to attend an employee injured in the course of his employment,⁷ has no implied or apparent authority to do so where the injury was received in a private brawl.⁸

§ 1911. — Payment of, or collateral for, private debts of officers or third persons. A corporate agent cannot use its funds to pay his private debt.⁹ So an officer, although the principal stockholder, cannot use the bank deposit of the corporation to pay his individual debt to the bank.¹⁰ Officers cannot pledge corporate notes to secure the payment of a personal debt of their president.¹¹ So they cannot execute notes or mortgages to secure their individual debts or the debts of others.¹²

§ 1912. Part of contract within powers of officer or agent. Part of a contract may be within the powers of an officer, and part outside his powers, and if the contract is severable it may be enforced as to the part within his powers.¹³

§ 1913. Authority as limited by special appointment. In determining the authority of an officer to contract, his authority as such

Georgia. *Georgia Co. v. Castleberry*, 43 Ga. 187.

Kansas. *Ehrgott v. Bridge Manufactory of Topeka*, 16 Kan. 486; *Rahm v. King Wrought-Iron Bridge Manufactory of Topeka*, 16 Kan. 277.

Kentucky. *Georgetown Water Co. v. Central Thompson-Houston Co.*, 17 Ky. L. Rep. 1270, 35 S. W. 636, 34 S. W. 435.

Michigan. *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321.

Pennsylvania. *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367.

Vermont. *Stark Bank v. United States Pottery Co.*, 34 Vt. 144.

⁶ *Hall v. Auburn Turnpike Co.*, 27 Cal. 255, 87 Am. Dec. 75; *Dobson v. More*, 62 Ill. App. 435, aff'd 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 243; *Small v. Elliott*, 12 S. D. 570,

76 Am. St. Rep. 630, 82 N. W. 92.

⁷ See § 1937, *infra*.

⁸ *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703.

⁹ *American Bonding Co. of Baltimore v. Laigle Stave & Lumber Co.*, 111 Ark. 151, 163 S. W. 167.

¹⁰ *Buena Vista Veneer Co. v. Hodges*, 116 Ark. 253, 172 S. W. 868.

¹¹ *El Capitan Land & Cattle Co. v. Boston-Kansas City Cattle Loan Co.*, 65 Kan. 359, 69 Pac. 332.

¹² *Edenborn v. Blacksher*, 137 La. 894, 69 So. 737; *First Nat. Bank of Rice Lake, Wisconsin v. Flour City Trunk Co.*, 118 Minn. 151, 136 N. W. 563.

¹³ *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 21 Ann. Cas. 611, 123 S. W. 271.

officer is limited where he is appointed as a special agent for a certain piece of work with limited powers.¹⁴

§ 1914. Effect of consent of directors to acts beyond powers of officers or agents. The directors of a corporation, unless they own all the stock, cannot bind the corporation by consenting to the wrongful act, including a violation of the by-laws, of an officer of the corporation.¹⁵

§ 1915. Transfer of duties as a transfer of authority. When authority to do a particular act is conferred upon an officer, and before the time for exercise of the authority the office is abolished, and the duties of the office assigned generally to another officer, the latter has authority to do the act.¹⁶

§ 1916. Apparent power and estoppel to deny power—General rules. Apparent authority is defined as "that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing," and is distinguished from implied authority which is defined as "that which the principal intends his agent to possess, and which is proper, usual, and necessary to the exercise of the authority actually granted."¹⁷ Apparent authority is also defined as "such authority as the acts or declarations of the principal give the agent the appearance of possessing. Closely related to this doctrine of apparent authority, and really a part of it, is the doctrine of estoppel under which a party who has knowingly permitted others to treat one as his agent will be estopped to deny the agency."¹⁸ There is little in the law relating to apparent authority which is peculiar to cases where the principal is a corporation rather than an individual, and hence it is advisable, in connection with the law laid down herein, to consult standard textbooks on the law of agency for the rules applicable to apparent authority of agents in general.¹⁹

¹⁴ *Traitel Marble Co. v. Brown Bros.*, 159 N. Y. App. Div. 485, 144 N. Y. Supp. 562.

¹⁵ *I. X. L. Pressed-Brick Co. v. Schoeneich*, 65 Mo. App. 283.

¹⁶ *Connecticut River R. Co. v. Wiliston*, 16 Gray (Mass.) 64.

¹⁷ *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440,

450, 50 L. R. A. (N. S.) 74, 124 N. W. 236.

¹⁸ *Farmers' Co-op. Shipping Ass'n v. George A. Adams Grain Co.*, 84 Neb. 752, 757, 122 N. W. 55.

¹⁹ See 1 *Meechem, Agency* (2nd Ed.), §§ 720-726, 730-735; 1 *Clark & Skyles, Agency*, §§ 55-59, 208, 209.

A corporation is subject to the same extent as a natural person to the general principle that one who holds out another, or allows him to appear as having authority to act, as his agent with respect to his business generally, or with respect to a particular matter, cannot, as against persons dealing with him in good faith, deny that his apparent authority is real. If a corporation, therefore, or its directors, either intentionally or negligently, clothe a particular officer or agent with an apparent authority to act for it in a particular business or transaction, and persons deal with him in good faith, it will be bound to the same extent precisely as if such apparent authority were real.²⁰

²⁰ **United States.** Fitzgerald & Malory Const. Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. Ed. 707; People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago, 101 U. S. 181, 25 L. Ed. 907; Case v. Citizens' Bank of Louisiana, 100 U. S. 446, 25 L. Ed. 695; Southern Life Ins. Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653; Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339; Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; In re Lance Lumber Co., 224 Fed. 598 (execution of note); Minnesota & O. Land & Timber Co. v. Hewitt Inv. Co., 201 Fed. 752; Cleveland-Cliffs Iron Co. v. Gamble, 201 Fed. 329; Jenson v. Toltec Ranch Co., 174 Fed. 86; Colorado Springs Co. v. American Pub. Co., 97 Fed. 843; G. V. B. Min. Co. v. First Nat. Bank of Hailey, 95 Fed. 23, modifying First Nat. Bank of Hailey v. G. V. B. Min. Co., 89 Fed. 439; The Sappo, 94 Fed. 545; McDougall v. Hazelton Tripod-Boiler Co., 88 Fed. 217; Armstrong v. Chemical Nat. Bank of New York, 83 Fed. 556, aff'g Chemical Nat. Bank of New York v. Armstrong, 76 Fed. 339; City Nat. Bank of Quanaah v. Chemical Nat. Bank of St. Louis, 80 Fed. 859; United States Nat. Bank v. First Nat. Bank of Little Rock, 79 Fed. 296; The Allianca, 73 Fed. 452; American Exch. Nat. Bank v. Oregon

Pottery Co., 55 Fed. 265; Page v. Fall River, W. & P. R. Co., 31 Fed. 257; Fletcher v. New York Life Ins. Co., 14 Fed. 846.

Alabama. Alabama Fuel & Iron Co. v. Rice, 187 Ala. 458, 65 So. 402; St. Louis & S. F. R. Co. v. Hall, 186 Ala. 353, 65 So. 33; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976; Alabama Great Southern R. Co. v. South & North Alabama R. Co., 84 Ala. 570, 5 Am. St. Rep. 401, 3 So. 286.

Arkansas. Capital Security Co. v. Gray, 114 Ark. 573, 169 S. W. 244; Winer v. Bank of Blytheville, 89 Ark. 435, 131 Am. St. Rep. 102, 117 S. W. 232; Texarkana & Ft. S. Ry. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944.

California. Dore v. Southern Pac. Co., 163 Cal. 182, 124 Pac. 817; Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695; Eells v. Gray Bros. Crushed Rock Co., 13 Cal. App. 33, 108 Pac. 735.

Colorado. German American Indemnity Co. v. State Mercantile Bank, 26 Colo. App. 242, 142 Pac. 189; Robinson Reduction Co. v. Johnson, 10 Colo. App. 135, 50 Pac. 215.

Connecticut. Credit Co. v. Howe

The rule has been well stated as follows: "A very large part of the business of the country is carried on by corporations. It certainly is not the practice of persons dealing with officers or agents who as-

Mach. Co., 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472.

District of Columbia. Woodward v. Nelligan, 19 App. Cas. 550.

Florida. South Florida Citrus Land Co. v. Waldin, 61 Fla. 766, 55 So. 862.

Georgia. Kaiser v. United States Nat. Bank, 99 Ga. 258, 25 S. E. 620; Cotton States Life Ins. Co. v. Mallard, 57 Ga. 64; Fitzgerald Cotton Oil Co. v. Farmers Supply Co., 3 Ga. App. 212, 59 S. E. 713.

Illinois. Chicago Tip & Tire Co. v. Chicago Nat. Bank, 176 Ill. 224, 52 N. E. 52, aff'g 74 Ill. App. 439; Atwater v. American Exch. Nat. Bank of Chicago, 152 Ill. 605, 38 N. E. 1017, rev'g 40 Ill. App. 501; McDonald v. Chisholm, 131 Ill. 273, 23 N. E. 596, aff'g 30 Ill. App. 176; Union Mut. Life Ins. Co. v. Slee, 110 Ill. 35; Union Mut. Life Ins. Co. v. White, 106 Ill. 67; Wait v. Smith, 92 Ill. 385; Home Life Ins. Co. v. Pierce, 75 Ill. 426; Gowen Marble Co. v. Tarrant, 73 Ill. 608; Chicago Bldg. Society v. Crowell, 65 Ill. 453; Montelione v. Republic Iron & Steel Co., 143 Ill. App. 413; Lake St. El. R. Co. v. Carmichael, 82 Ill. App. 344, aff'd 184 Ill. 348, 56 N. E. 372; Union Inv. Ass'n v. Geer, 64 Ill. App. 648.

Indiana. National State Bank of Terre Haute v. Vigo County Nat. Bank, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799; Madison & I. R. Co. v. Norwich Sav. Society, 24 Ind. 457; Bossert v. Geis, 57 Ind. App. 384, 107 N. E. 95; Southern R. Co. v. Hazlewood, 45 Ind. App. 478, 90 N. E. 18, 88 N. E. 636.

Iowa. Ney v. Eastern Iowa Tel. Co., 162 Iowa 525, 144 N. W. 383; Davenport v. Peoria Marine & Fire Ins. Co., 17 Iowa 276.

Kansas. Sherman Center Town Co. v.

Swigart, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569; St. Louis, Ft. S. & W. R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958.

Kentucky. Mosley v. Morgan, 141 Ky. 557, 133 S. W. 226; Star Mills v. Bailey, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077; Hurst v. American Ass'n, 105 Ky. 793, 49 S. W. 800; Trapp v. Fidelity Nat. Bank, 101 Ky. 485, 20 S. W. 535; Chemical Nat. Bank of New York v. Wagner, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535; German Nat. Bank v. Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951.

Louisiana. Robert Gair Co. v. Columbia Rice Packing Co., 124 La. 193, 50 So. 8; Mayville Canal Co. v. Lake Arthur Rice Milling Co., 119 La. 447, 44 So. 260.

Maine. McKenzie v. Webber Hospital Ass'n, 106 Me. 385, 76 Atl. 704; Perkins v. Portland, S. & P. R. Co., 47 Me. 573, 74 Am. Dec. 507.

Maryland. Carrington v. Turner, 101 Md. 437, 61 Atl. 324.

Massachusetts. Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co., 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 13 L. R. A. 559, 28 N. E. 245; Com. v. Reading Sav. Bank, 137 Mass. 431; Gilson v. Stevens Mach. Co., 124 Mass. 546; Lester v. Webb, 1 Allen 34.

Michigan. Martindale v. Lobdell-Emery Mfg. Co., 189 Mich. 477, 155 N. W. 559; Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; Ceeder v. H. M. Loud & Sons Lumber Co., 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; Eureka Iron & Steel Works v. Bresnahan, 60 Mich. 332, 27 N. W. 524.

sume to act for such entities to insist on being shown the resolution of the board of directors authorizing the particular officer or agent to transact the particular business which he assumes to conduct. A

Mississippi. New York Life Ins. Co. v. O'Dom, 100 Miss. 219, Ann. Cas. 1914 A 583, 56 So. 379; Metzger v. Southern Bank, 98 Miss. 108, 54 So. 241; State v. Commercial Bank of Manchester, 6 Smedes & M. 218, 45 Am. Dec. 280.

Missouri. Jones v. Williams, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486; Sparks v. Dispatch Transfer Co., 104 Mo. 531, 12 L. R. A. 746, 24 Am. St. Rep. 351, 15 S. W. 417; Hannibal & St. J. R. Co. v. Green, 68 Mo. 169; Lungstrass v. German Ins. Co., 57 Mo. 107; Western Bank of Missouri v. Gilstrap, 45 Mo. 419; Tyler Estate v. Hoffman (Mo. App.), 124 S. W. 535; Law Reporting Co. v. Elwood Grain Co., 135 Mo. App. 10, 115 S. W. 475; Madden v. Paroneri Realty Co., 75 Mo. App. 358; Ten Broek v. Winn Boiler Compound Co., 20 Mo. App. 19.

Montana. Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.

Nebraska. Johnston v. Milwaukee & W. Inv. Co., 46 Neb. 480, 64 N. W. 1100.

New Hampshire. Smith v. Bank of New England, 72 N. H. 4, 54 Atl. 385; Peterborough R. Co. v. Nashua & L. R. Co., 59 N. H. 385.

New Jersey. Dierkes v. Hauxhurst Land Co., 80 N. J. L. 369, 34 L. R. A. (N. S.) 693, 79 Atl. 361; Crossley v. St. Philip Neri, 74 N. J. L. 653, 67 Atl. 27; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; Clemen v. Young-McShea Amusement Co., 69 N. J. Eq. 347, 60 Atl. 419, rev'd on other grounds 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82; Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480, 38 Atl. 241.

New York. Corn Exch. Bank of

New York v. American Dock & Trust Co., 163 N. Y. 332, 57 N. E. 477, modifying 14 App. Div. 453, 43 N. Y. Supp. 1028; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707, aff'g 3 App. Div. 215, 38 N. Y. Supp. 253; Hanover Nat. Bank City of New York v. American Dock & Trust Co., 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72; Fifth Ave. Bank of New York v. Forty-Second St. & Grand St. Ferry R. Co., 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; Rathbun v. Snow, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379; Wilson v. Kings County El. R. Co., 114 N. Y. 487, 21 N. E. 1015; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 N. Y. Supp. 648; Ring v. Long Island Real Estate Exch. & Inv. Co., 93 App. Div. 442, 87 N. Y. Supp. 682, aff'd without opinion 184 N. Y. 553, 76 N. E. 1107; Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. 121, 60 N. Y. Supp. 739; Simmons v. Thompson, 29 App. Div. 559, 51 N. Y. Supp. 1018; Powers v. Schlicht Heat, Light & Power Co., 23 App. Div. 380, 48 N. Y. Supp. 237, aff'd 165 N. Y. 662, 59 N. E. 1129; Smith v. Martin Anti-Fire Car Heater Co., 64 Hun 639, 19 N. Y. Supp. 285; Craig Medicine Co. v. Merchants' Bank, 59 Hun 561, 14 N. Y. Supp. 16; Marine Bank of Buffalo v. Butler Colliery Co., 52 Hun 612, 5 N. Y. Supp. 291; Lovett v. German Reformed Church, 12 Barb. 67.

North Carolina. Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655.

North Dakota. Grant County State Bank v. Northwestern Land Co., 28

person who knows that the officer or agent of the corporation habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those

N. D. 479, 150 N. W. 736, reviewing this question at length.

Oklahoma. Jack v. National Bank of Wichita, 17 Okla. 430, 89 Pac. 219.

Pennsylvania. Culver v. Pocono Spring Water Ice Co., 206 Pa. 481, 56 Atl. 29; Lloyd v. West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

Rhode Island. Ward v. J. Samuels & Bro., 37 R. I. 438, 93 Atl. 649.

South Carolina. Massillon Sign & Poster Co. v. Buffalo Lick Springs Co., 81 S. C. 114, 61 S. E. 1098; Moyer v. East Shore Terminal Co., 41 S. C. 300, 25 L. R. A. 48, 44 Am. St. Rep. 709, 19 S. E. 651; Walker v. Wilmington, C. & A. R. Co., 26 S. C. 80, 1 S. E. 366.

South Dakota. Iowa Nat. Bank v. Sherman, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12.

Tennessee. Southern Life Ins. Co. v. Booker, 9 Heisk. 606, 24 Am. Rep. 344; Allison v. Tennessee Coal, Iron & Railroad Co. (Tenn. Ch. App.), 46 S. W. 348.

Texas. Equitable Life Assur. Soc. of United States v. Ellis, — Tex. Civ. App. —, 137 S. W. 184; Kincheloe Irrigating Co. v. Hahn Bros. & Co. (Tex. Civ. App.), 132 S. W. 78.

Utah. Moyle v. Congregational Soc. of Salt Lake City, 16 Utah 69, 50 Pac. 806; Armstrong v. Cache Valley Land & Canal Co., 14 Utah 450, 48 Pac. 690; Salt Lake Foundry & Machine Co. v. Mammoth Min. Co., 6 Utah 351, 23 Pac. 760.

Virginia. De Voss v. Richmond, 18 Gratt. 338, 98 Am. Dec. 647.

Washington. Union Savings & Trust Co. of Seattle v. Krumm, 88 Wash. 20, 28, 152 Pac. 681; Parker v. Hill, 68 Wash. 134, 122 Pac. 618; Livieratos v. Commonwealth Security Co., 57 Wash. 376, 106 Pac. 1125; W.

E. Moses Land Scrip & Realty Co. v. Stack-Gibbs Lumber Co., 56 Wash. 529, 106 Pac. 207; Duggan v. Pacific Boom Co., 6 Wash. 593, 36 Am. St. Rep. 182, 34 Pac. 157.

West Virginia. Union Bank & Trust Co. v. Long Pole Lumber Co., 70 W. Va. 558, 41 L. R. A. (N. S.) 663, 74 S. E. 674; First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555.

Wisconsin. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 129 Am. St. Rep. 1068, 118 N. W. 853; Batavian Bank v. Minneapolis, St. P. & S. S. M. R. Co., 123 Wis. 389, 101 N. W. 687; St. Clair v. Rutledge, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; Lehigh Valley Coal Co. v. West Depere Agr. Works, 63 Wis. 45, 22 N. W. 831; Marshall v. American Exp. Co., 7 Wis. 1, 73 Am. Dec. 381.

England. Robinson v. Montgomeryshire Brewery Co., [1896] 2 Ch. 841; Biggerstaff v. Rowatt's Wharf, [1896] 2 Ch. 93.

Other cases are cited more specifically under the sections dealing with the powers of particular officers. See §§ 2006-2158, *infra*.

"It is well settled that a corporation may confer upon its officers or agents larger powers than ordinarily belong to them by holding them out to the public as possessing such powers by habitually permitting them to exercise them." Carrington v. Turner, 101 Md. 437, 443, 61 Atl. 324.

The apparent power, in case of a president of a corporation, may be broad enough to sustain a chattel mortgage executed by him to secure a loan. Buchwald Transfer Co. v.

charged with the conduct of the corporate business assumes, as he has the right to assume, that such agent or officer is acting within the scope of his authority.”²¹ The rule applied is that “the authority of an agent to do certain acts in behalf of his principal may be inferred from the continuance of the acts themselves over such a period of time and the doing of them in such a manner that the principal would naturally have become cognizant of them and would have forbidden them, if unauthorized.”²² The reason for this rule is further stated as follows: “If each and every individual having business with such a corporation must at his peril ascertain and determine the exact scope and limitation of the agent’s authority, it is manifest that he could not safely deal with the acknowledged agent, and that the business of the corporation itself would be materially impaired. The public is compelled to rely upon the apparent authority of the conceded agents of such corporations, especially when, as managers or superintendents,

Hurst, 111 Md. 572, 19 Ann. Cas. 619, 75 Atl. 111.

Rule applied to vice president who signed power of attorney authorizing trustee of property assigned for benefit of creditors to dispose of such property. *Charles Roesch & Sons Co. v. Mumford*, 230 Fed. 56.

Rule applied to acceptance of an assignment of a debtor made for the benefit of all the creditors. *Charles Roesch & Sons Co. v. Mumford*, 230 Fed. 56, 59.

Rule applied where one, although not in fact the agent of the corporation, is clothed with the apparent powers of a managing agent. *Wilcox v. Citizens’ Laundry*, 108 Ark. 607, 156 S. W. 436, where corporation was held liable for acts of lessee under unrecorded lease.

²¹ *Curtis Land & Loan Co. v. Interior Land Co.*, 137 Wis. 341, 129 Am. St. Rep. 1068, 118 N. W. 853.

“When a corporation allows a person in a large measure to control its business transactions, it must be held responsible for his acts in the name of the corporation, until it has been affirmatively shown that such acts were unauthorized.” *McKinley v.*

Mineral Hill Consol. Min. Co., 46 Wash. 162, 89 Pac. 495.

“Uniform dealing is equivalent to actual authority, in the absence of actual knowledge on the part of the one dealing with the agent of any limitation on his express authority.” *Mosley v. Morgan*, 141 Ky. 557, 133 S. W. 226.

Although an insurance company neither authorizes nor participates in the act of its agent in collecting a premium before it is due, the insurance company may be held therefor where the agent was acting within his apparent authority. *New England Mut. Life Ins. Co. v. Swain*, 100 Md. 558, 60 Atl. 469.

Where the agent of a foreign insurance company has been intrusted with authority to issue policies and collect premiums thereon, the company will not be heard to assert that he exceeded his authority in waiving a condition of the policy that same would be deemed void if an incumbency was placed thereon. *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 2 Ann. Cas. 275, 71 N. E. 897.

²² *Jackson Realty Co. v. Lehman*, 83 N. J. Eq. 636, 92 Atl. 374.

they are placed in control of departmental affairs.”²³ If an officer, for years prior to a certain act or contract, “was held out by the corporation as its general agent, and as having authority to do such acts as the one in question, it is bound thereby to the same extent as if authority were conferred in the most formal manner.”²⁴ Apparent authority is sufficient without any formal resolution conferring such authority.²⁵ If the question involved is one of apparent power, then the actual power is immaterial, so far as limiting the liability of the corporation is concerned.²⁶ Of course, the apparent authority must have existed before the act in controversy.²⁷ If contracts beyond the express authority are also not within the apparent authority, the corporation is not liable where it had no knowledge thereof and received no benefits therefrom.²⁸

§ 1917. — Ostensible authority as defined by statute. In California and some of the Western states, apparent authority is called by statute, “ostensible” authority, and defined as “such as the principal intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.”²⁹

§ 1918. — What constitutes apparent authority. Apparent authority may result from (1) the general manner by which the corporation holds out an officer or agent as having power to act or in other words the apparent authority with which it clothes him to act in general or (2) the acquiescence in his acts of a particular nature, with actual or constructive knowledge thereof, whether within or without the scope of his ordinary powers. In regard to the first class, it is self-evident that no general rule can be laid down. Many items may be considered, especially when it is contended that the officer or agent is apparently a general manager. For instance, the fact that one has an office at the principal place of business of the corporation where its actual operations take place, that he apparently is in charge of the work, that he gives orders to employees, that he

²³ *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 38 L. R. A. (N. S.) 1135, 115 Pac. 841.

²⁴ *St. Clair v. Rutledge*, 115 Wis. 583, 589, 95 Am. St. Rep. 964, 92 N. W. 234.

²⁵ *Eells v. Gray Bros. Crushed Rock Co.*, 13 Cal. App. 33, 108 Pac. 735.

²⁶ *Knapp v. Tidewater Coal Co.*, 85 Conn. 147, 81 Atl. 1063.

²⁷ *McBroom v. Sheboygan Brewing*

& Malting Co., 162 Mich. 323, 17 Det. L. N. 571, 127 N. W. 361.

²⁸ *Gause v. Commonwealth Trust Co.*, 124 N. Y. App. Div. 438, 108 N. Y. Supp. 1080, aff'g 55 N. Y. Misc. 110, 106 N. Y. Supp. 288.

²⁹ See *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 497, 150 N. W. 736, where the court said that “the statute defining ostensible authority is but a codification of the common law on the subject.”

opens the letters of the corporation, that he conducts its correspondence, etc., may all be considered, regardless of his title, in determining what his apparent authority is.³⁰ So the nature and size of the corporation, the kind of business it is engaged in, and all the surrounding circumstances may be taken into account. It is also material whether the contract alleged to be within the apparent authority of the officer or agent is an ordinary contract, taking into consideration the kind of the corporation involved and its size, or is an extraordinary contract. Thus, it has been held that the mere fact that a person is at the head of the business office of a newspaper and printing company is not sufficient to establish an apparent agency to make a special and unusual contract involving a large sum;³¹ although undoubtedly it would be held in such a case that he could make binding contracts ordinarily entered into by such a company as a part of its everyday business. In case of agencies in general, textbook writers lay down the rule that "the apparent scope of an agent's authority is that authority which a reasonably prudent man, induced by the principal's acts or conduct, and in the exercise of reasonable diligence and sound discretion, under similar circumstances with the party dealing with the agent, and with like knowledge, would naturally suppose the agent to have."³²

Secondly, apparent power may result from the corporation, having knowledge of the facts, habitually or for a long time or on numerous

³⁰ Thus, where a person having business with a corporation calls at its principal office and states his business, and is shown the "contract department," and is introduced to the vice president, apparently recognized as in charge of that department, the evidence supports an inference of the latter's power to bind the company as to matters properly within the scope of the business apparently intrusted to him. *Bridgetown v. Fidelity & Deposit Co. of Maryland*, 88 N. J. L. 645, 96 Atl. 918.

Where a corporation conveyed its property to trustees, as authorized by the statutes of Massachusetts, it is not estopped from claiming that an act of an agent of the trustees was not its act on the ground that its letterheads were allowed to be used by the trustees, and that the act com-

plained of was written on one of such letterheads. *Thompson v. American Optical Co.*, 173 N. Y. App. Div. 123, 159 N. Y. Supp. 412.

"But the mere circumstance that in properly carrying out such specific authority the agent may have appeared to the public to have been clothed with a more general authority cannot be made the basis of relief, where it affirmatively appears that no general authority was in fact conferred and that the agent at all times acted within and pursuant to his restricted authority." *Daniele v. Burlington Real Estate & Manufacturing Co.*, 84 N. J. Eq. 53, 92 Atl. 587.

³¹ *Adams v. Herald Pub. Co.*, 82 Conn. 448, 74 Atl. 755.

³² 1 Clark & Skyles, Agency, § 208, citing *Huffcut*, Agency, § 103.

occasions, permitting an officer or agent to do an act ordinarily not within the powers of such an officer or agent. For instance, the treasurer of a corporation has no implied authority, as a general rule, to borrow money, or to make, accept or indorse notes or bills, or to sell or pledge notes or other securities or to sell other property, etc.³³ But if the corporation allows him habitually to do so, and thus clothes him with apparent authority, it is bound thereby.³⁴ And the same is true of any other officer whom the stockholders or directors, by allowing him to act for the corporation in a particular way, have clothed with an apparent authority which is beyond that usually implied from his office.³⁵ Thus, payment of many similar notes executed and issued by the same officers shows apparent authority of such officers to execute like notes.³⁶ However, it is immaterial that the officer or agent had never before performed the identical act, where he had been accustomed to perform closely analogous acts.³⁷ But it has been held that proof of previous acts of the same kind are not sufficient to show an implied authority, "unless it be also shown that they were done so frequently, and under such circumstances, as to warrant the inference that it was the custom or usual course of the business."³⁸

Where an officer, having authority to act, refers a person seeking to enter into a contract to another as the proper person to deal with, the latter has apparent authority to act.³⁹ But it has been held that where the officer who referred the other contracting party to another officer as the person with authority to act, had such authority but no power to delegate his authority, such act does not authorize the latter officer to enter into the contract.⁴⁰

³³ See §§ 2089-2093, *infra*.

³⁴ *United States*. Page v. Fall River, W. & P. R. Co., 31 Fed. 257; Foster v. Ohio-Colorado Reduction & Mining Co., 17 Fed. 130.

Massachusetts. Lester v. Webb, 1 Allen 34.

Missouri. Moore v. H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975.

New Jersey. Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; Blake v. Domestic Mfg. Co., 64 N. J. Eq. 480, 38 Atl. 241.

New York. Phillips v. Campbell, 43 N. Y. 271.

³⁵ *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707;

McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 13 L. R. A. 559.

³⁶ *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162.

³⁷ *Tyler Estate v. Hoffman* (Mo. App.), 124 S. W. 535, where officer had never before executed a mortgage but had been accustomed to secure loans by assignments of property as collateral security. The court distinguished *State v. Perkins*, 90 Mo. App. 603.

³⁸ *Trent v. Sherlock*, 24 Mont. 255, 267, 61 Pac. 650.

³⁹ *Klamath Lumber Co. v. Co-operative Land & Trust Co.*, 25 Cal. App. 678, 145 Pac. 159.

⁴⁰ *Trent v. Sherlock*, 24 Mont. 255,

If the authority of a general manager is terminated, and he is allowed to continue in charge of the property as a lessee, the corporation owes the duty to those who had been dealing with him as its agent to give notice in some way of the change of its business relations.⁴¹

"The question of the existence of an apparent or implied agency is essentially one of fact,"⁴² as hereafter noted.⁴³ However, the conclusions of corporate officers as to the existence of apparent authority are not admissible in evidence.⁴⁴

§ 1919. — Estoppel not the only ground for holding corporation liable. It is held, at least in some jurisdictions, that where a corporation officer or agent is accustomed to do certain acts with the knowledge of the corporation, actual authority may be implied therefrom, without reliance on the doctrine of estoppel. Thus, it has been said that "a customary act by an official may be treated as valid and within the exercise of an actual authority, not necessarily because the company is estopped to deny its validity from having invested the officer with apparent authority to perform it, but because the inference can be drawn that he was, in truth, authorized."⁴⁵ It follows that even if the other party to the contract had no knowledge of such course of business on the part of the corporate officer or agent, so as to prevent an estoppel, yet the corporation may be held on the theory of actual authority, in states where this doctrine is recognized.⁴⁶

§ 1920. — Application of rule to abuse of apparent authority. Where a corporate officer or agent has actual or apparent authority to do an act, but exceeds his authority without the knowledge of the other party to the contract who relies upon such apparent authority, the corporation is liable.⁴⁷ For example, although the cashier of a bank

61 Pac. 650, modified in 26 Mont. 85, 66 Pac. 700.

⁴¹ Red Mineral Springs Development Co. v. Davis, — Tex. Civ. App. —, 164 S. W. 427.

⁴² Adams v. Herald Pub. Co., 82 Conn. 448, 74 Atl. 755.

⁴³ See § 1945, *infra*.

⁴⁴ Grant County State Bank v. Northwestern Land Co., 28 N. D. 479, 150 N. W. 736.

⁴⁵ Tyler Estate v. Hoffman (Mo. App.), 124 S. W. 535.

⁴⁶ See § 1923, *infra*.

⁴⁷ Mr. Morawetz states the rule thus: "The general rule is established, that, if an act performed by an agent would, under ordinary circumstances, be within the authority delegated to the agent, a person dealing with him in good faith, on the faith of his apparent powers and without notice of facts showing that the act was unauthorized, may hold the principal liable whether the act was authorized or not." 2 Morawetz, Corporations, § 597.

exceeds his authority in certifying a check when the drawer has no funds, yet, as he has general authority to certify checks, the bank is liable thereon to a bona fide holder.⁴⁸ The same principle applies when an officer or agent of a railroad or warehouse company, having general authority to issue bills of lading or warehouse receipts upon receipt of goods, exceeds his authority by issuing a bill of lading or receipt without receiving any goods,⁴⁹ although there is authority to the contrary in some jurisdictions;⁵⁰ where the officer or agent of a corporation, having general authority to issue certificates of stock, exceeds his authority by fraudulently or through mistake issuing a fictitious certificate;⁵¹ where an officer or agent, authorized generally

⁴⁸ *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96, 11 Am. Rep. 667.

"The bank having placed the cashier in the position which implies this inherent authority, those who deal with the bank have a right to infer that he possesses it, and although the exercise of it in a given case may not be warranted on account of the existence or nonexistence of some extrinsic fact peculiarly within his official knowledge, yet the bank is responsible instead of an innocent party, upon every principle of reason and morality." *Cooke v. State Nat. Bank*, 52 N. Y. 96, 115, 11 Am. Rep. 667.

⁴⁹ *Illinois. St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293.

Kansas. Wichita Sav. Bank v. Atchison, T. & S. F. R. Co., 20 Kan. 519.

Nebraska. Sioux City & P. R. Co. v. First Nat. Bank of Fremont, 10 Neb. 556, 35 Am. Rep. 488.

New York. Corn Exch. Bank of New York v. American Dock & Trust Co., 163 N. Y. 332, 57 N. E. 477, modifying 14 App. Div. 453, 43 N. Y. Supp. 1028; *Hanover Nat. Bank City of New York v. American Dock & Trust Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E.

433; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603.

Pennsylvania. Brooke v. New York, L. E. & W. R. Co., 108 Pa. St. 529, 56 Am. Rep. 235, 1 Atl. 206.

⁵⁰ *United States. Friedlander v. Texas & P. Ry. Co.*, 130 U. S. 416, 32 L. Ed. 991; *Pollard v. Vinton*, 105 U. S. 7, 15 L. Ed. 998.

Maryland. Baltimore & O. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Minnesota. National Bank of Commerce v. Chicago, B. & N. R. Co., 44 Minn. 224, 9 L. R. A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560.

North Carolina. Williams v. Wilmington & W. R. Co., 93 N. C. 42, 53 Am. Rep. 450.

England. Grant v. Norway, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. Div. 147.

⁵¹ *Connecticut. Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

Maryland. Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.

Massachusetts. Allen v. South Boston R. Co., 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

New York. Fifth Ave. Bank of New York v. Forty-Second St. & Grand St. Ferry R. Co., 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep.

to make, draw, accept and indorse notes or bills on behalf of the corporation, in the course of its business, exceeds his authority by doing so for the mere accommodation of another, or otherwise for an unauthorized purpose, or fraudulently for his own purposes;⁵² where a cashier or other officer, having general authority to transfer negotiable paper belonging to the corporation, does so fraudulently for the purpose of converting the proceeds to his own use;⁵³ or where an officer having general authority to borrow money, or receive deposits or paper for collection, does so in a particular instance in pursuance of a fraudulent scheme to appropriate the same to his own use.⁵⁴

712, 33 N. E. 378; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

Ohio. *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

Pennsylvania. *In re Kisterboeck's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

Contra, *British Mut. Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. Div. 714 (where the officer or agent was acting for his own interest). See also *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385.

⁵² *Auten v. Manistee Nat. Bank*, 67 Ark. 243, 47 L. R. A. 329, 54 S. W. 337; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; *Farmers' & Mechanics' Bank of Kent County v. Butchers' & Drovers' Bank*, 14 N. Y. 623, 16 N. Y. 125, 69 Am. Dec. 678; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis. 663, 7 Am. Rep. 107.

The fact that the president of a corporation uses the proceeds of a corporate note for his private purposes is no defense to the corporation where the president had apparent, if not actual authority, to issue the note as that of the corporation. *Schreyer v. J. S. Bailey & Co.*, 97 N. Y. App. Div. 185, 89 N. Y. Supp. 870.

One who loans money to an officer

of a corporation, as such, is not bound to see that he pays it over to the company. *Allen v. West Point Min. & Mfg. Co.*, 132 Ala. 292, 31 So. 462.

⁵³ *Auten v. Manistee Nat. Bank*, 67 Ark. 243, 47 L. R. A. 329, 54 S. W. 337; *Kaiser v. United States Nat. Bank*, 99 Ga. 258, 25 S. E. 620.

Where the treasurer of a corporation, intrusted with the entire management of its business, surrenders to a debtor of the corporation securities pledged to it by him, knowing of the debtor's intent to pledge them to others, the corporation cannot follow them and assert its lien as against bona fide purchasers or pledgees. *Hubbard v. Tod*, 171 U. S. 474, 43 L. Ed. 246, aff'g 76 Fed. 905.

⁵⁴ *City Nat. Bank of Quanah v. Chemical Nat. Bank of St. Louis*, 80 Fed. 859; *Texarkana & Ft. S. Ry. Co. v. Bemis Lumber Co.*, 67 Ark. 542, 55 S. W. 944.

Where the cashier of a bank had full charge of its business and secured loans on notes of the bank signed by him, apparently in the usual course of business, under documents giving him authority from the directors to borrow, it was held that the bank was liable on the notes, although the documents were forgeries, and the proceeds of the loans were used by the cashier for his own benefit. *City Nat. Bank of Quanah v.*

§ 1921. — Acts not within knowledge of corporation as creating apparent authority. In order that a corporation may be held to have clothed an officer or agent with apparent authority by having allowed him to exercise such authority in the past, it must either have had actual knowledge of his acts relied on as creating apparent authority or else be chargeable with such knowledge. If there is no knowledge, actual or constructive, on the part of the corporation, of the assumption of power not expressly delegated nor within the usual powers of the office or agency, then there is no estoppel.⁵⁵ For instance, an officer is not clothed with apparent authority to borrow money or make notes on behalf of a corporation, so as to give rise to an estoppel against the corporation, merely because he has been in

Chemical Nat. Bank of St. Louis, 80 Fed. 859.

Where the cashier of a bank receives deposits and paper for collection and appropriates the same to his own use, in pursuance of a fraudulent scheme, the bank is liable to the depositor. *Hanson v. Heard*, 69 N. H. 190, 38 Atl. 788.

55 California. *Wickersham Banking Co. v. Nicholas*, 2 Cal. App. 18, 82 Pac. 1124.

Illinois. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L. R. A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, rev'g 99 Ill. App. 108; *Wheeler v. Home Savings & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28.

Missouri. *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95.

New Jersey. *Schlessinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N. S.) 347, 138 Am. St. Rep. 627, 76 Atl. 1024.

New York. *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210; *Gause v. Commonwealth Trust Co.*, 124 App. Div. 438, 108 N. Y. Supp. 1080, aff'g 55 Misc. 110, 106 N. Y. Supp. 288.

It follows that evidence of ratification of other like acts, prior to the one sued on, is admissible to show implied authority. *Corn Exch. Bank*

of New York v. American Dock & Trust Co., 163 N. Y. 332, 57 N. E. 477.

In attempting to show the power of the vice president of a corporation to sign notes in the corporate behalf, the bare fact that the vice president has similarly signed other notes is not admissible, where it is not shown that the other notes were signed by authority of the corporation or that with knowledge it ratified such action on his part. *Dreeben v. First Nat. Bank of McKinney (Tex.)*, 99 S. W. 850.

Where the president of a bank fraudulently appropriates its funds to his personal use by means of drafts, which he so enters on the bank's books as to conceal their fraudulent character, the bank is not estopped to deny his authority to draw the drafts merely by reason of his course of dealing in the matter. *Lamson v. Beard*, 94 Fed. 30, 45 L. R. A. 822.

Possession of books by a bank, containing entries of drafts fraudulently drawn by the president in personal brokerage transactions, is not notice thereof to the bank, where the books are under the sole control of the president, and kept in such a manner as to conceal his defalcations. *Lamson v. Beard*, 94 Fed. 30, 45 L. R. A. 822.

the habit of doing so, if it was without the knowledge of the stockholders and directors, unless they have been guilty of such negligence and inattention as to estop them.⁵⁶

The board of directors are chargeable with knowledge of the extent of the power usually exercised by an officer of the corporation and must be held to have acquiesced in the possession by him of such authority;⁵⁷ and if, through negligence or inattention on the part of the stockholders or directors, an officer or agent is suffered to act habitually beyond his authority, knowledge of the fact is imputable to the corporation.⁵⁸ And it is chargeable with knowledge, or, at the least, a jury may infer knowledge, if the fact that an officer is so acting appears on the books of the corporation.⁵⁹ "Directors [of a bank] cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."⁶⁰ So a corporation is chargeable with notice of the filing of amended articles of incorporation, at least where several years have elapsed, where they were filed with the clerk of the county where the corporation transacted its business, so that it could not assert that the officers had no authority to file such articles.⁶¹ On the other hand, failure of a corporation to examine the pass book, canceled checks and check stubs in the hands of a local agent in another state, where the corporation had no reason to believe the agent was overdrawing his account, does not make the corporation liable for an overdraft.⁶²

⁵⁶ *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. St. 157, 28 Atl. 1072.

⁵⁷ *Sun Prtg. & Pub. Ass'n v. Moore*, 183 U. S. 642, 46 L. Ed. 366, aff'g 101 Fed. 591.

⁵⁸ *Hanover Nat. Bank City of New York v. American Dock & Trust Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72. See also *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; *Blake v. Domestic Mfg. Co.* (N. J. Ch.), 38 Atl. 241.

⁵⁹ *Hanover Nat. Bank City of New York v. American Dock & Trust Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72.

⁶⁰ *Martin v. Webb*, 110 U. S. 7, 15, 28 L. Ed. 49.

⁶¹ *Licking Valley Bldg. Ass'n, No. 3 v. Com.*, 28 Ky. L. Rep. 543, 89 S. W. 682.

⁶² *Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co.*, 223 Ill. 41, 7 L. R. A. (N. S.) 752, 79 N. E. 38, aff'g 123 Ill. App. 430.

§ 1922. — As affected by secret instructions or prohibitions. An apparent authority cannot be limited by secret instructions.⁶³ This rule applies to the apparent power of an officer or agent of a corporation so as to prevent the corporation from setting up, as against a person dealing with him, limitations on his apparent power consisting either of corporate resolutions, oral or written instructions or the like.⁶⁴ For instance, secret instructions to officers, as general agents in charge of the business, requiring them to obtain permission from an executive officer before expending any money, are not binding upon persons dealing with them in good faith in reliance upon their ostensible authority.⁶⁵ So secret agreements between the corporation and the officer that the latter was to pay for services rendered under the contract are not binding on the other party to the contract.⁶⁶ Likewise, the corporation is bound by acts within the apparent power of its officers notwithstanding the resolution authorizing the particular act limited the authority of the officers, where such limitation was unknown to the other contracting party.⁶⁷

⁶³ 1 Mechem, Agency (2nd Ed.), § 730 et seq., where the question as relating to agents in general is fully discussed.

⁶⁴ **United States.** Fitzgerald & Malory Const. Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Hatch v. Codrington, 95 U. S. 48, 24 L. Ed. 339.

Alabama. Alston v. Broadus Cotton Mill, 152 Ala. 552, 44 So. 654.

Arkansas. Forrester-Duncan Land Co. v. Evatt, 90 Ark. 301, 119 S. W. 282.

Colorado. Bonanza Milling Co. v. Borrego, 59 Colo. 365, 148 Pac. 859.

Georgia. Cotton States Life Ins. Co. v. Mallard, 57 Ga. 64; Eminent Household of Columbian Woodmen v. George E. Benz & Co., 11 Ga. App. 733, 76 S. E. 99; Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 S. E. 56.

Illinois. Union Mut. Life Ins. Co. v. White, 106 Ill. 67; Home Life Ins. Co. v. Pierce, 75 Ill. 426.

Missouri. Tyler Estate v. Hoffman (Mo. App.), 124 S. W. 535.

New York. Lyon v. West Side

Transfer Co., 132 App. Div. 777, 117 N. Y. Supp. 648; Powers v. Schlicht Heat, Light & Power Co., 23 App. Div. 380, 48 N. Y. Supp. 237.

South Carolina. Walker v. Wilmington, C. & A. R. Co., 26 S. C. 80, 1 S. E. 366.

Virginia. L. E. Mumford Banking Co. v. Farmers' & Merchants' Bank of Kilmarnock, 116 Va. 449, 82 S. E. 112; Pine Beach Inv. Corporation v. Columbia Amusement Co., 106 Va. 810, 56 S. E. 822; De Voss v. Richmond, 18 Gratt. 338; 98 Am. Dec. 646.

⁶⁵ Parrot v. Mexican Cent. R. Co., 207 Mass. 184, 93 N. E. 590.

⁶⁶ Flournoy v. Phoenix Brick & Construction Co., 159 Mo. App. 376, 140 S. W. 752.

⁶⁷ Kirkpatrick v. Eastern Milling & Export Co., 135 Fed. 146, decree modified 137 Fed. 387, holding that where a pledge of bonds to secure a loan was expressly authorized, there was power to pledge the subscriptions for such bonds.

The effect of by-laws as notice of limitation of authority is stated hereafter.⁶⁸

§ 1923. — Necessity for knowledge of and reliance on former acts by other party to contract. Whether the other party to a contract with a corporation must have had knowledge of and relied on former acts of the corporate officer or agent, in order to be able to rely on such acts as constituting apparent authority, depends upon whether the right to recover is based on an estoppel or on the ground that the doing of such acts shows actual authority. It has been held in New Jersey that "it is not correct, we think, to confine the application of this doctrine to cases of strict estoppel. At least, where a third party seeks to charge a corporation with a contract made by it through the agency of one of its officers, it is not incumbent on such third party to show that the previous course of business was known to and relied upon by him. * * * The principle of technical estoppel as between parties is not involved in such cases."⁶⁹ In another case in that state it was held that, "if there was a holding out to the defendant, but not a holding out to others, or to the public as well, then the agency in such case might well be said to depend upon the estoppel of the principal to deny the agency which he had held out to the creditor, and which the creditor had relied on. But it is clear * * * that in commercial transactions, which must be carried on largely by means of general agencies to do particular acts, there is an agency which is created by the general and public exercise of an authority with the permission of the principal; and where this general agency in fact exists as arising from this source it is not necessary for the creditor to show further that it was previously known to him, and that he acted in reliance on it."⁷⁰ This rule is followed in North Dakota.⁷¹ In support of this rule, it has been said in Missouri that "a customary act by an official may be treated as valid and within the exercise of an actual authority, not necessarily because the company is estopped to deny its validity from having invested the officer with apparent au-

⁶⁸ See § 1931, *infra* and § 502, *supra*.

⁶⁹ *Murphy v. W. H. & F. W. Cane, Inc.*, 82 N. J. L. 557, Ann. Cas. 1913 D 643, 82 Atl. 854.

Where one seeks to "charge a corporation with a contract made by it through the agency of one of its officers, it is not incumbent" on it "to show that the previous course of busi-

ness was known to and relied upon by him." *Murphy v. W. H. & F. W. Cane, Inc.*, 82 N. J. L. 557, Ann. Cas. 1913 D 643, 82 Atl. 854.

⁷⁰ *Blake v. Domestic Mfg. Co.*, 64 N. J. Eq. 480, 491, 38 Atl. 241.

⁷¹ *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736.

thority to perform it, but because the inference can be drawn that he was, in truth, authorized."⁷² However, it is held in Minnesota that while it is permissible to show implied authority as distinguished from apparent authority—implied authority being defined as that which the principal intends his agent to possess, and which is proper, usual and necessary to the exercise of the authority actually granted—although the facts which establish it were not known to the other contracting party at the time the contract was made, yet there can be no implied authority where there is a by-law expressly requiring the concurrence of another agent.⁷³

On the other hand, some courts, on the theory of a technical estoppel as the ground for recovery, hold that there must be knowledge of the former acts and reliance thereon by the other party to the contract with the corporation;⁷⁴ and in Minnesota it is held that knowledge is not necessary to show implied as distinguished from apparent authority, but is necessary where apparent authority is relied on.⁷⁵

⁷² *Tyler Estate v. Hoffman* (Mo. App.), 124 S. W. 535.

⁷³ *Bloomingtondale v. Cushman*, 134 Minn. 445, 159 N. W. 1078.

⁷⁴ *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L. R. A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, rev'g 99 Ill. App. 108; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210, aff'g 149 N. Y. App. Div. 356, 134 N. Y. Supp. 418; *M. H. Marcus & Bro. v. National Film Distributing Co.*, 76 N. Y. Misc. 429, 135 N. Y. Supp. 37. See also *Silsbee Ice & Manufacturing Co. v. Tippet-Stanley-Garner Co.*, —Tex. Civ. App.—, 158 S. W. 787.

"A party dealing with an agent must prove that the facts giving color to the agency were known to him when he dealt with the agent. If he has no knowledge of such facts he does not act in reliance upon them and is in no position to claim anything on account of them." *Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co.*, 223 Ill. 41, 7 L. R. A. (N. S.) 752, 79 N. E. 38, aff'g 123 Ill. App. 430.

Where a corporation is sued to re-

cover damages for failure to comply with a contract entered into by its agent, his apparent authority cannot be relied on where plaintiff neither parted with value nor incurred liability in reliance upon the apparent authority. *Herington v. Alta Planing Mill Co.*, 25 Cal. App. 620, 144 Pac. 973, construing general statutes relating to agency.

⁷⁵ *Bloomingtondale v. Cushman*, 134 Minn. 445, 159 N. W. 1078, more fully set forth supra in this section.

"But the doctrine of apparent agency is not limited to the conduct of the principal. The authority must have been actually apparent to the party dealing with the agent. * * * All of the elements of estoppel must be present. There must be conduct calculated to mislead, and it must be under circumstances which justified the claim that the principal should have expected that the representations would be relied and acted upon, and it must appear that they were relied and acted upon in good faith, to the injury of the innocent party." *Dispatch Printing Co. v. National*

§ 1924. — Reliance solely on representations of officer or agent.

It has been held that a corporation is not estopped to deny the authority of a person acting as its agent, without authority in fact, as against one who relied, not on any appearance of authority, but merely on the representations of the person himself; and it can make no difference that the pretended agent had apparent authority in writing not known to the other party.⁷⁶

§ 1925. — Deprivation of benefit of contract as sufficient prejudice.

It has been held that deprivation of the benefit of a contract made with an officer of a corporation, whom it had clothed with apparent authority, is alone sufficient prejudice to the other party to support an estoppel against the corporation.⁷⁷

§ 1926. Actual or constructive notice of powers of officers or agents to third persons dealing with corporation—In general. One dealing with a corporation must take notice that the authority of its officers and agents is limited to contracts within the charter powers, and also as to the extent of such charter powers.⁷⁸ This rule is too well settled to admit of argument, although the courts have not always kept it in mind, as is evidenced by decisions as to the implied powers of corporate officers and agents as to ultra vires acts.⁷⁹ Another rule, often loosely stated and usually as mere dictum, is that a person dealing with a corporate officer or agent must take notice of his powers.⁸⁰ This latter rule, however, is more honored in its breach

Bank of Commerce, 115 Minn. 157, 162, 132 N. W. 2.

⁷⁶ Rathbun v. Snow, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379.

⁷⁷ Allison v. Tennessee Coal, Iron & Railroad Co. (Tenn. Ch. App.), 46 S. W. 348.

⁷⁸ Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville, 69 Neb. 220, 95 N. W. 819, 62 Neb. 472, 87 N. W. 156.

⁷⁹ See § 1910, supra.

⁸⁰ United States. Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 338; Forest v. St. Francis Levee Dist. of Missouri, 77 Fed. 555; Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co., 75 Fed. 433.

California. Gashwiler v. Willis, 33

Cal. 11, 91 Am. Dec. 607; State Savings & Commercial Bank v. Winchester, 25 Cal. App. 691, 145 Pac. 171.

Colorado. Conqueror Gold Mining & Milling Co. v. Ashton, 39 Colo. 133, 90 Pac. 1124.

Connecticut. Couch v. City Fire Ins. Co., 38 Conn. 181, 9 Am. Rep. 375.

Georgia. Dobbins v. Etowah Mfg. & Min. Co., 75 Ga. 238.

Kentucky. Sanford v. McArthur, 18 B. Mon. 411; Georgetown Water Co. v. Central Thomson-Houston Co., 17 Ky. L. Rep. 1270, 35 S. W. 636, 34 S. W. 435.

Missouri. Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co., 251 Mo. 553, 158 S. W. 359.

than its observance; or, to put it another way, the limitations of the rule, generally not stated in connection with the rule, confine its operation to a very small class of cases. The rule, although generally broadly stated as above, is intended merely to cover notice of the extent of the powers as conferred by the statutes or charter, so that if a statute or the charter expressly or impliedly limits the powers of an officer or agent the person dealing with him must take notice thereof, "provided" the act is not within the apparent powers of the officer or agent. Thus, it has been held or said in a number of cases that persons dealing with a corporation are bound to take notice of its charter and by-laws, and of limitations thereby imposed upon the powers of particular officers, or provisions that particular contracts shall be made, or other acts done, by particular officers only; and that contracts made or acts done in violation of the charter or by-laws, or by other officers or agents than those prescribed, are not binding on the corporation.⁸¹ This is undoubtedly true in so far as provisions in the charter of a corporation are concerned,⁸² unless they are merely

New York. *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 105 N. E. 210, aff'g 149 App. Div. 356, 134 N. Y. Supp. 418; *Traitel Marble Co. v. Brown Bros.*, 159 App. Div. 485, 144 N. Y. Supp. 562; *Thompson v. Mar-seillaise French Baking Co.*, 85 Misc. 392, 147 N. Y. Supp. 402; *Fischer v. Motor Boat Club of America*, 61 Misc. 66, 113 N. Y. Supp. 56; *Adriance v. Roome*, 52 Barb. 399; *Dabney v. Stevens*, 40 How. Pr. 341.

Pennsylvania. *Manderson v. Commercial Bank*, 28 Pa. St. 379.

Texas. *Tempel v. Dodge*, 89 Tex. 69, 33 S. W. 222, 32 S. W. 514.

Virginia. *Bocock's Ex'r v. Alleghany Coal & Iron Co.*, 82 Va. 913, 3 Am. St. Rep. 128, 1 S. E. 325; *Haden v. Farmers' & Mechanics' Fire Ass'n*, 80 Va. 683.

Wisconsin. *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; *Butler v. Mitchell*, 15 Wis. 355.

England. *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137.

Every one is chargeable with

knowledge of a statute under which the directors of a corporation are authorized to enter into a particular contract only on petition of a majority of the stockholders, and one who enters into such a contract with them with knowledge that there has been no such petition cannot hold the company liable. *Louisville Trust Co. v. Louisville, N. A. & C. Ry Co.*, 75 Fed. 433.

⁸¹ *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337; *Bocock's Ex'r v. Alleghany Coal & Iron Co.*, 82 Va. 913, 3 Am. St. Rep. 128, 1 S. E. 325; *Haden v. Farmers' & Mechanics' Fire Ass'n*, 80 Va. 683.

⁸² **California.** *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607.

Connecticut. *Couch v. City Fire Ins. Co.*, 38 Conn. 181, 9 Am. Rep. 375.

Georgia. *Dobbins v. Etowah Mfg. & Min. Co.*, 75 Ga. 238.

Kentucky. *Sandford v. McArthur*, 18 B. Mon. 411.

New York. *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *McCullough v. Moss*, 5 Den. 575.

directory.⁸³ If the charter of a corporation prescribes the mode in which its affairs shall be managed, or the persons by whom corporate powers shall be exercised, and the provisions are not merely directory, they are controlling and exclusive, and the concerns of the corporation cannot be managed in any other mode, or the corporate powers exercised by any other person or persons. The proposition, however, needs qualification as applied to provisions in the by-laws of a corporation. Persons dealing with a corporation, it is generally held, are not chargeable with notice of by-laws, unless they have actual notice of them,⁸⁴ and the stockholders of a corporation, or the corporation, may expressly or impliedly waive its by-laws.⁸⁵ It follows, therefore, that persons dealing with a corporation are not bound by by-laws imposing limitations upon the apparent powers of particular officers, unless they have actual knowledge of them.⁸⁶ So, it is held that a person dealing with corporate officers is not bound to fully investigate the extent of the power conferred upon them by the directors, since the records of the action of corporate boards of directors are not open to public inspection.⁸⁷

The "apparent authority" rule may, at first blush, seem inconsistent with the rule that a person dealing with a corporation must take notice of the powers of the officer. However, if the latter rule ever did apply to apparent authority, it is obsolete. As said by Jus-

Pennsylvania. *Manderson v. Commercial Bank of Pennsylvania*, 28 Pa. St. 379.

Texas. *Tempel v. Dodge*, 89 Tex. 69, 33 S. W. 222, 32 S. W. 514; *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306, 16 S. W. 1078.

Virginia. *Silliman v. Fredericksburg, O. & C. R. Co.*, 27 Gratt. 119, 130.

Wisconsin. *Butler v. Mitchell*, 15 Wis. 355.

England. *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137.

One dealing with a corporation is required to take notice of any limitation placed by the articles upon the powers of the particular officer with whom he is dealing. *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 69 Neb. 220, 95 N. W. 819.

⁸³ **Indiana.** *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind. 536.

Minnesota. *Dana v. Bank of St. Paul*, 4 Minn. 385.

New York. *Barnes v. Ontario Bank*, 19 N. Y. 152.

Ohio. *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.

England. *Prince of Wales Life & Educational Assur. Co. v. Harding, E. B. & E.* 183.

What provisions are directory, see §§ 1896-1915, *supra*.

⁸⁴ See § 502, *supra*, and also § 1931, *infra*.

⁸⁵ See § 503, *supra*.

⁸⁶ See § 1931, *infra*.

⁸⁷ *Groeltz v. Armstrong*, 125 Iowa 39, 99 N. W. 128.

tice Marshall, in a Wisconsin case, "the idea that every time a person deals with the officer of a corporation or person assuming to act in its behalf, he must under all circumstances take his chances on whether such officer or person has been specially authorized in regard to the matter, has no place in the law in our day. Proof of apparent authority of a corporate officer to contract in its behalf *prima facie* establishes actual authority so to do, and mere want of authority in fact will not relieve a corporation from the burden of a contract made in reasonable reliance upon such appearance of authority."⁸⁸

To illustrate: "One wishing to deposit money in a savings bank, who delivers it at the counter of the bank to one of its officers who has apparent or ostensible authority to receive the same, is not required to ascertain whether the board of directors has given such officer express authority to receive the deposit. If the conduct of the bank has been such as to justify the depositor in believing that he is authorized to receive the money, the bank cannot exonerate itself from liability by showing that no express authority therefor had been given by the board of directors."⁸⁹

However, even if an inquiry is necessary, and there is no inquiry, but an inquiry would have led to the discovery of facts justifying the dealings, the third person should have the benefit thereof.⁹⁰

If the corporate records show that the directors expressly authorized a sale of certain property, the purchaser may assume that the record was correct and that the authority was conferred at a meeting of the board.⁹¹

§ 1927. — Actual notice. Of course, if the party contracting with an officer has knowledge of limitations imposed on his power to contract, he cannot hold the corporation where the contract is within such limitations.⁹² And a person dealing with an officer or agent of a corporation, or relying upon his acts to charge the corporation, cannot be said to have relied upon any apparent authority on his part, where he had actual notice of his want of authority. And when this is the case, the corporation is not bound,⁹³ unless by ratification. No-

⁸⁸ *St. Clair v. Rutledge*, 115 Wis. 583, 591, 95 Am. St. Rep. 964, 92 N. W. 234; *Bullen v. Milwaukee Trading Co.*, 109 Wis. 41, 44, 85 N. W. 115.

⁸⁹ *Burnell v. San Francisco Sav. Union*, 136 Cal. 499, 69 Pac. 144.

⁹⁰ *Ward v. City Trust Co.*, 117 N. Y. App. Div. 130, 102 N. Y. Supp. 50.

⁹¹ *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756.

⁹² *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385.

⁹³ *United States. Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843. *Arkansas. El Dorado Improvement*

tice of the want of power of directors or other officers to enter into a contract may appear on the face of the contract.⁹⁴ If the contract provides that it cannot be modified except by a certain person or higher officer of the company, then of course no other person has power to modify it, regardless of apparent authority.⁹⁵

§ 1928. — Constructive notice. The corporation is not liable for acts within the apparent authority of its officer or agent where the person dealing with the officer or agent has notice of facts sufficient to put him upon inquiry as to the latter's authority. In such a case, if he acts without inquiry, he does so at his peril.⁹⁶ Thus, where an

Co. v. Citizens' Bank, 85 Ark. 185, 107 S. W. 676.

Kansas. Manross v. Uncle Sam Oil Co., 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385.

Kentucky. Forked Deer Pants Co. v. Shipley, 25 Ky. L. Rep. 2299, 80 S. W. 476.

Michigan. Hallenbeck v. Powers & Walker Casket Co., 117 Mich. 630, 76 N. W. 119.

New York. Newkirk v. National Wall Paper Co., 68 App. Div. 639, 74 N. Y. Supp. 150. Compare Security Warehousing Co. v. American Exch. Nat. Bank, 118 N. Y. App. Div. 350, 103 N. Y. Supp. 399.

Texas. Judson v. Bell, — Tex. Civ. App. —, 153 S. W. 169.

Washington. Francis v. Spokane Amateur Athletic Club, 54 Wash. 188, 102 Pac. 1032.

"Apparent authority and its effect vanish, however, in the presence of the actual knowledge of the third party as to the real scope of the agent's authority." Portland v. American Surety Co. of New York, 79 Ore. 38, 154 Pac. 121, 153 Pac. 786.

⁹⁴ Lawyers' Advertising Co. v. Consolidated Railway, Lighting & Refrigerating Co., 187 N. Y. 395, 80 N. E. 199.

On the back of a contract with a corporation, which petitioner had

signed, were the following words: "The company shall be bound by and responsible for only such statements as are contained in this contract, and no officer or agent of this company, general, special, or state agent, has any authority to promise a loan or to bind the company by any promise, representation, or other statement not contained in this contract." The petitioner, signer of the contract, brought an action to rescind on the ground that an agent of the corporation had induced her to sign the contract by representations not embraced therein. The court held adversely to the petitioner. Butler v. Standard Guaranty & Trust Co., 122 Ga. 371, 50 S. E. 132. See also Gish v. Insurance Co. of North America, 16 Okla. 59, 87 Pac. 869.

⁹⁵ State v. Kenosha Home Tel. Co., 158 Wis. 371, Ann. Cas. 1916 E 365, 148 N. W. 877.

⁹⁶ In re Lance Lumber Co., 224 Fed. 598; Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 294 (where a contract stated that it was made in pursuance of certain resolutions adopted by the corporation); Western R. Co. v. Bayne, 11 Hun (N. Y.) 166; Franco-Texan Land Co. v. McCormick, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123. See Eddy v. American Amusement Co., 21 Cal. App. 487,

option given by a committee of a corporation stated that they were acting under written authority, the person to whom the option was given was chargeable with notice of the extent of the authority of the committee.⁹⁷ But the omission of the corporate seal on an assignment of accounts, no seal being necessary, does not constitute notice that the officer executing the assignment was acting without authority.⁹⁸

Furthermore, if the terms of a contract entered into on behalf of a corporation by its officers are "extraordinary or unusual, such as are not ordinarily made by the president or other officer in the ordinary course of the transaction of the current business of the corporation, the party contracting with the officer is put upon inquiry as to his

132 Pac. 83, as to what is constructive notice.

It has been held that the fact that goods ordered by an officer in the name of a corporation are directed by him to be shipped to a third person is sufficient to put the seller upon inquiry as to the officer's authority. *Stikwell-Bierce & Smith-Vaile Co. v. Niles Paper-Mill Co.*, 115 Mich. 35, 72 N. W. 1107. See, however, *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59.

A person contracting with a corporation through its agent is chargeable with notice of the limitations on his authority, where he has received a circular from the corporation specifying the terms of its contracts. *Lowenstein v. Lombard, Ayres & Co.*, 17 N. Y. App. Div. 408, 45 N. Y. Supp. 286.

Parties dealing with the corporation may be deemed to be affected with notice that a contract entered into in behalf of the corporation by its general manager was without authority where the corporation had refused to enter into a similar contract with the same parties, on the theory that the company was only engaged in preliminary work. *Tres Palacios Rice & Irrigation Co. v. Eidman*, 41 Tex. Civ. App. 542, 93 S. W. 698.

"Any person taking checks made

payable to a corporation, which can act only by agents, does so at his peril, and must abide by the consequences if the agent who indorses the same is without authority, unless the corporation is negligent * * * or is otherwise precluded by its conduct from setting up such lack of authority in the agent as in *Phillips v. Mercantile Nat. Bank of N. Y.*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596." *Standard Steam Specialty Co. v. Corn Exch. Bank*, 220 N. Y. 478, 116 N. E. 386.

"It is a well-settled rule of law that those dealing with a known agent of a corporation or of an individual do so at their peril, as to his authority, where the act is not within the regular scope of the ordinary power of an agent." In the case at bar a bill of exchange was drawn by the managing agent of a mining corporation in the name of the corporation, and it was held that one who discounted the bill without inquiry into the agent's authority did so at his peril. *Bank of Commerce v. Baird Min. Co.*, 13 N. M. 424, 85 Pac. 970.

⁹⁷ *Kelsey v. New England St. Ry. Co.*, 60 N. J. Eq. 230, 46 Atl. 1059.

⁹⁸ *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

authority.”⁹⁹ But it has well been stated that “it is obviously impossible to state any precise rule by which a line can be drawn, in every case, between such acts as are sufficiently unusual to put persons dealing with an agent upon inquiry, and such acts as may be presumed to be within the agent’s authority. Each case must be considered in view of its own peculiar facts and circumstances.”¹

§ 1929. — Notice from individual or adverse interest of officer or agent. Every person dealing with an officer of a corporation who assumes to act for it in matters in which the interests of the corporation and the officer are adverse is put upon inquiry as to the authority of the officer.² In other words, where an officer of a corporation is dealing for himself, to the knowledge of the other party, and also assumes to act for and bind his corporation, such fact is sufficient to put the other party upon inquiry as to his power to act for the corporation; and, as a general rule, if the other party deals with the officer without making inquiry as to his authority to bind the corporation, he does so at his peril.³ This principle applies where a person

⁹⁹ *Stanley v. Franco-American Ferment Co.*, 97 N. Y. Misc. 401, 161 N. Y. Supp. 365.

¹ 2 *Morawetz, Corporations*, § 608.

² *Leigh v. American Brake-Beam Co.*, 205 Ill. 147, 151, 68 N. E. 713, aff’g 107 Ill. App. 444; *Rogers v. Southern Fiber Co.*, 119 La. 714, 121 Am. St. Rep. 537, 44 So. 442; *Singer v. Strompf*, 88 N. Y. Misc. 103, 150 N. Y. Supp. 660; *McCloskey v. Goldman*, 62 N. Y. Misc. 462, 115 N. Y. Supp. 189; *Lucile Dreyfus Min. Co. v. Wilbard*, 46 Wash. 345, 89 Pac. 935.

³ **United States.** *Moores v. Citizens’ Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385.

Illinois. *Wheeler v. Home Savings & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev’g 85 Ill. App. 28.

Iowa. *Hartman Steel Co. v. Hoag*, 104 Iowa 269, 73 N. W. 611.

Kentucky. *Chemical Nat. Bank of New York v. Wagner*, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535.

Massachusetts. *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L.

R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109.

New York. *Rochester & C. Turnpike Road Co. v. Paviour*, 164 N. Y. 281, 52 L. R. A. 790, 58 N. E. 114; *Hanover Nat. Bank City of New York v. American Dock & Trust Co.*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72; *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

Pennsylvania. *In re Wright’s Appeal*, 99 Pa. St. 425.

Tennessee. *Mt. Verd Mills Co. v. McElwee* (Tenn. Ch. App.), 42 S. W. 465.

A bank holding corporate funds which knowingly accepts and pays a check drawn by an officer of the corporation against the funds of the corporation in payment of his individual debt is liable to the corporation for the amount of its funds so misappropriated in payment of the individual debt of such officer. *First Nat. Bank of El Reno v. Gillette*, — Okla. —, 152 Pac. 1084.

receives notes or other securities of a corporation, or a check or money, from an officer in payment of or as security for the personal debt of the officer, or where he knows that the proceeds are to be used for his personal use; ⁴ and the same rule applies where commercial paper is

4 United States. West St. Louis Sav. Bank v. Parmalee, 95 U. S. 557, 24 L. Ed. 490.

Illinois. Wheeler v. Home Savings & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g on other grounds 85 Ill. App. 28.

Iowa. Hartman Steel Co. v. Hoag, 104 Iowa 269, 73 N. W. 611.

Minnesota. First Nat. Bank of Rice Lake, Wisconsin v. Flour City Trunk Co., 118 Minn. 151, 136 N. W. 563.

Missouri. Reynolds v. Title Guaranty Trust Co., — Mo. App.—, 189 S. W. 33; St. Louis Charcoal Co. v. Moore, 178 Mo. App. 692, 162 S. W. 745; Coleman v. Stoeke, 159 Mo. App. 43, 139 S. W. 216; St. Louis Charcoal Co. v. Lewis, 154 Mo. App. 548, 136 S. W. 716.

New Jersey. Louis DeJonge & Co. v. Woodport Hotel & Land Co., 77 N. J. L. 233, 72 Atl. 439.

New York. Ward v. City Trust Co. of New York, 192 N. Y. 61, 84 N. E. 585; Rochester & C. Turnpike Road Co. v. Paviour, 164 N. Y. 281, 52 L. R. A. 790, 58 N. E. 114, aff'g 28 App. Div. 623, 51 N. Y. Supp. 1149; Wilson v. Metropolitan El. R. Co., 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; Newman v. Newman, 160 App. Div. 331, 145 N. Y. Supp. 325; Lanning v. Trust Co. of America, 137 App. Div. 722, 122 N. Y. Supp. 485. See also Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890.

North Dakota. Emerado Farmers' El. Co. v. Farmers' Bank of Emerado, 20 N. D. 270, 29 L. R. A. (N. S.) 567, 127 N. W. 522.

Oklahoma. Jenkins v. Planters' & Mechanics' Bank, 34 Okla. 607, 126 Pac. 757.

Rhode Island. Sheer v. Hall & Lyon Co., 36 R. I. 47, 88 Atl. 801.

Tennessee. Mt. Verd Mills Co. v. McElwee (Tenn. Ch. App.), 42 S. W. 465.

Washington. Mooney v. O. P. Mooney Co., 71 Wash. 258, 128 Pac. 225.

West Virginia. Wheeling Ice & Storage Co. v. Conner, 61 W. Va. 111, 55 S. E. 982.

Thus, the payee of a check drawn by a treasurer in the name of the corporation, and given in payment of the individual notes of the treasurer is put on inquiry and chargeable with notice of all the rights of the corporation. Manhattan Web Co. v. Aquidneck Nat. Bank, 133 Fed. 76.

So if a bank knowingly pays a check drawn by a corporate officer against corporate funds in satisfaction of his individual debt, the bank is liable to the corporation for the amount thereof. First Nat. Bank of El Reno v. Gillette, — Okla.—, 152 Pac. 1084.

Brokers accepting drafts fraudulently drawn in their favor by the president of a bank in payment of margins in transactions for him personally are put upon inquiry as to his authority to draw the drafts, and are liable to the bank for their proceeds thus fraudulently converted. Lamson v. Beard, 94 Fed. 30, 45 L. R. A. 822.

The president of a corporation, although its business manager, cannot, without a just compensation moving to the corporation, create an indebtedness against it by assuming for it liability for his individual debt. Barnhardt v. Star Mills, 123 N. C. 428, 31 S. E. 719.

executed by a corporate officer, in the name of the corporation, to his own order and is transferred for his own benefit,⁵ or where an officer of a railroad or warehouse company, having general authority to issue bills of lading or warehouse receipts, issues a bill of lading or receipt, without receiving the goods, in payment of or as security for his own debt, or issues the same to himself.⁶ However, the rule applicable to notes made by officers of a corporation to their own order, and used to pay their individual obligations, has no application to notes made by the duly authorized officers and payable to a director who turns over the notes to a debtor on account of his personal debt;⁷ and one to whom negotiable paper is presented for discount has the right to assume that the relations to the paper of every party whose name appears upon it are precisely what they appear to be, and though the note is made by a corporation to a third person, by whom it is indorsed, and is presented for discount by the president of the corporation, the purchaser is justified in assuming that it came into the hands of the president as his private property in the usual course of business.⁸

This principle also applies when an officer having authority generally to issue certificates of stock fraudulently issues a fictitious certificate. A person who purchases the certificate from the officer, or lends him money on the security thereof, is bound to make inquiry as to the authority of the officer and the genuineness of the certificate,

5 United States. Havana Cent. R. Co. v. Central Trust Co. of New York, 204 Fed. 546, L. R. A. 1915 B 715; Park Hotel Co. v. Fourth Nat. Bank of St. Louis, 86 Fed. 742, 744.

California. Smith v. Los Angeles Immigration & Land Co-operative Ass'n, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

Kentucky. Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 31 L. R. A. (N. S.) 169 with note, 130 S. W. 965.

Missouri. Lee v. Smith, 84 Mo. 304, 54 Am. Rep. 101.

New York. Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435; Ward v. City Trust Co., 192 N. Y. 61, 81 N. E. 585; Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890; Havana Cent. R. Co. v. Knickerbocker Trust Co., 135 App.

Div. 313, 119 N. Y. Supp. 1035, modified 198 N. Y. 422, L. R. A. 1915 B 720, 92 N. E. 12.

North Dakota. Security Bank of Minnesota v. Kingsland, 5 N. D. 263, 65 N. W. 697.

Oregon. Saylor v. Commonwealth Investment & Banking Co., 38 Ore. 204, 62 Pac. 652.

Rhode Island. Randall v. Rhode Island Lumber Co., 20 R. I. 625, 40 Atl. 763.

6 Hanover Nat. Bank City of New York v. American Dock & Trust Co., 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72.

7 Orr v. South Amboy Terra Cotta Co., 113 N. Y. App. Div. 103, 98 N. Y. Supp. 1026.

8 Cheever v. Pittsburgh, S. & L. E. R. Co., 150 N. Y. 59, 34 L. R. A. 69, 55 Am. St. Rep. 646, 44 N. E. 701.

and, if he takes it without such inquiry, he acts at his peril, and cannot claim to be a bona fide holder.⁹

It has been held, however, that failure to make inquiry in such cases does not deprive one of the character or status of a bona fide holder, where the inquiry, if made, would have disclosed facts upon which he might have relied as showing authority.¹⁰ Moreover, the fact that an officer is acting for his personal benefit does not affect persons dealing with him within the apparent scope of his authority, if they are ignorant of such fact.¹¹ And a corporation may be estopped by having habitually allowed an officer to issue checks, warehouse receipts, etc., to himself, or to issue checks in payment of his individual debts, and thus having clothed him with apparent authority to do so in the particular instance.¹²

§ 1930. — Notice of extrinsic facts making act improper in particular case. Conceding that a person dealing with a corporation is bound to know whether or not the officer or agent who acts for it is authorized to do so, yet, if he is, and the act is within the apparent scope of his authority, the person dealing with him is not chargeable with notice of extrinsic facts making it improper for him to act in

⁹ *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109. Compare, however, *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

¹⁰ *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384. And see *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

When a note of a corporation is made payable to itself, and is offered for discount by its president, any intended purchaser is subjected to the burden of inquiry whether the issue of the note was authorized; but if an inquiry, if made, would have resulted only in ascertaining that such issue was authorized by a resolution of the board of directors in due form, the purchaser must be regarded as a

bona fide holder, although he made no inquiry, and the resolution may have been unlawfully adopted by the directors to provide payment to the president of a salary to which he was not entitled. *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

¹¹ *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655.

¹² *Corn Exch. Bank of New York v. American Dock & Trust Co.*, 163 N. Y. 332, 57 N. E. 477, modifying 14 N. Y. App. Div. 453, 43 N. Y. Supp. 1028.

Evidence of a custom for officers of a corporation to pay their individual debts with checks of the corporation is admissible to refute the presumption, arising from such method, of knowledge on the part of the persons so paid that the officers, in doing so, were misapplying the funds of the corporation. *Levins v. W. O. Peeples Grocery Co.* (Tenn. Ch. App.), 38 S. W. 733.

the particular case.¹³ And, by the weight of authority, this is true although the officer or agent may in fact act fraudulently and for his own purposes and benefit, and not for the benefit of the corporation, if there is nothing to show that this is the case to the person dealing with him, or relying upon his act.¹⁴ Likewise, diversion of proceeds by a corporate officer is no defense in an action against the corporation, if the officer had power, actual or apparent, to make the contract.¹⁵

§ 1931. — By-laws as notice. Whatever may be the rule as to the effect of a statute or charter provision limiting the powers of officers or agents,¹⁶ the weight of authority holds that the rule does not apply to by-laws, so far as third persons are concerned.¹⁷ As to by-laws it is held in most jurisdictions that if a corporation clothes an officer or agent with apparent authority to bind it by a particular contract or act, it cannot escape liability by setting up limitations or restrictions upon his authority contained in by-laws not known to the other party, since persons dealing with the officers or agents of a corporation, acting within their apparent authority, are not bound to ascertain whether such apparent authority is restricted by the by-laws.¹⁸ Thus, a bank is not charged with notice of a by-law requiring counter

¹³ *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96, 11 Am. Rep. 667.

¹⁴ *United States. City Nat. Bank of Quanah v. Chemical Nat. Bank of St. Louis*, 80 Fed. 859.

Arkansas. Texarkana & Ft. Smith Ry. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944; *Auten v. Manistee Nat. Bank*, 67 Ark. 243, 47 L. R. A. 329, 54 S. W. 337.

Georgia. Kaiser v. United States Nat. Bank, 99 Ga. 258, 25 S. E. 620.

Kentucky. Kentucky Land & Immigration Co. v. Wallace, 55 S. W. 885.

New Hampshire. Hanson v. Heard, 69 N. H. 190, 38 Atl. 788.

New York. Corn Exch. Bank of New York v. American Dock & Trust Co., 163 N. Y. 332, 57 N. E. 477, modifying 14 App. Div. 453, 43 N. Y. Supp. 1028.

North Carolina. Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655.

¹⁵ *Schreyer v. J. S. Bailey & Co.*, 97 N. Y. App. Div. 185, 89 N. Y. Supp. 870.

¹⁶ See § 1926, *supra*.

¹⁷ See § 502, *supra*.

¹⁸ *Alabama. Kelly v. Mobile Building & Loan Ass'n*, 64 Ala. 501.

Illinois. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179; *Wait v. Smith*, 92 Ill. 385; *Smith v. Smith*, 62 Ill. 493; *Trawick v. Peoria & Ft. Clark Street Ry. Co.*, 68 Ill. App. 156.

Maryland. Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.

Missouri. Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507.

Nebraska. Monarch Portland Cement Co. v. P. J. Creedon & Sons,

signature on checks of a corporation which is a depositor therein.¹⁹ An exception, however, has been said to exist where "by custom concerning the particular dealing the by-laws are usually considered, in which event to ignore them may amount to negligence and may defeat recovery on any ostensible authority of the agent."²⁰

It has been said that "even where notice of the by-law is brought home to the person dealing with the agent, it does not follow that he must at his peril ascertain whether the by-law has been complied with. If the by-law is merely a provision for the internal government of the corporation, and prescribes formalities to be observed in the action of the company's agents, due compliance with the by-law may usually be assumed, in the absence of notice to the contrary."²¹

94 Neb. 185, 142 N. W. 906; Barber v. Stromberg-Carlson Tel. Mfg. Co., 81 Neb. 517, 18 L. R. A. (N. S.) 680, 129 Am. St. Rep. 703, 116 N. W. 157; Johnston v. Milwaukee & W. Inv. Co., 46 Neb. 480, 64 N. W. 1100.

New York. Powers v. Schlicht Heat, Light & Power Co., 165 N. Y. 662, 59 N. E. 1129, aff'g 23 App. Div. 380, 48 N. Y. Supp. 237; Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379; Bacon v. Montauk Brewing Co., 130 App. Div. 737, 115 N. Y. Supp. 617; Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. 121, 60 N. Y. Supp. 739; Marine Bank of Buffalo v. Butler Colliery Co., 52 Hun 612, 5 N. Y. Supp. 291; Merchants' Bank v. McColl, 6 Bosw. 473.

North Dakota. Grant County State Bank v. Northwestern Land Co., 28 N. D. 479, 150 N. W. 736.

South Carolina. Moyer v. East Shore Terminal Co., 41 S. C. 300, 25 L. R. A. 48, 44 Am. St. Rep. 709, 19 S. E. 651.

South Dakota. American Nat. Bank v. Wheeler-Adams Auto Co., 31 S. D. 524, 141 N. W. 396.

Tennessee. Barnes v. Black Diamond Coal Co., 101 Tenn. 354, 47 S. W. 498.

Vermont. Howland Bros. & Cave

v. Barre Sav. Bank & Trust Co., 89 Vt. 290, 95 Atl. 679.

Washington. Slocum v. Seattle Taxicab Co., 67 Wash. 220, 39 L. R. A. (N. S.) 435, 121 Pac. 67.

See also cases cited, § 502, note 48, vol. 1, supra.

Third persons dealing with a corporation will not be presumed to have notice of a by-law limiting the powers of corporate officers or prescribing the mode in accordance with which they shall perform their official acts. Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507; Lyndon Sav. Bank v. International Co., 75 Vt. 224, 54 Atl. 191.

In an action on a contract executed by a corporate officer, in behalf of the corporation, by-laws limiting their authority are not admissible, at least where not within the knowledge of the other party to the contract. Hagerstown Brewing Co. v. Gates, 117 Md. 348, 83 Atl. 570.

¹⁹ Havana Cent. R. Co. v. Central Trust Co. of New York, 204 Fed. 546, L. R. A. 1915 B 715.

²⁰ Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736.

²¹ See 2 Morawetz, Corporations, § 594.

On the other hand, it is held in Pennsylvania²² and Texas²³ that by-laws are binding on third persons as to the power of corporate officers with whom they contract.

§ 1932. Constructive notice of powers of officers or agents by members or other officers of corporation. In case of the apparent powers of an officer, where the rights of another officer are concerned rather than the rights of a third person, the officer is chargeable with the knowledge he should have had in the discharge of his duties.²⁴ And members of the corporation who deal with its officers or agents are bound to take notice of the limitation of their powers as prescribed by the by-laws, it is held in some states,²⁵ although as to this matter there is some conflict in the decisions.²⁶

§ 1933. Power to borrow money. Whether an officer or agent of a corporation has power to borrow money for the corporation is involved in some doubt. In regard to the power of agents, whether agents of individuals or of corporations, to borrow, it is said by Professor Mechem, in his well known work on Agency, that "the power to borrow money on the principal's account, is everywhere regarded as a dangerous one, not readily to be implied."²⁷ Even a general manager is sometimes held to have no authority to borrow money,²⁸ and it is generally held that the president has no power to borrow money.²⁹ A loan made to an officer or stockholder may be shown by evidence aliunde to have been in fact made to the corporation although in form to the individual,³⁰ and if there is authority to borrow there is no duty on the part of the lender to see that the money is applied to corporate purposes and not diverted by the officer or agent obtaining the loan.³¹ Corporate power to borrow money includes power to borrow it through the intervention of a trustee.³²

²² *Lutz v. Webster*, 249 Pa. 226, 94 Atl. 834.

²³ *Vacarezza v. Realty Inv. Co.*, — Tex. Civ. App.—, 165 S. W. 516.

²⁴ *Logan v. Fidelity-Phenix Fire Ins. Co. of New York*, 161 N. Y. App. Div. 404, 146 N. Y. Supp. 678.

²⁵ *Louchheim v. Somerset Building & Loan Ass'n*, 25 Pa. Super. Ct. 325.

²⁶ See § 501, *supra*.

²⁷ 1 Mechem, *Agency* (2nd Ed.), § 1026.

²⁸ See § 2110, *infra*.

²⁹ See § 2041, *infra*.

³⁰ *Watson v. Proximity Mfg. Co.*, 147 N. C. 478, 61 S. E. 273.

³¹ *Watson v. Proximity Mfg. Co.*, 147 N. C. 478, 61 S. E. 273.

³² *Venner v. New York Cent. & H. River R. Co.*, 160 N. Y. App. Div. 127, 145 N. Y. Supp. 725, *aff'g* 81 N. Y. Misc. 298, 143 N. Y. Supp. 211.

§ 1934. Power to execute commercial paper—In general. It has been said by a leading textbook writer on the law of Agency that "the power to bind the principal by the making, accepting or indorsing of negotiable paper is an important one, not lightly to be inferred. * * * The authority to create such obligations is obviously a delicate one, easily susceptible of abuse, and, if abused, bringing disaster and financial ruin to the principal. Our law therefore properly regards such an authority as extraordinary, and not ordinarily to be included within the terms of general grants; and the rule is abundantly established that it can exist only when it has been directly conferred or is warranted by necessary implication."³³ This rule applies equally well to officers and agents of corporations.³⁴ If the corporation itself has the power to execute negotiable paper, the board of directors may execute it or authorize its execution.³⁵ Whether a general manager has such power depends largely on circumstances,³⁶ and it is generally held that the president has no such power.³⁷ Neither the secretary³⁸ nor treasurer³⁹ has such power.

§ 1935. — Negotiable paper as binding on corporation. If an officer issues negotiable paper in the name of a corporation, when he has no implied authority to do so by virtue of his office, and has not been clothed by the stockholders or directors with apparent authority, the paper is not binding on the corporation, even in the hands of a bona fide purchaser for value, since all persons are chargeable in such a case with notice of the want of authority.⁴⁰ The paper is

³³ 1 Meechem, Agency (2nd Ed.), § 969.

³⁴ "It is certainly true that an officer of a corporation, in the absence of special authority, has no power to execute accommodation paper in the corporate name." Pelton v. Spider Lake Sawmill & Lumber Co., 117 Wis. 569, 98 Am. St. Rep. 946, 94 N. W. 293.

³⁵ See § 1968, *infra*.

³⁶ See § 2111, *infra*.

³⁷ See § 2038, *infra*.

³⁸ See § 2076, *infra*.

³⁹ See § 2089, *infra*.

⁴⁰ **United States.** Dexter Sav. Bank v. Friend, 90 Fed. 703.

Arkansas. City Elec. St. Ry. Co. v. First Nat. Exch. Bank, 62 Ark.

33, 31 L. R. A. 535, 54 Am. St. Rep. 282, 34 S. W. 89.

Kentucky. Chemical Nat. Bank of New York v. Wagner, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535.

Massachusetts. Craft v. South Boston R. Co., 150 Mass. 207, 5 L. R. A. 641, 22 N. E. 920; Bradlee v. Warren Five Cents Sav. Bank, 127 Mass. 107, 34 Am. Rep. 351.

Minnesota. Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

New Mexico. Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522.

New York. Jacobus v. Jamestown Mantel Co., 211 N. Y. 154, 105 N. E. 210.

Pennsylvania. In re Milward-

binding, however, in the hands of a bona fide purchaser, if authority to issue it was presumably incident to the office, or if the officer was clothed with apparent authority, although there may have been secret limitations upon his apparent authority, or although he may have issued the same for an unauthorized purpose.⁴¹ The rule is stated by a leading textbook writer as follows: "Negotiable paper obtained from the agents of a corporation by a party having notice of their want of authority to issue it, may become binding upon the company after it has passed into the hands of a purchaser without notice. A purchaser of a negotiable instrument issued or indorsed by an agent of a corporation to a prior holder, stands in the same position as a party dealing directly with the agent. He must at his peril take notice of limitations placed upon the agent's authority by the charter or articles of association of the company, but not of special instructions; and if the agent who issued or indorsed the paper would have had authority to do so under ordinary circumstances, the purchaser, acting in good faith, may assume that the agent had authority to issue or indorse that particular paper."⁴²

§ 1936. Power to mortgage. Officers of a corporation usually have no implied power to mortgage real estate; but it is otherwise where the articles of incorporation make no provisions for officers nor as to their duties, and no by-laws are adopted, and all of the business of the corporation is conducted by such officers, and the only thing ever done by the board of directors was to elect officers.⁴³

Cliff Cracker Co.'s Estate, 161 Pa. St. 157, 28 Atl. 1072.

Virginia. *Davis v. Rockingham Inv. Co.*, 89 Va. 290, 15 S. E. 547.

41 United States. *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335; *Page v. Fall River, W. & P. R. Co.*, 31 Fed. 257.

Connecticut. *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472.

Georgia. *Jacobs Pharmacy Co. v. Southern Banking & Trust Co.*, 97 Ga. 573, 25 S. E. 171.

Illinois. *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419, aff'g 41 Ill. App. 72.

Kentucky. *Chemical Nat. Bank of New York v. Wagner*, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535.

Massachusetts. *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322.

New York. *Wahlig v. Standard Pump Mfg. Co.*, 9 N. Y. Supp. 739.

North Carolina. *Merchants' Nat. Bank v. Dunn Oil Mill Co.*, 157 N. C. 302, 73 S. E. 93.

Wisconsin. *Johnson v. Weed & Gumaer Mfg. Co.*, 103 Wis. 291, 79 N. W. 236.

⁴² 2 Morawetz, Corporations, § 602.

⁴³ *National City Bank of Minneapolis v. Zimmer Vacuum Renovator Co.*, 132 Minn. 211, 156 N. W. 265.

§ 1937. Power to employ physicians and surgeons—In general.

It may be stated, as a general rule, that subordinate officers, other than the general manager⁴⁴ or perhaps the president,⁴⁵ have no power to employ physicians or surgeons or to contract for medical assistance, where employees of the company are injured in the course of their work⁴⁶ or where passengers are injured,⁴⁷ except in case of an emergency.⁴⁸ Thus, a railroad conductor has no implied authority to employ medical assistance for an injured employee;⁴⁹ and the same is true as to a station agent⁵⁰ or roadmaster.⁵¹ Likewise a physician or surgeon,⁵² even though a district or chief surgeon of the railroad company,⁵³ has no power to employ assistants.

A fortiori, medical employment is not authorized in case of an employee injured outside the scope of his employment and for whose injuries the company is not legally liable.

§ 1938. — In cases of emergency. In some states subordinate officers or agents of railroad companies are held to have power to employ physicians, surgeons or nurses to care for injured employees when there is no higher officer or agent on the ground and immediate action seems necessary.⁵⁴ This rule has been applied to such an em-

⁴⁴ Power of general manager, see § 2104, *infra*.

⁴⁵ Power of president, see § 2036, *infra*.

⁴⁶ *Indiana*. Louisville, E. & St. L. Ry. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770.

Kentucky. Godshaw v. J. N. Struck & Bro., 109 Ky. 285, 51 L. R. A. 668, 58 S. W. 781.

Michigan. Marquette & O. R. Co. v. Taft, 28 Mich. 289.

Missouri. Brown v. Missouri, K. & T. Ry. Co., 67 Mo. 122; Tucker v. St. Louis, K. C. & N. Ry. Co., 54 Mo. 177; Meisenbach v. Southern Cooperage Co., 45 Mo. App. 232.

New York. Stephenson v. New York & H. R. Co., 2 Duer 341.

England. Cox v. Midland Counties Ry. Co., 3 Exch. 268.

But see Texas Bldg. Co. v. Drs. Albert & Edgar, 57 Tex. Civ. App. 638, 123 S. W. 716, holding foreman of building crew, at work at a dis-

tance from the home office, was authorized.

⁴⁷ See Hays v. Wabash R. Co., 119 Mo. App. 439, 95 S. W. 299.

⁴⁸ See *infra*, next section.

⁴⁹ *Peninsular Ry. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194; *St. Louis & K. C. R. Co. v. Olive*, 40 Ill. App. 82; *Tucker v. St. Louis, K. C. & N. Ry. Co.*, 54 Mo. 177.

⁵⁰ *Tucker v. St. Louis, K. C. & N. Ry. Co.*, 54 Mo. 177.

⁵¹ *Peninsular Ry. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194; *Houston & T. C. R. Co. v. Watkins*, 1 Tex. App. Civ. Cas. (White & W.) 147.

⁵² *Evansville & I. R. Co. v. Spellbring*, 1 Ind. App. 167, 27 N. E. 239.

⁵³ *Smith v. Chicago & N. W. Ry. Co.*, 104 Iowa 147, 73 N. W. 581; *Burke v. Chicago & W. M. Ry. Co.*, 114 Mich. 685, 72 N. W. 997.

⁵⁴ *Arkansas Southern R. Co. v. Loughbridge*, 65 Ark. 300, 45 S. W.

ployment by a conductor of a railroad train where he was the highest agent of the company on the ground.⁵⁵ Likewise it seems that, in case of an emergency, such power exists, in some states, where a passenger is injured,⁵⁶ or even where a stranger or trespasser is injured.⁵⁷ Furthermore, this rule has been applied to emergency cases where the corporation was one other than a railroad company,⁵⁸

907; *Chicago & A. R. Co. v. Davis*, 94 Ill. App. 54.

⁵⁵ *Arkansas Southern R. Co. v. Loughridge*, 65 Ark. 300, 45 S. W. 907; *Chicago & A. R. Co. v. Davis*, 94 Ill. App. 54; *Hunt v. Illinois Cent. R. Co.*, 163 Ind. 106, 71 N. E. 195; *Louisville, N. A. & C. Ry. Co. v. Smith*, 121 Ind. 353, 6 L. R. A. 320, 22 N. E. 775; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Evansville & R. R. Co. v. Freeland*, 4 Ind. App. 207, 30 N. E. 803.

The Indiana court stated that the leading case upon the authority of a railway conductor to employ surgical aid in an emergency for an employee of the company who had been injured by his train is *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, and the court followed the principle therein given, saying that in the *Terre Haute* case the court was careful to limit its decision to "surgical services rendered upon an urgent exigency, where immediate attention was demanded to save life or prevent great injury." *Hunt v. Illinois Cent. R. Co.*, 163 Ind. 106, 71 N. E. 195.

⁵⁶ *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377, 13 S. W. 1092; *Hays v. Wabash R. Co.*, 119 Mo. App. 439, 95 S. W. 299; *Patterson v. Consolidated Traction Co.*, 9 Pa. Dist. 362; *Langan v. Great Western R. Co.*, 30 L. T. N. S. 173. Compare *Union Pac. Ry. Co. v. Beatty*, 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845, where liability was denied where a passenger was injured through no fault of the company.

⁵⁷ *Bonnette v. St. Louis, I. M. & S. R. Co.*, 87 Ark. 197, 16 L. R. A. (N. S.) 1081 with note, 128 Am. St. Rep. 30, 112 S. W. 220, where the court said: "The conductor is the highest agent on the ground, and is in command of the train that did the injury. Before sufficient time had intervened to ascertain whether the accident was caused by the negligence of the company, he certainly had at least the implied authority to protect his company by doing what might be necessary to lessen the damages in the event it should be afterwards ascertained that the company was liable." See also *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650. But see *Adams v. Southern Ry. Co.*, 125 N. C. 565, 34 S. E. 642; *Wills v. International & G. N. R. Co.*, 41 Tex. Civ. App. 58, 92 S. W. 273.

⁵⁸ *Rich v. Edison Elec. Co.*, 18 Cal. App. 354, 123 Pac. 230; *Salter v. Nebraska Tel. Co.*, 79 Neb. 373, 13 L. R. A. (N. S.) 545, 112 N. W. 600; *Texas Bldg. Co. v. Drs. Albert & Edgar*, 57 Tex. Civ. App. 638, 123 S. W. 716. See also *Weinsberg v. St. Louis Cordage Co.*, 135 Mo. App. 553, 116 S. W. 461.

In Michigan, however, the rule is limited to cases "in which the employment is hazardous, exposing the employees to dangers and risks greater than those in the ordinary pursuits of life." *Holmes v. McAllister*, 123 Mich. 493, 48 L. R. A. 396, 82 N. W. 220, holding employment in laundry, in particular case, not accompanied by any such dangers.

although in some states it is confined, it seems, to railroad companies.⁵⁹ In other states the emergency rule is disapproved,⁶⁰ or else not discussed as bearing on the question, although in the particular case an emergency actually did exist.

However, "such employment does not make the employer liable for services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him."⁶¹ In Nebraska the rule is laid down that "emergency services, unless expressly limited at the time of procuring them, ought to extend to a sufficient time for the party employed to communicate with the company, and, if it declines to be further responsible, for notice to the proper proper authorities, if the injured party is entitled to public care."⁶²

§ 1939. Powers of subordinate agents or employees—In general.

There is nothing to be said about the authority of special agents, employed by a corporation for a particular purpose only, which does not apply equally in the case of agency for natural persons. Works on the general law of agency, therefore, must be consulted. Such an agent has authority to make such contracts and do such acts as are necessary and usual in order to enable him to accomplish the purpose for which he is employed,⁶³ but he cannot bind the corporation by

⁵⁹ *New Pittsburgh Coal & Coke Co. v. Shaley*, 25 Ind. App. 282, 58 N. E. 87; *Chaplin v. Freeland*, 7 Ind. App. 676, 34 N. E. 1007; *Godshaw v. J. N. Struck & Bro.*, 109 Ky. 285, 51 L. R. A. 688, 58 S. W. 781; *Spelman v. Gold Coin Mining & Milling Co.*, 26 Mont. 76, 55 L. R. A. 640, 91 Am. St. Rep. 402, 66 Pac. 597.

⁶⁰ See *Peninsular Ry. Co. v. Gary*, 22 Fla. 356, 1 Am. St. Rep. 194.

⁶¹ *Holmes v. McAllister*, 123 Mich. 493, 48 L. R. A. 396, 82 N. W. 220.

⁶² *Salter v. Nebraska Tel. Co.*, 79 Neb. 373, 13 L. R. A. (N. S.) 545, 112 N. W. 600.

⁶³ *Alabama Great Southern R. Co. v. Hill*, 76 Ala. 303; *Catiron v. First Universalist Soc. of Manchester*, 46 Iowa 106. And see generally *Mechem, Agency* (2nd. Ed.), § 742; *Clark & Skyles, Agency*.

Authority to erect a building includes the power to contract debts necessary for the purpose, and to execute notes therefor. *Catiron v. First Universalist Soc. of Manchester*, 46 Iowa 106.

Authority to employ a servant or agent in the business of the corporation includes authority to agree on his compensation. *Alabama Great Southern R. Co. v. Hill*, 76 Ala. 303.

A committee authorized to employ accountants to investigate the affairs and accounts of the company has authority to agree as to their compensation. *Star Line v. Van Vliet*, 43 Mich. 364, 5 N. W. 418.

An agent authorized to sell goods for a corporation, and to take, indorse and procure the discount of notes for goods sold, may take notes in renewal of notes given for goods

any contract or act which is beyond the scope of his employment.⁶⁴ The contracts which a corporate agent may make are only such as he is expressly authorized to make, or such contracts as pertain to the duties which the corporation imposes upon him.⁶⁵ The question of corporate liability is the same as if an individual was the principal,⁶⁶ and the scope of their powers is the same as those of like agents of individuals.⁶⁷ It has been held that the acting assistant secretary of

sold. *Marine Bank of Buffalo v. Butler Colliery Co.*, 52 Hun (N. Y.) 612, 5 N. Y. Supp. 291.

An executive committee authorized to make arrangements with a person for "securing the transfer" of patent rights belonging to him to the corporation has authority to execute a contract for the transfer. *Andres v. Fry*, 113 Cal. 124, 45 Pac. 534.

An agent authorized to make the best arrangement possible for the purchase of certain property for the corporation can make a contract for its purchase by which the seller reserves title until payment of the price. *Merchants' & Mechanics' Bank v. Cottrell*, 96 Ga. 168, 23 S. E. 127.

⁶⁴*Chesnut-Hill Reservoir Co. v. Chase*, 14 Conn. 123; *Gillis v. Bailey*, 17 N. H. 18.

An agent appointed by a corporation to take charge of its interests in a tract of land mortgaged to it has no authority to bind it by the execution of negotiable notes in its name. *Webber v. Williams College*, 23 Pick. (Mass.) 302.

Authority "to make contracts of sale of the lands" of a corporation, given by resolution of the directors, does not authorize the agent to convey land as attorney in fact of the corporation. *Green v. Hugo*, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79.

An agent of a railroad company, authorized "to procure a right of way," has no authority to promise a landowner that the company will locate a depot at a certain place.

Houston & T. Cent. R. Co. v. McKinney, 55 Tex. 176.

A railway engineer has ordinarily no power to render a railroad corporation liable by his employment of a brakeman to assist him. *Mickelson v. New East Tintic R. Co.*, 23 Utah 42, 64 Pac. 463.

⁶⁵*Interstate Securities Co. v. Third Nat. Bank*, 35 Pa. Super. Ct. 277, 282.

⁶⁶*Interstate Securities Co. v. Third Nat. Bank*, 35 Pa. Super. Ct. 277.

The corporation is not bound by the act of its agent pursuant to instructions from the assistant secretary where the authorization is beyond the apparent scope of the assistant secretary's authority and no express authority is shown. So, also, the corporation cannot be held for action taken by an agent of the corporation under instructions of an attorney where it is not shown that the attorney was authorized to represent the corporation. *Beiswanger v. American Bonding & Trust Co.*, 98 Md. 287, 57 Atl. 202.

A corporation is bound by and charged with the fraud of its agents. *Peerless Fire Ins. Co. v. Reveire*, — Tex. Civ. App., 188 S. W. 254.

⁶⁷*Bristol Sav. Bank v. Judd*, 116 Iowa 26, 89 N. W. 93.

A contract by a messenger of a telephone company to make delivery of a message to one not found at the place of address is beyond the power of the messenger and not binding on the company. "The nature of his agency, a mere messenger, was notice

a title guaranty company has no power to employ an agent to sell a mortgage;⁶⁸ that a shipping clerk has very limited powers;⁶⁹ that a lineman of a telephone company has no authority to accept payment for monthly telephone rent;⁷⁰ and that power to remove trespassers from a fishing and hunting preserve confers no power to shoot them.⁷¹ It seems that an agreement of a railroad conductor to furnish a better car is a mere incident to his general work.⁷² Of course, an agent may draw a draft on the company where expressly authorized so to do.⁷³

The local freight agent in charge of the freight business of a railroad in receiving and delivering freight at a way station has no implied power, it seems, to hire a veterinary to treat horses injured in course of shipment,⁷⁴ nor to settle claims for injuries to freight;⁷⁵ but a station agent in charge of a railroad station, where the station burns down, has authority to make some arrangement to transfer the freight under his charge.⁷⁶

A claim agent, it has been held, has apparent power to employ a physician for an injured employee;⁷⁷ and a railroad adjuster, with

of the limitation upon his power to enter into contracts for the telephone company extending its liability." Cumberland Telephone & Telegraph Co. v. Atherton, 28 Ky. L. Rep. 1100, 91 S. W. 257.

These general rules as to powers of agents have been applied to agents of a common carrier located at a particular place to attend to the local business and furnish rates. Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44, rev'g 17 N. Y. App. Div. 408, 45 N. Y. Supp. 286.

It does not follow that an agency of a manufacturing corporation has authority to borrow money from the fact that it is an agency for purposes of distribution of a manufactured product. Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co., 223 Ill. 41, 7 L. R. A. (N. S.) 752, 79 N. E. 38, aff'g 123 Ill. App. 430.

Power to accept payments depends on the rules governing all agents. See Carter White Lead Co. v. Pounds, 65 N. Y. App. Div. 476, 72 N. Y. Supp. 876.

⁶⁸ Stone v. United States Title Guaranty & Indemnity Co., 159 N. Y. App. Div. 679, 144 N. Y. Supp. 849.

⁶⁹ Megaarden v. Hartman Furniture & Carpet Co., 114 Minn. 224, 130 N. W. 1027.

⁷⁰ Southwestern Telegraph & Telephone Co. v. Luckett, 60 Tex. Civ. App. 117, 127 S. W. 856.

⁷¹ Strader's Adm'rs v. President & Directors of Lexington Hydraulic & Manufacturing Co., 146 Ky. 580, 142 S. W. 1073.

⁷² Myhra v. Chicago, M. & P. S. R. Co., 62 Wash. 1, 112 Pac. 939.

⁷³ C. M. Keys Commission Co. v. Miller, —Okla.—, 157 Pac. 1029.

⁷⁴ Hill v. Southern R. Co., 6 Ala. App. 488, 60 So. 450.

⁷⁵ Betts v. Chicago, B. & Q. R. Co., 150 Iowa 252, 129 N. W. 962.

⁷⁶ Cincinnati, N. O. & T. P. R. Co. v. Ashurst (Ky.), 124 S. W. 303.

⁷⁷ Southern R. Co. v. Hazlewood, 45 Ind. App. 478, 90 N. E. 18, 88 N. E. 636. See also § 1937, *supra*.

power to settle claims for personal injuries, has authority to bind the company for medical services to an injured passenger.⁷⁸ But a claim agent of a railroad company has no implied power to promise an injured employee, in settlement of his claim in whole or in part, employment for life⁷⁹ or during good behavior.⁸⁰

§ 1940. — Powers of purchasing or selling agents. State agents of a foreign corporation, who are mere soliciting and sales agents, have not the power of general agents.⁸¹ A special agent to sell capital stock cannot contract for printing,⁸² and has authority to sell for cash only;⁸³ but he may be held out as authorized to receive cash in payment, by acceptance of a similar act.⁸⁴ A special agent with authority to negotiate corporate notes for cash has no authority to exchange them for bonds of another company.⁸⁵ A traveling salesman has no authority to indorse corporate paper for transfer,⁸⁶ nor to bind the corporation by agreeing to pay a person commissions on a sale to a third person, for assisting the salesman to effect the sale;⁸⁷ and he has very limited powers as to settlements.⁸⁸ An inspector and buyer of lumber cannot agree on behalf of the company to pay commissions to others assisting him to discover lumber.⁸⁹ An agent of a grain company who was its sole representative in buying and selling

⁷⁸ It is immaterial whether he employed the physician to render the services in the first instance. *Reynolds v. Chicago, B. & Q. R. Co.*, 114 Mo. App. 670, 90 S. W. 100.

⁷⁹ *Hornick v. Union Pac. R. Co.*, 85 Kan. 568, 38 L. R. A. (N. S.) 826 with note, Ann. Cas. 1913 A 208, 118 Pac. 60.

⁸⁰ *Bohanan v. Boston & M. R. R.*, 70 N. H. 526, 49 Atl. 103.

⁸¹ *International Life Ins. Co. v. Vaughan*, 114 Ark. 26, 169 S. W. 330.

⁸² *Seymour Dudley Co. v. Arbor Realty Co.* (N. Y. Misc.), 123 N. Y. Supp. 978.

⁸³ *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App.—, 142 S. W. 96.

⁸⁴ *People's Life Ins. Co. v. Kohn*, 100 Ark. 240, 140 S. W. 24.

⁸⁵ *In re Charles R. Partridge Lumber Co.*, 215 Fed. 973.

⁸⁶ *Wickersham Banking Co. v.*

Nicholas, 2 Cal. App. 18, 82 Pac. 1124.

A salesman is without implied authority to indorse the corporate name on negotiable instruments. *Blum Jr.'s Sons v. Whipple* (Mass.), 80 N. E. 501.

That a contract between a corporation and its sales agents provides that the corporation shall take notes for the product sold by its agents, where a local bank quotes the makers of such notes as good, does not clothe such agents with power to bind the corporation by indorsing notes so taken by them. *National Fence Mach. Co. v. Highleyman*, 71 Kan. 347, 80 Pac. 568.

⁸⁷ *Jones v. Keeler*, 40 N. Y. Misc. 221, 81 N. Y. Supp. 648.

⁸⁸ *Frick Co. v. Hoff*, 26 S. D. 360, 128 N. W. 495.

⁸⁹ *Cummer Mfg. Co. of Texas v. First Nat. Bank of Center*, — Tex. Civ. App.—, 173 S. W. 536.

grain has implied power to contract for a report of the proceedings of the interstate commerce commission.⁹⁰

§ 1941. Powers of general solicitor or counsel, and of attorneys. The authority of attorneys to bind a corporation is precisely the same as in the case of natural persons. Unless authorized to do so, an attorney of a corporation cannot bind it by any contract or act beyond the scope of his employment.⁹¹ An attorney of a railroad cannot bind it by employing a physician to attend a person injured on its road.⁹² The general solicitor or counsel of a corporation, in the absence of provision in the charter or by-laws, has no authority to institute and prosecute suits without the sanction of the directors or other proper officer.⁹³ Nor has he any general authority to bind the corporation by contracts. Such an officer is sometimes provided for in the charter or by-laws of a corporation. When this is so, he is not presumed to have authority to make any contracts except in matters relating to his department.⁹⁴ The general counsel or head of the legal department of a railroad company has implied power, it seems, to employ such special or local attorneys as may be necessary.⁹⁵ In any event, the employment of an attorney by the joint authority of the general counsel and the president, who also exercised the duties of superintendent, is to be regarded as the act of the corporation.⁹⁶

§ 1942. When powers terminate. After discharge or termination of his term of office, the powers of a corporate officer or agent are terminated,⁹⁷ subject to the rules relating to de facto officers,⁹⁸ and provided there is no apparent authority thereafter conferred on the ex-officer or agent. Likewise, "when the corporation ceased to carry

⁹⁰ *Law Reporting Co. v. Elwood Grain Co.*, 135 Mo. App. 10, 115 S. W. 475.

⁹¹ See 2 *Mechem, Agency* (2nd Ed.), §§ 2159-2187, and 2 *Clark & Skyles, Agency*, §§ 640-651, as to implied authority of attorneys in general.

⁹² *St. Louis, A. & T. Ry. Co. v. Hoover*, 53 Ark. 377, 13 S. W. 1092.

⁹³ *Des Moines & M. R. Co. v. Chicago & N. W. R. Co.*, 7 Fed. 748.

⁹⁴ *Chicago General Ry. Co. v. Chicago City Ry. Co.*, 62 Ill. App. 502.

⁹⁵ *Dublin & S. W. R. Co. v. Aker-*

man & Akerman, 2 Ga. App. 746, 59 S. E. 10.

⁹⁶ *Dublin & S. W. R. Co. v. Akerman & Akerman*, 2 Ga. App. 746, 59 S. E. 10.

⁹⁷ Where a corporation discharges its manager employed under a contract for a number of years, it seems that the manager is without power thereafter to bind the corporation, whether his discharge be right or wrong. *Maine Products Co. v. Alexander*, 115 N. Y. App. Div. 109, 100 N. Y. Supp. 709.

⁹⁸ See §§ 1833-1852, *supra*.

on its business, all implied power in its officers to bind it by incurring new obligations was at an end.”⁹⁹

§ 1943. Presumptions and burden of proof—In general. Presumptions as to power of agents to act are no different in the case of a corporation's agents than in case of those of an individual.¹ There is no presumption of authority unless the instrument is sealed,² except in a few states, in case of certain officers, as hereinafter noted.³ If an act or contract is not within the inherent powers of a corporate officer or agent, it is necessary to prove his authority, at least where properly put in issue by the pleadings. Ordinarily the burden of proving the power of the officer to make the contract is on the person suing on the contract unless the contract is under seal,⁴ at least if the

⁹⁹ *Lemars Shoe Co. v. Lemars Shoe Mfg. Co.*, 89 Ill. App. 245, 257.

¹ *Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co.*, 223 Ill. 41, 7 L. R. A. (N. S.) 752, 79 N. E. 38, aff'g 123 Ill. App. 430.

² *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580; *Degnan v. Thoroughman*, 88 Mo. App. 62, and see § 1944, *infra*.

³ See §§ 2012-2030, *infra*.

⁴ *California*. *Barney v. Pforr*, 117 Cal. 56, 48 Pac. 987.

Colorado. *Conqueror Gold Mining & Milling Co. v. Ashton*, 39 Colo. 133, 90 Pac. 1124.

Georgia. *Savannah, F. & W. Ry. Co. v. Humphreys*, 114 Ga. 681, 40 S. E. 711.

Illinois. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L. R. A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, rev'g 99 Ill. App. 108.

Louisiana. *Interstate Bank & Trust Co. v. Welsh*, 118 La. 676, 43 So. 274.

Maine. *Peirce v. Morse-Oliver Bldg. Co.*, 94 Me. 406, 47 Atl. 914.

Montana. *Wagner v. St. Peter's Hospital*, 32 Mont. 206, 79 Pac. 1054; *Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co.*, 55 Pac. 112.

New York. *New York Metal Ceiling Co. v. Raub*, 86 N. Y. Supp. 249.

North Carolina. *Greensboro Nat.*

Bank v. Carolina Mut. Life Ins. Co., 159 N. C. 200, 74 S. E. 579.

Evidence is admissible to show that the general agent who made the contract sued on had no authority so to do. *Tres Palacios Rice & Irrigation Co. v. Eidman*, 41 Tex. Civ. App. 542, 93 S. W. 698.

Since the law does not define the authority of either a railroad claim agent or his assistant, limits of the authority of these officials, where in issue, are to be proved as matters of fact. That the conduct of the officials may appear to be without explanation except on the theory that they possessed authority to act for the corporation does not alter the rule. *St. Louis & S. F. R. Co. v. Daugherty*, 72 Kan. 678, 83 Pac. 821.

“It is doubtless true that certain officers of some corporations are clothed with certain powers which, either by the nature of their office or by long-established and universal custom, are a part of the necessary incidents of the office. Instance the cashier of a bank or the general managers in actual charge of corporations such as mercantile concerns. In such cases, proof of the character of the corporation, the office and the official act by which the corporation is sought to be bound (if within the customary

authority of an officer to sign the instrument sued on is denied by the plea.⁵ Thus, the burden of showing the authority of individual officers to act for the corporation in making a deed, where the deed is not under seal nor acknowledged by the corporation as required by law, is on the grantee or those claiming under him.⁶ To the contrary, however, it is held in a federal decision that the signatures of corporate officers to promissory notes "are presumptive evidence of their authority to make negotiable paper on its behalf."⁷ It will not be presumed, in the absence of any evidence, that a general agent made a contract to sell corporate products for future delivery, without authority.⁸

But it is held that where an instrument is offered in evidence without objection, the presumption is, in the absence of evidence to the contrary, that the officer who signed it was authorized to do so.⁹ And in some states, in an action upon a contract executed in the name of the corporation by its officers, it is held that "unless the lack of" authority of the officers to act "is affirmatively shown on the face of the complaint, declaration or bill, or unless it be matter of judicial knowledge that such officers have no such capacity or authority to bind the corporation," the burden of proof as to authority is on the defendant corporation.¹⁰ So, in Wisconsin, where a deed is executed in the manner prescribed by statute, the presumption is that its officers who signed it were duly authorized to make it.¹¹

Of course, if the authority of the officer to make the contract sued on is shown, the burden of disproving such authority shifts to the corporation.¹²

powers of such officers), is sufficient, at least prima facie, to establish the official act as that of the corporation." *Tres Palacios Rice & Irrigation Co. v. Eidman*, 41 Tex. Civ. App. 542, 93 S. W. 698.

⁵ *Dreeben v. First Nat. Bank of McKinney* (Tex.), 99 S. W. 850.

An admission that a deed purporting to be that of a corporation was duly executed, necessarily implies, it has been held, "that the natural person or persons who assumed to execute it in behalf of the corporation had due authority for that purpose." *Woronieki v. Pariskiego*, 74 Conn. 224, 226, 50 Atl. 562.

⁶ *Lyons & E. P. Toll Road Co. v.*

People, 29 Colo. 434, 438, 68 Pac. 275.

⁷ *National Loan & Investment Co. v. Rockland Co.*, 94 Fed. 335, 336, where note was signed by vice president and by one who was secretary and treasurer.

⁸ *Walnut Ridge Mercantile Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413.

⁹ *Eastern Texas Traction Co. v. Harrison*, — Tex. Civ. App. —, 189 S. W. 302.

¹⁰ *Perryman & Co. v. Farmers' Union Ginning & Manufacturing Co.*, 167 Ala. 414, 52 So. 644.

¹¹ *Marvin v. Anderson*, 111 Wis. 387, 87 N. W. 226, where nothing is said as to seal.

¹² *Karsch v. Pottier & Stymus*

If an assignee of a contract sues the corporation on it, the burden of showing want of authority to make the assignment is on the corporation.¹³

It will be presumed that payments of interest made annually, by the president of a corporation, on a debt due by the company, are made by the corporation, with corporation funds, and not by the president in his individual capacity.¹⁴

It is often stated that the general manager or the president of a corporation, will or will not be presumed to have power to do certain things; but these presumptions apply only to the particular officer.¹⁵

§ 1944. — Presumptions from seal. The authority of an officer of a corporation to execute an instrument is presumed where the instrument is under seal,¹⁶ although this presumption of authority is rebut-

Manufacturing & Improvement Co., 82 N. Y. App. Div. 230, 81 N. Y. Supp. 782.

¹³ *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260.

¹⁴ *Canal Bank & Trust Co. v. Bank of Ascension*, 140 La. 465, 73 So. 269.

¹⁵ See §§ 2006 et seq., *infra*.

¹⁶ *United States. Kirkpatrick v. Eastern Milling & Export Co.*, 135 Fed. 144.

Alabama. *Collier v. Alexander*, 142 Ala. 422, 38 So. 244.

Arkansas. *Sibly v. England*, 90 Ark. 420, 119 S. W. 820.

California. *Chandler v. Hart*, 161 Cal. 405, Ann. Cas. 1913 B 1094, 119 Pac. 516; *J. S. Potts Drug Co. v. Benedict*, 156 Cal. 322, 25 L. R. A. (N. S.) 609, 104 Pac. 432; *Mills v. Boyle Min. Co.*, 132 Cal. 95, 64 Pac. 122; *Greve v. Echo Oil Co.*, 8 Cal. App. 275, 96 Pac. 904.

Colorado. *Sargent v. Chapman*, 12 Colo. App. 529, 56 Pac. 194, where execution and delivery not denied.

Georgia. *Augusta Land Co. v. Augusta Ry. & Elec. Co.*, 140 Ga. 519, 79 S. E. 138; *Cannon v. Gorham*, 136 Ga. 167, Ann. Cas. 1912 C 39, 71 S. E. 142; *Taylor v. Hartsfield*, 134 Ga. 478,

68 S. E. 70; *Nelson v. Spence*, 129 Ga. 35, 58 S. E. 697.

Illinois. *West Side Auction House Co. v. Connecticut Mut. Ins. Co.*, 85 Ill. App. 497, aff'd 186 Ill. 156, 57 N. E. 839.

Indiana. *Ellison v. Banstrator*, 153 Ind. 146, 54 N. E. 433.

Iowa. *Wisconsin Lumber Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 69 L. R. A. 968, 109 Am. St. Rep. 387, 101 N. W. 742.

Massachusetts. *Stauffer v. Koch*, 225 Mass. 525, 114 N. E. 750.

Michigan. *Gray v. Waldron*, 101 Mich. 612, 60 N. W. 288.

Missouri. *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316.

Nebraska. *Wilson v. Neu*, 1 Neb. (Unoff.) 42, 95 N. W. 502.

New Hampshire. *Flint v. Clinton Co.*, 12 N. H. 430.

New Jersey. *In re West Jersey Traction Co.*, 59 N. J. Eq. 63, 45 Atl. 282.

New York. *Whitney v. Union Trust Co.*, 65 N. Y. 576.

North Carolina. *Clark v. Hodge*, 116 N. C. 761, 21 S. E. 562.

Pennsylvania. *Little Sawmill Val. Turnpike or Plank-Road Co. v. Federal St. & P. V. Passenger Ry. Co.*,

table;¹⁷ and a seal is presumably authorized until the contrary is shown.¹⁸ But no such presumption arises where merely the letters "L. S.," inclosed in brackets, were used instead of the corporate seal, and the instrument does not recite that it is a sealed instrument.¹⁹

§ 1945. Question of power as one of law or fact. Generally, the authority of an officer or agent of a corporation to make a contract is a question of fact for the jury,²⁰ especially where the question is

194 Pa. St. 144, 45 Atl. 66; Tucker v. Erie & N. E. R. Co., 27 Pa. St. 281.

Tennessee. Levering & Carnecross v. Memphis, 7 Humph. 553.

Texas. Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562, 54 S. W. 381.

Washington. Milton v. Crawford, 65 Wash. 145, 118 Pac. 32.

West Virginia. Lathrop v. Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299; Deepwater Council v. Renick, 59 W. Va. 343, 53 S. E. 552.

Wisconsin. Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115.

Rule applied to assignment of cause of action. Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562, 54 S. W. 381.

In Maine, however, the contrary is held. The court said: "We can see no reason why the presence of a corporate seal, which does not appear to have been affixed by one having authority, or by a proper official in the general line of his authority, should be even prima facie evidence that a contract, signed and sealed by a person who, so far as the case shows, had no authority to make or execute this or such a contract, was the contract of the corporation." Morrison v. Wilder Gas Co., 91 Me. 492, 497, 64 Am. St. Rep. 257, 40 Atl. 542.

¹⁷ Blakely Artesian Ice Co. v. Clarke, 13 Ga. App. 574, 79 S. E. 526; Adams v. His Creditors, 14 La.

454; Beach v. Palisade Realty & Amusement Co., 86 N. J. L. 238, 90 Atl. 1118.

¹⁸ McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260.

¹⁹ Bank of Garfield v. Clark, 138 Ga. 798, 76 S. E. 95.

²⁰ **United States.** Monarch Electric & Wire Co. v. National Conduit & Cable Co., 138 Fed. 18.

Michigan. Lake-Ulricksen Co. v. Grand Lodge I. O. O. F., 182 Mich. 653, 148 N. W. 688.

Missouri. Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456.

New York. First Nat. Bank of Binghamton v. Commercial Travelers' Ass'n of America, 108 App. Div. 78, 95 N. Y. Supp. 454; Conant v. American Rubber-Tire Co., 48 App. Div. 327, 62 N. Y. Supp. 972.

Pennsylvania. Wax v. Roydhouse Arey Co., 59 Pa. Super. Ct. 142.

Whether or not a contract of employment made by a corporate officer professedly on behalf of the corporation was duly authorized is to be determined by the jury where the facts are in dispute. Julius Kessler & Co. v. Ellis, 27 Ky. L. Rep. 1042, 87 S. W. 798.

Whether a medical examiner for a corporation has been intrusted with authority to employ another in connection with his duties held for the jury. Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456.

whether an act is within the apparent authority of an officer.²¹ For instance, where there are no directors, but the functions normally pertaining to a board of directors are performed by the stockholders themselves, and the president is allowed to run the company, it is a question for the jury whether his apparent authority included the making of a certain contract.²² If the evidence as to the powers of an officer is not so clear that the court can say there is no dispute as to the material facts, or that different men might not honestly draw different conclusions or inferences from such facts, the question is one for the jury.²³ On the other hand, if the authority of an officer depends upon the construction of the articles of incorporation or the by-laws, the question is one of law for the court.²⁴

Whether there is evidence sufficient to go to the jury upon the question of the authority of the officer making or executing the contract sued on, depends, of course, upon the facts shown in the particular case.²⁵

§ 1946. Who may urge want of power—In general. If an officer or agent acts beyond the scope of his actual or apparent powers, the corporation is not bound and may urge the want of power, unless it has ratified the act. If the corporation does not set up want of authority on the part of an officer or agent to bind it by a contract, and does not ratify the contract, the other party thereto cannot raise the objection for the purpose of avoiding the contract.²⁶ So the maker of a note to a corporation, when sued by an indorsee, cannot set up want of authority on the part of the officer of the corporation who transferred and indorsed the note, where the corporation has acquiesced.²⁷ One who sells and delivers property to the president of a corporation without obtaining the price which was a condition precedent, and who thereafter gives a lease of the property to the corporation, cannot attack the authority of the president to act for the corpora-

²¹ *Roe Rice & Land Co. v. Strobhart*, 123 Ark. 146, 184 S. W. 461; *C. L. Kraft Co. v. Grubbs*, 116 Ark. 520, 174 S. W. 245; *Jacobus v. Jamestown Mantel Co.*, 149 N. Y. App. Div. 356, 134 N. Y. Supp. 418; *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736.

²² *Murphy v. W. H. & F. W. Cane, Inc.*, 82 N. J. L. 557, Ann. Cas. 1913 D 643, 82 Atl. 854.

²³ *Western Investment & Land Co. v. First National Bank of Denver*, 23 Colo. App. 143, 128 Pac. 476.

²⁴ *Groeltz v. Armstrong Real Estate Co.*, 115 Iowa 602, 89 N. W. 21.

²⁵ See *New York & P. Coal & Coke Co. v. Meyersdale Coal Co.*, 217 Fed. 747.

²⁶ *Kennedy v. Knight*, 21 Wis. 340, 94 Am. Dec. 543.

²⁷ *Marbourg v. H. Lloyd, Son & Co.*, 21 Kan. 545.

tion and at the same time claim title to the property on account of the transactions with him.²⁸

§ 1947. — Third persons. As a general rule, if a corporation does not raise the objection that an officer or other person assuming to enter into a contract or do any other act on its behalf, and particularly where it has ratified the act, the objection of want of authority cannot be raised by third persons.²⁹ Thus, a creditor of a person who transfers property to a corporation in payment of its claim cannot complain that the officer receiving the transfer was without authority.³⁰ So the acceptance of an assignment of wages by an employee of a corporation without authority is valid as to third persons until repudiated by the company.³¹ Moreover, as already stated, the general rule is that only the stockholders, or the stockholders and the corporation, can question the validity of a corporate act or instrument on the ground that the required consent of stockholders was not obtained or that the consent was not a valid one because not given as provided for by the statute or charter.³²

§ 1948. — Receiver or creditors. As a rule, the receiver of a corporation and its creditors, in attacking unauthorized transactions by the officers of the corporation, stand in its shoes, and are estopped if it is estopped, provided there is no fraud as against them. Neither the receiver of a corporation nor its creditors can set up want of authority on the part of an officer to borrow money for the corporation, for the purpose of attacking the security given therefor, where the creditors and the corporation have received the benefit of the trans-

²⁸ *Sprague Canning Machinery Co. v. Fuller*, 158 Fed. 588.

²⁹ *United States. Kansas City Hay-Press Co. v. Devol*, 81 Fed. 726, rev'd on other grounds 84 Fed. 463.

California. Chandler v. Hart, 161 Cal. 405, Ann. Cas. 1913 B 1094, 119 Pac. 516; *Oakland Paving Co. v. Rier*, 52 Cal. 270.

Massachusetts. Shawmut Commercial Paper Co. v. Auerbach, 214 Mass. 363, 101 N. E. 1000.

Mississippi. Sells v. Rosedale Grocery & Commission Co., 72 Miss. 590, 17 So. 236.

New Hampshire. O'Neil v. Dunn, 63 N. H. 393.

New York. Eno v. Crooke, 10 N.

Y. 60; *Nelson v. Edwards*, 40 Barb. 279; *Butterfield v. Spencer*, 1 Bosw. 1; *Belden v. Meeker*, 2 Lans. 470.

Pennsylvania. Heidrick v. Pittsburgh, S. & C. R. Co., 239 Pa. 29, 86 Atl. 527.

Wisconsin. Germantown Farmers' Mut. Ins. Co. v. Dhein, 43 Wis. 420, 28 Am. Rep. 549; *Kennedy v. Knight*, 21 Wis. 340, 94 Am. Dec. 543.

But see *Trent v. Sherlock*, 26 Mont. 85, 66 Pac. 700, modifying 24 Mont. 255, 61 Pac. 650.

³⁰ *First Nat. Bank of Latrobe v. Garretson*, 107 Iowa 196, 77 N. W. 856.

³¹ *O'Neil v. Dunn*, 63 N. H. 393.

³² See § 1946, *supra*.

action.³³ Creditors of a corporation cannot attack conveyances by it for want of authority on the part of the officers executing them, where the stockholders do not object, and the conveyances have been ratified by the directors.³⁴

§ 1949. — Officer or agent who performs act. An officer or agent of a corporation who assumes authority to act for it, and enter into contracts or do other acts in its name, is individually estopped to deny that he was authorized to act.³⁵

§ 1950. Want of authority as cured by ratification or estoppel. The importance of determining whether an officer or agent acted within his authority is often eliminated by the fact that the corporation by its acts has ratified the act or is estopped to set up the want of authority.³⁶

XII. DELEGATION OF AUTHORITY BY DIRECTORS OR OTHER OFFICERS OR AGENTS

§ 1951. General rule. It is a general principle of the law of agency that, in the absence of express or implied authority, the trust delegated by a principal to his agent cannot be delegated by the latter, particularly when the performance of the agency involves the exercise of judgment or discretion. The maxim is, *delegatus non potest delegare*. This principle applies to agents of corporations, as well as of natural persons, although not to the same extent. From the necessities of the case and usage, authority on the part of officers and agents of corporations to appoint subordinate agents and delegate authority to them, is often implied, when it would not be implied if the principal were a natural person.

§ 1952. Delegation of authority by directors or trustees—General rule. In some of the textbooks and cases it has been said that the directors or trustees of a corporation, intrusted generally with the supervision and management of the concerns of the corporation, and the performance of whose duties involves the exercise of discretion and judgment, cannot delegate their powers;³⁷ but this is far from

³³ *Brower v. Brooklyn Trust Co.*, 66 Hun (N. Y.) 631, 21 N. Y. Supp. 324.

³⁴ *Sells v. Rosedale Grocery & Commission Co.*, 72 Miss. 590, 17 So. 236.

³⁵ *Simons v. Steele*, 36 N. H. 73; *Moss v. Averell*, 10 N. Y. 449; *Brown*

v. Torrey, 10 Jones & S. (N. Y.) 1; *Kinkler v. Junica*, 84 Tex. 116; *Witter v. Grand Rapids Flouring-Mill Co.*, 78 Wis. 543, 47 N. W. 729.

³⁶ See *infra*, this chapter.

³⁷ *Farmers' Mut. Fire Ins. Co. v.*

true. The doctrine that an agent cannot delegate his powers does not apply where he is authorized to do so, either expressly or impliedly. The directors or trustees of a corporation, therefore, can certainly delegate authority to act for and represent the corporation to subordinate officers and agents, even in matters involving the exercise of judgment and discretion, when they are expressly authorized to do so by appointment of committees and subordinate officers and agents.³⁸ Thus the articles of incorporation, or the general statutes often provide that the board of directors may delegate to an executive committee the power to do any and all acts which the board is authorized to do, except such acts as by law, or by the by-laws, must be done by the board itself. And even in the absence of express authority, an authority to delegate powers to a large extent must be implied from necessity and usage, for the directors or trustees cannot attend to all the details and current business of the corporation, and it is not customary for them to do so. Where the charter, general law or a by-law vests the general superintendence and control and active management of all the concerns of a corporation in a board of directors or trustees, as is generally the case in business corporations, the board constitutes, to all purposes of dealing with others, the corporation, and does not, at least in the general management of the corporate business, exercise a delegated authority in the sense of the rule prohibiting delegation of authority by an agent;³⁹ and it has been held,

Chase, 56 N. H. 341; Gillis v. Bailey, 21 N. H. 149; Silver Hook Road v. Greene, 12 R. I. 164.

Directors or corporate managers may vest in a committee of their own number or in an individual the performance of duties which are merely ministerial. They may not, however, delegate discretionary powers to a subcommittee or an agent. First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454.

³⁸ The directors may be expressly authorized by the charter or general law, or by the by-laws if not inconsistent therewith, to delegate their powers to an executive committee or other agents, and they may thus have authority to delegate their full powers. Union Pac. R. Co. v. Chicago, R. I. &

P. R. Co., 163 U. S. 564, 41 L. Ed. 265, 51 Fed. 309. See also Harris' Case, 7 Ch. App. 587.

Under a statute providing that the business of a manufacturing corporation shall be carried on by trustees or directors, but that they may appoint such subordinate officers and agents as the conduct of the business may require, the trustees or directors of a corporation owning electric light patents and manufacturing electrical supplies are authorized to appoint an executive committee of their own number to contract with companies in different states for the exclusive use of its lights and dynamos in such states. Sheridan Elec. Light Co. v. Chatham Nat. Bank, 127 N. Y. 517, 28 N. E. 467.

³⁹ Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Jones

therefore, that it has authority, acting as and for the corporation, to delegate to subordinate officers or agents or to a committee of its own number, the power to perform any act, in the course of the business of the corporation, which can itself legally perform, although the performance of the act may involve the exercise of the highest judgment and discretion.⁴⁰ The board of directors can exercise its plenary power by delegating its authority as to certain transactions or classes of transactions to its president or other executive officers, as well as by direct authorization of a particular transaction by express resolution to that effect.⁴¹ So authority may in effect be delegated by a consent implied by law from a course of conduct permitted and recognized by its governing body.⁴² A mortgage executed by officers of a corporation as authorized by the directors named in the articles of incorporation is valid, although the statute requires corporate powers to be exercised by a board of directors "to be elected" from the stockholders.⁴³ "The principle that a board of directors is the depository of discretionary powers to be exercised by the board itself and not to be delegated by it to any smaller body even of its own members," said the court in a Vermont case, "is entirely consistent with the other principle that it may delegate authority to perform such duties as are required in the usual and ordinary course of its business."⁴⁴ In a Missouri case it was said: "The directors have the power, without statutory authority, to delegate to officers, agents or executive committees the power to transact, not only ordinary and routine business, but business requiring the highest degree of judgment and discretion. Thus authority to manage the business

v. Williams, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486; Hoyt v. Thompson's Ex'r, 19 N. Y. 207.

⁴⁰ Hoyt v. Thompson's Ex'r, 19 N. Y. 207; Burden v. Burden, 8 N. Y. App. Div. 160, 40 N. Y. Supp. 499, aff'd 159 N. Y. 287, 54 N. E. 17.

The board of directors may delegate to an agent the power to make contracts. Ney v. Eastern Iowa Tel. Co., 162 Iowa 525, 144 N. W. 383.

The board of directors may appoint an executive committee who may act for and in behalf of the corporation within the limits of the power delegated. Canada-Atlantic & Plant S. S. Co., Ltd. v. Flanders, 145 Fed. 875.

The making of a contract of employment may be delegated by the directors to an executive committee. Young v. Canada, A. & P. S. S. Co., 211 Mass. 453, 97 N. E. 1098.

Delegation of powers to bank officers, see also Morse, Banks and Banking (5th Ed.), §§ 116, 117.

⁴¹ Salem Iron Co. v. Lake Superior Consol. Iron Mines, 112 Fed. 239.

⁴² Salem Iron Co. v. Lake Superior Consol. Iron Mines, 112 Fed. 239.

⁴³ Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

⁴⁴ John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co., 76 Vt. 131, 56 Atl. 530.

of railroad corporations, insurance companies, banking institutions and other corporations having large and complicated business interests, is, usually, delegated by the directors to agents, often, but not necessarily, officers of the corporation. These agents, or managing officers, have incidental power to employ all assistants and to do all acts necessary to properly conduct the business over which they are given charge. Formal action of the board of directors is not necessary in order to confer the authority. The power expressly given by statute to the board of directors 'to appoint such subordinate officers and agents as the business of the corporation may require,' does not limit or diminish the common-law power to delegate authority. The directors represent the impersonal corporation completely, in the business it is authorized to transact, and have the power to do, or cause to be done, whatever they as individuals could do if the business were their own. They act as the corporation itself, as well as under a delegated authority from it."⁴⁵

Thus, they may appoint officers or agents as general managers of the business, or of particular parts of it, or authorize agents to sell and convey or mortgage property, or buy property, or make contracts, etc.⁴⁶

⁴⁵ *Jones v. Williams*, 139 Mo. 1, 25, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486.

⁴⁶ *Illinois*. *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621.

Maine. *Stevens v. Hill*, 29 Me. 133.

Maryland. *Merrick v. Bank of Metropolis*, 8 Gill 59.

Massachusetts. *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 13 L. R. A. 559, 28 N. E. 245; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Burrill v. Nahant Bank*, 2 Metc. 163, 35 Am. Dec. 395.

Missouri. *Jones v. Williams*, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486; *Kitchen v. Cape Girardeau & S. L. R. Co.*, 59 Mo. 514; *Western Bank v. Gilstrap*, 45 Mo. 419.

New Hampshire. *Manchester & L. R. Co. v. Fisk*, 33 N. H. 297.

New Jersey. *Metropolitan Telephone & Telegraph Co. v. Domestic*

Telegraph & Telephone Co., 43 N. J. Eq. 626, 14 Atl. 908.

New York. *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; *Burden v. Burden*, 8 App. Div. 160, 40 N. Y. Supp. 499, aff'd 159 N. Y. 287, 54 N. E. 17; *Prindle v. Washington Life Ins. Co.*, 73 Hun. 448, 26 N. Y. Supp. 474.

Pennsylvania. *Ridgway v. Farmers' Bank of Bucks County*, 12 Serg. & R. 256, 14 Am. Dec. 681.

Utah. *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah 265, 1 Pac. 356.

Where the directors are authorized to assign securities belonging to the company, they may authorize an officer or one of their number to assign them. *Stevens v. Hill*, 29 Me. 133; *Northampton Bank v. Pepoon*, 11 Mass. 288.

When the directors are vested with general and full power to manage all the concerns of the corporation, they may delegate to a committee of their own number an authority to alienate

On the other hand, it has been held that, conceding a board of directors may, for the term of its own existence, delegate comprehensive powers, such delegation cannot be made beyond call for a period extending long beyond the terms of the directors.⁴⁷

§ 1953. — Power to delegate entire control. There is a limit, however, even to the power of the directors or trustees to delegate authority. As their authority to delegate is implied from the necessities in the management of the corporation, and from usage, so, also, it is limited by the same considerations. They cannot delegate entire supervision and control of the corporation to others, unless expressly authorized, for this is not only unnecessary and contrary to usage, but it is inconsistent with the charter or law which requires that they shall have general supervision and control of the corporation.⁴⁸ Thus, it has been held that the board of directors cannot delegate its powers "to any officers or men, however capable, or however high their standard for integrity and honesty may be," although they are majority stockholders.⁴⁹ Whether the board of directors may delegate all its powers to an executive committee is questionable.⁵⁰

§ 1954. — Power to delegate authority vested exclusively in themselves. The board of directors cannot delegate to subordinate officers or agents the exercise of discretionary powers which by the

or incumber the real estate of the company, and to execute proper instruments and affix the corporate seal for the purpose. *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395.

The directors of a railroad company may delegate to agents the power to fix rates. *Manchester & L. R. Co. v. Fisk*, 33 N. H. 297.

The directors of a bank have power to appoint a cashier, vesting him with the powers usually pertaining to that office. *Mason v. Moore*, 73 Ohio St. 275, 296, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, 76 N. E. 932.

Directors may, by resolution, authorize the president to execute notes on behalf of the company. *McCormick v. Stockton & T. C. R. Co.*, 130 Cal. 100, 62 Pac. 267.

⁴⁷ *Shaw v. Bankers' Nat. Life Ins. Co.*, — Ind. App. —, 112 N. E. 16.

⁴⁸ *Tempel v. Dodge*, 89 Tex. 69, 33 S. W. 222, 32 S. W. 514; *Flagstaff Silver Min. Co. v. Patrick*, 2 Utah 304; *Davis v. Flagstaff Silver Min. Co.*, 2 Utah 74.

The directors cannot surrender or delegate the entire management and control of the corporate business to a creditor, to be exercised until payment of his claim. *Davis v. Flagstaff Silver Min. Co.*, and *Flagstaff Silver Min. Co. v. Patrick*, *supra*.

⁴⁹ *Ames v. Goldfield Merger Mines Co.*, 227 Fed. 292, 302.

⁵⁰ See *Canada-Atlantic & Plant S. S. Co., Ltd. v. Flanders*, 145 Fed. 875, 879.

charter, general laws, by-laws, vote of the stockholders or usage is vested exclusively in the board.⁵¹ Thus, where the charter of a bank expressly requires that all discounts shall be made by the board of directors, the board cannot delegate authority to make discounts to the president or cashier;⁵² and, even where there is no such charter provision, it is held that "the discounting of commercial paper is a function of the directors of a bank and cannot be delegated to a single officer."⁵³ And it has been held that a by-law of a corporation, providing that the directors shall exercise general control over the affairs of the company, and have power to sell its lands and tenements on such terms and conditions as they may deem advantageous to the company, does not authorize them to delegate to another, as their agent and attorney, authority to lease lands of the company on such terms and conditions as he may deem proper.⁵⁴ Where the charter or general law vests the power to make calls or assessments on stock in the board of directors, it cannot delegate the power to a subordinate officer or agent or to a committee of its own number.⁵⁵ And when the charter empowers the directors to order the treasurer to sell shares for nonpayment of assessments, they cannot delegate this power by appointing the president and treasurer a committee to collect ar-

⁵¹ **California.** *Bliss v. Kaweah Canal & Irrigation Co.*, 65 Cal. 502, 4 Pac. 507.

Louisiana. *Percy v. Millaudon*, 3 La. 568, 8 Mart. (N. S.) 68; *Bright v. Metairie Cemetery Ass'n*, 33 La. Ann. 58.

New Hampshire. *Gillis v. Bailey*, 21 N. H. 149.

Vermont. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

England. *Cartmell's Case*, 9 Ch. App. 691; *Howard's Case*, 1 Ch. App. 561.

That the power to locate the route of a railroad company cannot be delegated by the directors, see *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615.

⁵² *Percy v. Millaudon*, 3 La. 568, 8 Mart. (N. S.) 68. See also *Morse, Banks and Banking* (5th Ed.), § 117.

⁵³ *Mutual Trust Co. v. Stern*, 235 Pa. 202, 204, 83 Atl. 614. See also

Bank of United States v. Dunn, 31 U. S. 51, 8 L. Ed. 316; *Stewart v. Huntingdon Bank*, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628.

⁵⁴ *Gillis v. Bailey*, 21 N. H. 149.

⁵⁵ **Illinois.** *Banet v. Alton & S. R. Co.*, 13 Ill. 504.

Maine. *Pike v. Bangor & C. Shore Line R. Co.*, 68 Me. 445; *Monmouth Mut. Fire Ins. Co. v. Lowell*, 59 Me. 504.

New Hampshire. *Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341.

Rhode Island. *Silver Hook Road v. Greene*, 12 R. I. 164.

Vermont. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

Where a statute directs that assessments in a mutual fire insurance company shall be levied by the directors, the company cannot delegate the authority to its secretary. *Farmers' Mill Co. v. Mill Owners' Mut. Fire Ins. Co.*, 127 Iowa 314, 103 N. W. 207.

rearages and enforce collections of assessments by sales or otherwise.⁵⁶ Nor can the directors or trustees delegate the power to declare dividends.⁵⁷ On the other hand, it has been held that directors, so far as creditors are concerned, have the right to commit to the president or other officer the entire management and discretion in regard to unpaid subscriptions to stock, since the directors are trustees for the stockholders but not for the creditors of the corporation.⁵⁸

§ 1955. — Power to delegate particular authority specially conferred on directors. Where special power is conferred upon the board of directors, as by a resolution of the stockholders or members of the corporation, it would seem that any discretion connected therewith cannot be delegated by the board to its executive committee, but there is no doubt that merely ministerial duties connected therewith may be so delegated.⁵⁹ Thus, it is held that "when the words thus expressly point to a particular duty to be performed by the directors, and not to general business or a class of duties, we think the fair intent of the law is that they should act as a body in regard to the particular matter, and not delegate their discretion or duty to a sub-committee."⁶⁰

§ 1956. — Ministerial acts. Directors may unquestionably delegate purely ministerial duties to a particular individual or to a portion of their own number.⁶¹ Whatever may be the rule as to discretionary acts, it is settled beyond controversy that, when the directors or trustees have been specially vested with discretionary power, and have exercised their discretion to the extent of determining upon certain action, they may authorize an agent or a committee of their own

⁵⁶ York & C. R. Co. v. Ritchie, 40 Me. 425.

⁵⁷ Gratz v. Redd, 4 B. Mon. (Ky.) 186.

⁵⁸ Hall & Farley v. Alabama Terminal & Improvement Co., 173 Ala. 398, 56 So. 235.

⁵⁹ First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd without opinion in 185 N. Y. 575, 78 N. E. 1103.

When the stockholders confer on the directors discretionary power to dispose of the corporate power, they cannot delegate the exercise of their

discretion in the matter, although they may delegate the performance of ministerial duties in connection with a sale made or authorized by themselves. Patterson v. Portland Smelting Works, 35 Ore. 96, 56 Pac. 407.

⁶⁰ Rutland & B. R. Co. v. Thrall, 35 Vt. 536, 554.

⁶¹ First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454.

Ministerial duties may be delegated to an executive committee. Young v. Schenck, 64 Wash. 90, 116 Pac. 588.

number to perform the ministerial duties necessary to carry their resolution into effect. Thus, the directors or trustees, after they have met and determined to execute notes or bonds, or make any other contract, or to execute a conveyance, mortgage, or assignment for the benefit of creditors, may direct or authorize an agent or committee to execute the contract, conveyance or mortgage, and affix the seal of the corporation.⁶²

§ 1957. — Necessity for formal vote to delegate authority. There need be no formal vote of the directors in order to confer authority on officers or agents to perform acts in the ordinary course of business.⁶³ And failure to enter in the minutes of the board of directors the resolution authorizing an officer to execute a mortgage does not affect its validity.⁶⁴

§ 1958. — Ratification. When a contract is made or other act done for a corporation by a person acting without authority, the directors may ratify his act and render it binding, if it is an act which they could have authorized. This involves no delegation of their powers.⁶⁵ Thus, where the charter of a river improvement company required the tolls for driving logs to be fixed by the directors, and they were fixed by an executive committee, and then ratified by the directors, it was held sufficient.⁶⁶ So while the directors cannot delegate their power to make calls or assessments on stock, yet if the power is exercised by others, and their act is afterwards adopted or ratified by the directors, it becomes in effect the act of the latter.⁶⁷

§ 1959. Delegation of authority by executive committee. It seems that since an executive committee of the board of directors can act

⁶² **United States.** *Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135.

Massachusetts. *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Northampton Bank v. Pepoon*, 11 Mass. 288.

Oregon. *Patterson v. Portland Smelting Works*, 35 Ore. 96, 56 Pac. 407.

Utah. *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah 265, 1 Pac. 356.

Vermont. *Arms v. Conant*, 36 Vt. 744.

⁶³ *National State Bank of Terre*

Haute v. Sandford Fork & Tool Co., 157 Ind. 10, 60 N. E. 699; *H. C. Jaquith Co. v. Shumway's Estate*, 80 Vt. 556, 69 Atl. 157.

⁶⁴ *Meridian Fertilizer Factory v. Wright*, 136 La. 926, 67 So. 967.

⁶⁵ *Burrill v. Nahant Bank, 2 Mete. (Mass.)* 163, 35 Am. Dec. 395; *Black River Improvement Co. v. Holway*, 85 Wis. 344, 55 N. W. 418.

⁶⁶ *Black River Improvement Co. v. Holway*, 85 Wis. 344, 55 N. W. 418.

⁶⁷ See § 673, *supra*.

only as a board,⁶⁸ it cannot delegate all or a part of its powers to a member of the committee.⁶⁹ Thus, where power to make contracts with general agents is delegated to an executive committee, it cannot delegate its authority to one of their number.⁷⁰

§ 1960. Delegation of authority by officers and agents other than directors. Whether or not officers and agents of a corporation other than the directors can delegate powers to other agents depends upon whether authority to do so has been expressly conferred or can be implied. The president of a corporation, or any other officer or agent who has been intrusted by the charter or by the stockholders or directors, with general authority to manage the business of the corporation, undoubtedly has the implied power to appoint usual and necessary subordinate agents to act under his supervision and control, although their acts may involve the exercise of judgment and discretion.⁷¹ Thus, the president of a corporation has power to delegate to an employee of the company the doing of a ministerial act which the president himself was empowered or authorized to do.⁷² So a general agent of a corporation may delegate to another his authority to purchase supplies for the corporation.⁷³ And a corporation will become bound on an instrument where the corporate seal is attached thereto by a third party to whom the president has intrusted that

⁶⁸ See § 2005, *infra*.

⁶⁹ *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Young v. United States Mortgage & Trust Co.*, 156 N. Y. App. Div. 515, 141 N. Y. Supp. 364; *Caldwell v. Mutual Reserve Fund Life Ass'n*, 53 N. Y. App. Div. 245, 65 N. Y. Supp. 826.

⁷⁰ Where the charter of a life insurance company required its business to be conducted by a board of twelve directors, and all corporate powers were vested in such board, and the board was required to choose three of its members to act as an executive committee, which committee was given authority to determine all salaries and to make contracts with general agents, etc., it was held that the committee could not delegate to one of their number discretionary power to make a contract on behalf of the company with a person

as general manager of a department. *Caldwell v. Mutual Reserve Fund Life Ass'n*, 53 N. Y. App. Div. 245, 65 N. Y. Supp. 826.

⁷¹ *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573. See also § 2036, *infra*.

The son of the president can of course not act for his father in ratifying the act of another corporate officer. *Dreeben v. First Nat. Bank of McKinney (Tex.)*, 99 S. W. 850.

⁷² *Bijur Motor Lighting Co. v. Eclipse Mach. Co.*, 237 Fed. 89, 95.

⁷³ *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573. And see *Union Pac., D. & G. Ry. Co. v. McCarty*, 3 Colo. App. 530, 34 Pac. 767.

function.⁷⁴ So a corporation may be bound by the act of a subordinate agent, acting under authority of a general agent, in settling a claim against the corporation.⁷⁵ An officer or agent, however, has no authority to delegate special powers conferred upon him, and which involve the exercise of judgment or discretion, unless he is expressly authorized to do so, or unless the circumstances are such that the authority is necessarily implied.⁷⁶ Thus, it has been held that a general agent of a corporation, who has been given special authority by the stockholders or board of directors to execute negotiable instruments on behalf of the corporation, cannot, unless authorized to do so, delegate such power to a subordinate agent.⁷⁷ So the treasurer of a corporation, having authority from the board of directors or stockholders to pay debts of the corporation, cannot delegate such authority to another.⁷⁸ And, unless a corporation gives its express or implied consent, one authorized by the corporation to act for it in all matters pertaining to the insurance of its property, embracing the determination of rates and the acceptance of insurance policies, is without power to pass his delegated authority to a third person.⁷⁹

XIII. POWERS OF DIRECTORS

§ 1961. General rules. The peculiar relation directors "bear to the corporation and the owners of its stock grows out of the inability of the corporation to act except through such managing officers and agents. The corporation is the owner of the property, but the directors in the performance of their duty possess it, and act in every way as if they owned it."⁸⁰ In determining the powers of a board of directors, the first matter to be considered is whether such powers are defined or limited by a general statute, the charter or by-laws.⁸¹

⁷⁴ *Uvalde Asphalt Pav. Co. v. New York*, 99 N. Y. App. Div. 327, 91 N. Y. Supp. 131.

⁷⁵ *Russell & Co. v. Stevenson*, 34 Wash. 166, 75 Pac. 627.

⁷⁶ *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Trent v. Sherlock*, 24 Mont. 255, 61 Pac. 650.

The president of a corporation cannot delegate any discretion he has as such officer, but he may authorize another to retain an attorney in behalf of the company. *Clay v. Brown*, 148 Mo. App. 541, 128 S. W. 803.

⁷⁷ *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66.

⁷⁸ *Middletown & H. Turnpike Road v. Watson*, 1 Rawle (Pa.) 330.

⁷⁹ *Insurance Co. of North America v. Wisconsin Cent. R. Co.*, 134 Fed. 794.

⁸⁰ *People v. Powell*, 201 N. Y. 194, 94 N. E. 634.

⁸¹ See *Van Atten v. Modern Brotherhood of America*, 131 Iowa 232, 108 N. W. 313; *Sherman v. Harbin*, 125 Iowa 174, 100 N. W. 629.

For form of by-laws in Maine de-

The articles of incorporation sometimes expressly provide that the board of directors shall have the whole charge and management of the property and effects of the company. So far as the statutes are concerned, they generally provide merely that the business of the corporation shall be managed by its directors, without further defining their powers. If there are no such provisions, other than a general one conferring power to manage, as is usually the case, then the question narrows down to whether the act is one of "management" of the affairs of the corporation. However, in considering whether the board of directors may do certain things, the decisions are to be construed according to whether the contention was (1) in effect that the directors, even assuming that they have full power to act for the corporation, had or had not the power to do a certain act as the substitute for the corporation, which reduces itself to the question whether the corporation itself has the power to do the act,⁸² or whether the contention was (2) that the stockholders were the proper body to act or that the consent of all or a majority of the stockholders was necessary. In many cases, the decisions merely state that the directors have or have not power to do a certain thing, without more, so that it is impossible to tell just what the contention was.

As a rule, the directors, by the terms of the statute, are merely intrusted generally with the control and management of the business of the corporation. When this is the case, the directors, subject to any express restrictions in the charter or valid by-laws of the corporation, or the general law, have the power to bind it by any contract which is within its express or implied powers, and which in their judgment is necessary or proper in order to carry out the objects for which the corporation was created, and, generally, to do or authorize any act which falls within what may properly be regarded as the management of the ordinary business of the corporation.⁸³ As said

fining powers of directors, see Fletcher's Corporation Forms, p. 733.

⁸² See chapters in vol. 2 as to various powers of corporations.

⁸³ **United States.** Siegman v. Elec. Vehicle Co., 140 Fed. 117; Wing v. Charleroi Plate Glass Co., 112 Fed. 817.

Alabama. Chamberlain v. Bromberg, 83 Ala. 576, 3 So. 434.

Arkansas. Winer v. Bank of Blytheville, 89 Ark. 435, 131 Am. St. Rep. 102, 117 S. W. 232.

California. Nixon v. Goodwin, 3 Cal. App. 358, 85 Pac. 169.

Colorado. Mosher v. Sinnott, 20 Colo. App. 454, 79 Pac. 742; Relender v. Riggs, 20 Colo. App. 423, 79 Pac. 328.

Connecticut. Chase v. Tuttle, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874.

Kentucky. Batchelor v. Planters' Nat. Bank of Louisville, 78 Ky. 435; Jones v. Hildale Cemetery Society, 23 Ky. L. Rep. 1486, 65 S. W. 838.

by Chief Justice Shaw in an early case in Massachusetts, in regard to bank directors—and there is no distinction in this respect between banks and other corporations—a “board of directors of the banks of Massachusetts is a body recognized by law. By the by-laws of these corporations, and by a usage, so general and uniform as to be regarded

Massachusetts. *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Burrill v. Nahant Bank*, 2 Metc. 163, 35 Am. Dec. 395.

Missouri. *Hutchinson v. Green*, 91 Mo. 367, 1 S. W. 853.

New Jersey. *Collier v. Consolidated Railway, Lighting & Refrigerating Co.*, 70 N. J. L. 313, 57 Atl. 417; *Lillard v. Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 58 Atl. 188, 56 Atl. 254; *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973; *Berger v. United States Steel Corporation*, 63 N. J. Eq. 809, 53 Atl. 68; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162.

New York. *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 932; *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363; *People v. Metropolitan El. Ry. Co.*, 26 Hun 82.

Ohio. *Cleveland & M. R. Co. v. Himrod Furnace Co.*, 37 Ohio St. 321, 41 Am. Rep. 509.

Pennsylvania. *Madden v. Penn Elec. Light Co.*, 199 Pa. 454, 49 Atl. 296.

Texas. *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 65 S. W. 509.

Vermont. *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

Wisconsin. *Theis v. Durr*, 125 Wis. 651, 1 L. R. A. (N. S.) 571, 110 Am. St. Rep. 880, 104 N. W. 985.

“The board of directors of a corporation have implied authority to do all acts in the management of the company’s ‘regular’ business, which the company itself can do without a

departure from its chartered powers.” 1 Morawetz, *Corporations* (2nd Ed.), § 510.

“The powers of a private corporation, so far as its dealings with third persons are concerned, are primarily lodged in its board of directors, from which source the officers, either expressly or by implication, derive such measure of authority as may be bestowed upon them.” *Taylor v. Sutherland-Meade Tobacco Co.*, 107 Va. 787, 14 L. R. A. (N. S.) 1135, 60 S. E. 132.

In Ohio, the court said: “In this state the corporate powers, business, and property of the corporation must be exercised, conducted, and controlled by the board of directors,” referring to the statute, and then continued by saying that “prima facie the corporate power of making or refusing to perform contracts on behalf of the corporation rests in the board of directors. Under our statutes, there is nothing in the nature of a corporate office which would imply authority to perform the functions which the statute imposes upon the board of directors as a board; not upon the directors individually. The corporation may by its regulations, so define the duties of its officers as to make them alter ego within the assigned limits. * * * But in the absence of express authority, and of such a course of dealing with the world as clearly implies authority to do the controverted act, the corporation can be bound only by its board of directors.” *Bradford Belting Co. v. Gibson*, 68 Ohio St. 442, 449, 67 N. E. 888.

as part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation.”⁸⁴ The board, unless restricted by charter or by-laws, “has full control and management of the corporate business and property.”⁸⁵ “All powers,” said the Court of Appeals of New York, “directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. The expression of the corporate will and the performance of corporate functions, in the management of a corporation, may originate with its directors, where the law or the by-laws have not expressly restricted their authority and made their action to rest for its validity upon the concurrence of the stockholders, by previous action or subsequent ratification. Within the chartered authority they have the fullest power to regulate the concerns of the corporation, according to their best judgment, and contracts, which the corporation could legitimately make, come within the scope of the ordinary powers of corporate management.”⁸⁶ In regard to banks, a leading textbook writer has said that “organic banking laws and charters customarily confer upon the board in broad phraseology the general power to conduct and manage the corporate business. But this language is practically only a recognition of the functions which the board would be entitled and called upon to exercise by the rules of common law, and does not operate to enlarge those functions, or to designate them with any greater particularity.”⁸⁷

However, the powers of directors are not unlimited but extend only to the ordinary or regular business of the corporation. Their authority does not extend to changes in the character or organization of the corporation, or to a winding up of the corporation, etc., since such matters do not relate to the ordinary or regular business of the corporation.⁸⁸

Unless it is otherwise provided, a board of directors has power to incur a debt,⁸⁹ to assume obligations of another corporation under proper circumstances,⁹⁰ to control the action of the corporate officers,⁹¹

⁸⁴ *Burrill v. Nahant Bank*, 2 Metc. (Mass.) 163, 166, 35 Am. Dec. 395.

⁸⁵ *Paducah & I. Ferry Co. v. Robertson*, 161 Ky. 485, 171 S. W. 171.

⁸⁶ *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489.

⁸⁷ 1 *Morse, Banks and Banking* (5th Ed.), § 116.

⁸⁸ See §§ 1993-1999, *infra*.

⁸⁹ *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, 112 Fed. 239.

⁹⁰ *Central Elec. Co. v. Sprague Elec. Co.*, 120 Fed. 925.

⁹¹ *In re Red River Line*, 115 La. 867, 40 So. 250.

to convey property in payment of a debt due by the corporation,⁹² to handle the corporate personal property as circumstances may render necessary,⁹³ to waive the statute of limitations,⁹⁴ and to accept amendments of the charter of the corporation under some circumstances, but not generally.⁹⁵ So it may remove the office of the corporation from one location to another in the same city; and it seems that this is so although a statute provides that the principal place of business of a corporation can be changed only with the consent of the holders of two-thirds of the stock, since not applicable to a removal from one location to another in the same city.⁹⁶ And the directors, where they have annually set aside a sum as working capital, as authorized by the certificate of incorporation or the by-laws, where such sums have not been used as actual working capital, but are invested in securities, may divert it to other purposes.⁹⁷ Likewise, bank directors have power to establish the reserve fund of the bank.⁹⁸ Railroad directors have power to determine the location of branches of the corporate railroad.⁹⁹ Insurance directors have power to pay a fire loss in whole or in part.¹

On the other hand, directors have no power to appropriate the assets of the corporation to their own use.² So directors cannot impose upon the corporation expenses incurred in legislative lobbying,³ nor in sending out notices asking for proxies where the purpose thereof is to continue themselves in office.⁴

The power of directors to elect or appoint other officers,⁵ or to re-

⁹² Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Sargent v. Webster, 13 Mete. (Mass.) 497, 46 Am. Dec. 743; Burrill v. Nahant Bank, 2 Mete. (Mass.) 163, 35 Am. Dec. 395. And see Sheldon Hat Blocking Co. v. Eickmeyer Hat Blocking Co., 56 How. Pr. (N. Y.) 70, 90 N. Y. 613.

⁹³ Klein v. Funk, 82 Minn. 3, 84 N. W. 460.

⁹⁴ Leayitt v. Oxford & G. Silver Min. Co., 3 Utah 265, 1 Pac. 356.

⁹⁵ See § 1995, *infra*.

⁹⁶ Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 120 Pac. 15.

⁹⁷ Bassett v. United States Cast Iron Pipe & Foundry Co., 74 N. J. Eq. 668, 70 Atl. 929.

⁹⁸ Mulcahy v. Hibernia Savings &

Loan Society, 144 Cal. 219, 77 Pac. 910. In this case the authority was conferred by statute.

⁹⁹ Price v. Pennsylvania R. Co., 209 Pa. 81, 58 Atl. 137.

¹ Gleason v. Canterbury Mut. Fire Ins. Co., 73 N. H. 583, 64 Atl. 187.

² Voorhees v. Mason, 245 Ill. 256, 91 N. E. 1056, *rev'g* on other grounds 148 Ill. App. 647.

³ McConnell v. Combination Mining & Milling Co., 31 Mont. 563, 79 Pac. 248.

⁴ Lawyers' Advertising Co. v. Consolidated Railway, Lighting & Refrigerating Co., 187 N. Y. 395, 80 N. E. 199.

⁵ See § 1758, *supra*.

move one of their number or other officers or agents,⁶ has already been stated.

The fact that directors own only one share of stock each, and that their election was controlled by the president who owned a majority of the stock, does not lessen their powers as directors.⁷

If the directors of a corporation enter into contracts or do other acts which are beyond the powers conferred upon them by the charter or by the stockholders, but within the powers conferred upon the corporation, their action may be ratified by the stockholders, expressly or impliedly, and thus be rendered binding.⁸

The extent to which the directors or trustees of a corporation may delegate the powers conferred upon them has already been stated.⁹

§ 1962. Powers as original or derivative. The board of directors, said Justice Comstock in an early New York case, "do not stand in the same relation to the corporate body which a private agent holds toward its principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former. * * * But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers."¹⁰

§ 1963. Powers as affected by by-laws. The powers of the directors may be limited by the corporate by-laws adopted by the stockholders, provided they are not inconsistent with the charter or statutes.¹¹ Thus, where the by-laws of a corporation provided that

⁶ See § 1819, *supra*.

⁷ *Cowell v. McMillin*, 177 Fed. 25, 43.

⁸ See *infra*, this chapter.

⁹ See §§ 1952-1958, *supra*.

¹⁰ *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207, 216.

"Their power is not a delegated authority, in the sense in which the rule applies to agents or attorneys, who have certain specified powers conveyed upon them, but no others, and therefore have no power which they can delegate to others." *Leavitt*

v. Oxford & G. Silver Min. Co., 3 Utah 265, 271, 1 Pac. 356.

"We think they [directors] do not exercise a delegated authority in the sense in which the rule applies to agents and attorneys, who exercise the powers especially conferred on them and no others." *Burrill v. Nantant Bank*, 2 Metc. (Mass.) 163, 35 Am. Dec. 395, approved in *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 540, 541, 58 Am. Dec. 439.

¹¹ *Fowler v. Great Southern Telephone & Telegraph Co.*, 104 La. 751,

all officials should hold office at the pleasure of the board of directors, it was held that the board had no power to employ a manager by the year, although it would clearly have the power in the absence of such a by-law.¹² However, as already stated, by-laws limiting the apparent powers of the officers of a corporation have no effect as against third persons dealing with them in good faith, and in ignorance of the by-laws.¹³

§ 1964. Acts in excess of corporate powers. Of course, the directors of a corporation have no authority to make or authorize contracts or do other acts which are beyond the powers conferred upon the corporation by its charter. Nor can they be given such authority by consent of the stockholders. If they do or attempt to do ultra vires acts, a dissenting stockholder may sue in a proper case to enjoin them or set their action aside,¹⁴ or they may render themselves liable to the corporation for mismanagement.¹⁵ It does not follow, however, that a corporation can incur no liability on ultra vires contracts entered into or authorized by the board of directors. If the directors enter into or authorize ultra vires contracts, their act is the act of the corporation, and under some circumstances, as we have seen, the defense of ultra vires cannot be set up to escape liability.¹⁶ In like manner, if the directors engage in an ultra vires business or transaction, the corporation, in most jurisdictions, cannot set up its want of power to engage in the business or transaction to escape liability for torts committed.¹⁷ However, as hereafter stated, if the directors, without the consent of the stockholders, engage in ultra vires transactions, they will be liable to the corporation for any loss which it may sustain by reason thereof.¹⁸

§ 1965. Repudiation of acts of other officers. If officers of a corporation exceed their powers, their acts may be repudiated by the board of directors. However, if the directors desire to repudiate a sale by executive officers, they should act promptly, notify the other party to the contract, and return benefits received.¹⁹

29 So. 271; *Hutchison v. Rock Hill Real Estate & Loan Co.*, 65 S. C. 45, 43 S. E. 295.

¹² *Fowler v. Great Southern Telephone & Telegraph Co.*, 104 La. 751, 29 So. 271.

¹³ See § 1931, *supra*.

¹⁴ *Pickering v. Stephenson*, L. R.

¹⁴ Eq. 322.

¹⁵ See *infra*, this chapter.

¹⁶ See § 1910, *supra*.

¹⁷ See Chap. 47, *infra*.

¹⁸ See *infra*, this chapter.

¹⁹ *Domestic Bldg. Ass'n v. Guadiano*, 195 Ill. 222, 63 N. E. 98.

§ 1966. Power to elect officers, employ agents or hire employees—
In general. Directors have power to elect officers,²⁰ to appoint agents,²¹ and to employ servants. Thus, they have power to employ an attorney to represent the corporation,²² to contract for services to be rendered in the future,²³ and to incur expense for offices and office help.²⁴ So a hold-over board has power to elect officers for the ensuing corporate year.²⁵ A charter provision that the board of directors "shall appoint a clerk, treasurer, and all other needed officers" does not include general counsel.²⁶ Power to appoint agents includes power to fix their compensation.²⁷

§ 1967. — Length of contract. The directors may hire a superintendent for a period extending beyond their term of office.²⁸ They may appoint agents whose authority is not terminated by the retirement of the board from office at the end of their term.²⁹ At any event, if approved by the stockholders, a contract hiring a general agent for ten years, is valid.³⁰ However, it is held that they have no power to make a contract of employment which would be perpetual or for the lifetime of the employee or of the corporation.³¹ So the board cannot bind the corporation, in hiring a general manager for a term of years, by an agreement that he shall be a member of the board of directors during such term.³²

²⁰ See § 1758, *supra*.

²¹ *Darrah v. Wheeling Ice & Storage Co.*, 50 W. Va. 417, 40 S. E. 373, and see § 1767, *supra*.

Power of corporation as to, see § 915, vol. 2.

²² *Breathitt Coal, Iron & Lumber Co. v. Gregory*, 25 Ky. L. Rep. 1507, 78 S. W. 148.

²³ *Brooklyn Heights Realty Co. v. Kurtz*, 115 N. Y. App. Div. 74, 100 N. Y. Supp. 723.

²⁴ *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

²⁵ *Western Cottage Piano & Organ Co. v. Burrows*, 144 Ill. App. 350.

²⁶ *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

²⁷ *Powers v. Rutland R. Co.*, 88 Vt. 376, 92 Atl. 463.

²⁸ *Granger v. American Brewing Co.*, 25 N. Y. Misc. 302, 54 N. Y. Supp. 590, *rev'd on other grounds* 25 N. Y.

Misc. 701, 55 N. Y. Supp. 695.

²⁹ *Kidd v. New Hampshire Traction Co.*, 74 N. H. 160, 66 Atl. 127.

³⁰ *Warner v. Morgan*, 81 N. Y. Misc. 685, 143 N. Y. Supp. 516.

³¹ *Carney v. New York Life Ins. Co.*, 162 N. Y. 453, 49 L. R. A. 471, 76 Am. St. Rep. 347, 57 N. E. 78; *Townsley v. Niagara Life Ins. Co.*, 160 N. Y. App. Div. 177, 145 N. Y. Supp. 209, holding, however, that a contract to continue "during the faithful performance of his duties * * * unless sooner terminated by mutual consent" is not a contract of employment for an unlimited time or for life.

They have no power to employ a person for life, where they hold office only for four years. *Beers v. New York Life Ins. Co.*, 66 Hun (N. Y.) 75, 20 N. Y. Supp. 788.

³² *Sowter v. Seekonk Lace Co.*, 34 R. I. 304, 83 Atl. 437.

§ 1968. Borrowing money and executing notes or bonds therefor.

In the absence of express restrictions, the directors or trustees of a corporation have the power to borrow money when it is needed in the business of the corporation and to execute or authorize the execution of negotiable notes or bonds to secure the same.³³ A resolution of directors that "no further assessment shall be made except by direction of the stockholders" leaves the directors clothed with all the other powers which they had before, except the power of assessment. It does not place the company in liquidation nor prevent the directors from borrowing money and securing the loan by a lien on the corporate property.³⁴

§ 1969. Mortgages and pledges of property. The directors of a corporation, as its managing officers, have the power to mortgage and pledge the property of the corporation to secure the payment of money borrowed for the legitimate purposes of the corporation, or to secure any other debt lawfully contracted,³⁵ unless, as in some jurisdictions,

³³ *Hodder v. Kentucky & G. E. Ry. Co.*, 7 Fed. 793; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Burrill v. Nahant Bank*, 2 Mete. (Mass.) 163, 35 Am. Dec. 395; *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 270; *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248, aff'g 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194; *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

Power of corporation to borrow money, see §§ 939-944, *supra*.

Power of corporation to execute or transfer negotiable instruments, see §§ 950-961, *supra*.

Directors have power, generally speaking, to execute notes and bonds in the corporate behalf. *Hutchison v. Rock Hill Real Estate & Loan Co.*, 65 S. C. 45, 43 S. E. 295; *Buck v. Troy Aqueduct Co.*, 76 Vt. 75, 56 Atl. 285.

³⁴ *Shickel v. Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

³⁵ *United States. Phinizy v. Augusta & K. R. Co.*, 62 Fed. 678; *Hodder v. Kentucky & G. E. Ry. Co.*, 7

Fed. 793; *Moran v. Strauss*, 6 Ben. 249, Fed. Cas. No. 9,787.

California. *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 45 Pac. 252, 41 Pac. 1017.

Illinois. *Wood v. Whelen*, 93 Ill. 153.

Massachusetts. *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Hendee v. Pinkerton*, 14 Allen 381; *Burrill v. Nahant Bank*, 2 Mete. 163, 35 Am. Dec. 395.

Michigan. *Bank Com'rs v. Bank of Brest*, 1 Harr. Ch. 106.

Mississippi. *Thompson v. Natchez Water & Sewer Co.*, 68 Miss. 423, 9 So. 821.

New York. *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207.

North Carolina. *Wall v. Rothrock*, 171 N. C. 388, 88 S. E. 633.

Pennsylvania. *Ashton v. Lehigh Coal & Navigation Co.*, 49 Pa. St. 261.

Vermont. *Arms v. Conant*, 36 Vt. 744.

Power of corporation to mortgage its property, see § 1266 et seq., *supra*.

The directors have power to pledge the corporate assets to secure funds

the consent or a vote of the stockholders is expressly required by the charter or general law.³⁶ This includes a mortgage of personal property.³⁷ They may execute a bond and secure it by an assignment of the corporate assets,³⁸ and may pledge bonds of the corporation to secure a corporate note, even though they are sureties thereon as individuals.³⁹ Moreover, they have power, as a part of their power to mortgage corporate property, to include after-acquired property in the mortgage.⁴⁰ It has been held, however, that the directors have no power to pledge future earnings, unless expressly authorized by the stockholders.⁴¹

§ 1970. Purchases. It seems hardly worth while to state that directors may purchase property reasonably necessary for the corporation.⁴² Thus, they may purchase necessary supplies.⁴³ Moreover, the assent of stockholders is not necessary to the assumption of a mortgage on property purchased by the corporation.⁴⁴

§ 1971. Sales in ordinary course of business. Of course, directors may sell the products of the corporation or other property thereof, where in the usual course of business.⁴⁵ So they may sell the corporate product below cost where conditions apparently render such course wise.⁴⁶ Where a company is operating two breweries, the directors

needed in the promotion of the corporate enterprise. *National State Bank v. Sandford Fork & Tool Co.*, 157 Ind. 10, 60 N. E. 699; *Hutchison v. Rock Hill Real Estate & Loan Co.*, 65 S. C. 45, 43 S. E. 295.

A statute authorizing the trustees to execute a mortgage on the erection of a building authorizes a mortgage to secure claims for work and materials used in the building. *Miller v. Chance*, 3 Edw. Ch. (N. Y.) 399.

³⁶ See § 1301, vol. 2.

³⁷ This is so notwithstanding a statute authorizing stockholders representing three-fourths of the outstanding stock to compel the directors to execute a mortgage or sale of all the corporate property should the stockholders so elect. *American Nat. Bank v. Wheeler-Adams Auto Co.*, 31 S. D. 524, 141 N. W. 396.

³⁸ *Hutchison v. Rock Hill Real Estate & Loan Co.*, 65 S. C. 45, 43 S. E. 295.

³⁹ *Medford v. Myrick*, — Tex. Civ. App. —, 147 S. W. 876.

⁴⁰ *Cummings v. Consolidated Mineral Water Co.*, 27 R. I. 195, 201, 61 Atl. 353.

⁴¹ *Brown v. Bradford*, 103 Iowa 378, 72 N. W. 648.

⁴² Power of corporation to acquire property, see §§ 1072-1079, 1082-1115, *supra*.

⁴³ *John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co.*, 76 Vt. 131, 56 Atl. 530.

⁴⁴ *In re Beaver Knitting Mills*, 154 Fed. 320.

⁴⁵ Power of corporation to sell its property, see §§ 1186-1229, *supra*.

⁴⁶ *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912.

may sell one of them.⁴⁷ Where one of the objects of a coal company is stated to be to "buy, own, hold, deal in, * * * lease, sell, exchange, transfer or, in any manner whatsoever, trade in or dispose of both real and personal property, and to develop and improve the same," the directors, with the consent of a majority of the stockholders, may sell undeveloped coal lands, where there is no showing that the sale disrupts the corporation, as against the objections of minority stockholders.⁴⁸ It seems that directors, in selling beach property, may agree with purchasers that the space between the ocean and a certain street, on which the property abuts, shall be kept open.⁴⁹

§ 1972. Transfer of choses in action. Directors have power to assign or transfer notes and other choses in action belonging to the corporation, in the ordinary course of business.⁵⁰

§ 1973. Gifts. The power of a corporation to donate property to another, including a dedication of land, has been noted in a preceding chapter.⁵¹ Of course, if the corporation has no power to make the donation, the board of directors is without such power.⁵² However, if there is corporate power, it would seem that it may be exercised by the board of directors. It has been held that directors have no power to give away corporate property even to reimburse a third person for alleged misconduct of the president of the corporation, where there was in fact no legal liability.⁵³

§ 1974. Leases. The power of corporations to make or take a lease of property has been stated in a preceding volume.⁵⁴ Directors may make or authorize a lease of property of the corporation, when necessary or advisable, if the power to make the lease is within the powers of the corporation,⁵⁵ subject to rules hereinafter laid down as

⁴⁷ *McCloskey v. New Orleans Brewing Co.*, 128 La. 197, 54 So. 738.

⁴⁸ *Smith v. Flathead River Coal Co.*, 66 Wash. 408, 119 Pac. 858.

⁴⁹ *Poole v. Commissioners of Rehoboth*, 9 Del. Ch. 192, 80 Atl. 683.

⁵⁰ *Stevens v. Hill*, 29 Me. 133; *Northampton Bank v. Pepoon*, 11 Mass. 288.

⁵¹ See §§ 1199-1202, vol. 2.

⁵² *Frankfort Bank v. Johnson*, 24 Me. 490; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

⁵³ *Brinkerhoff Zinc Co. v. Boyd*, 192 Mo. 597, 612, 91 S. W. 523.

⁵⁴ See §§ 1231-1240, vol. 2.

⁵⁵ *Dickinson v. Consolidated Traction Co.*, 114 Fed. 232; *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489; *Hennessy v. Muhleman*, 40 N. Y. App. Div. 175, 57 N. Y. Supp. 854, rev'g 27 N. Y. Misc. 232, 57 N. Y. Supp. 114. Compare, however, *Metropolitan El. Ry. Co. v. Manhattan El. Ry. Co.*, 14 Abb. N. Cas. (N. Y.) 103, 11 Daly 373.

to a lease of all the corporate property.⁵⁶ They may lease a part of the corporate property without the consent of stockholders notwithstanding a statute prohibiting a "conveyance" without such consent.⁵⁷

Likewise, they may lease from third persons property for the use of the corporation. Thus, they are *prima facie* authorized to lease an office at the place designated in the charter for the principal office of the corporation.⁵⁸

§ 1975. Assignments for benefit of creditors. A corporation in failing circumstances has the same power and right as a natural person to make a voluntary assignment of all its property and choses in action for the benefit of its creditors, unless prevented from so doing by some express statutory provisions, as where the statute provides some different and exclusive mode of winding up the affairs of corporations.⁵⁹ There is some conflict, however, as to whether the directors have power, where such course is apparently necessary, to make an assignment of the entire corporate property for the benefit of creditors. Although there is some authority to the contrary,⁶⁰ it is now almost universally held that directors have power to execute or authorize execution of an assignment of all the property of the corporation, for the benefit of its creditors, when such a step is necessary or advisable,⁶¹ unless such an assignment is prohibited by law in the

May lease the mining property of a mining company, without the consent of the stockholders. *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742.

⁵⁶ See § 1998, *infra*.

⁵⁷ *Seal of Gold Min. Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.

⁵⁸ *McConnell v. Combination Mining & Milling Co.*, 31 Mont. 563, 79 Pac. 248.

⁵⁹ See chapter on Insolvency, *infra*.

⁶⁰ *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *Bank Com'rs v. Bank of Brest*, 1 Harr. Ch. (Mich.) 106; *Eppright v. Nickerson*, 78 Mo. 482.

⁶¹ *Alabama*. *Chamberlain v. Bromberg*, 83 Ala. 576, 3 So. 434.

Connecticut. *Chase v. Tuttle*, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874.

Illinois. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

Indiana. *De Camp v. Alward*, 52 Ind. 468, 473.

Iowa. *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

Maryland. *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176; *Merrick v. Bank of Metropolis*, 8 Gill 59.

Massachusetts. *Sargent v. Webster*, 13 Metc. 497, 46 Am. Dec. 743.

Michigan. *Boynton v. Roe*, 114 Mich. 401, 72 N. W. 257; *In re George T. Smith Middlings Purifier Co.*, 86 Mich. 149, 48 N. W. 864.

Minnesota. *Tripp v. Northwestern Nat. Bank*, 41 Minn. 400, 43 N. W. 60.

Missouri. *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115; *Hutchinson v. Green*, 91 Mo. 367, 1 S. W. 853.

New Jersey. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514.

New York. *Rogers v. Pell*, 154 N.

particular jurisdiction.⁶² However, in some jurisdictions, by statute, a vote of the stockholders is necessary,⁶³ and sometimes this is required by the articles of incorporation;⁶⁴ but notwithstanding the fact that the charter provides that the board of directors shall not dispose of any corporate real estate without the consent of a majority of the stock, yet if no stockholder raises any objection for some four years to an assignment for benefit of creditors by the board of directors, stockholders cannot urge that the assignment was made without the consent of a majority of the stock.⁶⁵

§ 1976. Issuance and sale of stock. Directors may issue stock as fully paid up upon such terms and at such prices as they see fit, so far as stockholders are concerned, unless it is otherwise provided by statute or the charter.⁶⁶ They may sell full-paid treasury stock for what they deem it to be worth, although below par.⁶⁷ However, a contract by a director, without the knowledge of the stockholders, to personally repurchase stock sold to the manager of the corporation, upon discontinuance of his employment from any cause, is against public policy and void,⁶⁸ for the reason that "his duties as director and his private interest under the contract to repurchase plaintiff's stock upon the conditions stated were antagonistic, and his private interests might oblige him to act contrary to his duties toward the other stockholders. Under such circumstances such contracts are held void on the ground of public policy, unless all the stockholders assent thereto."⁶⁹

Y. 518, 49 N. E. 75; *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 932.

Pennsylvania. *Ardesco Oil Co. v. North American Oil & Mining Co.*, 66 Pa. St. 375; *Dana v. Bank of United States*, 5 Watts & S. 223.

South Dakota. *Wright v. Lee*, 2 S. D. 596.

Texas. *Birmingham Drug Co. v. Freeman*, 15 Tex. Civ. App. 451, 39 S. W. 626.

Wisconsin. *Goetz v. Knie*, 103 Wis. 366, 79 N. W. 401.

Canada. *Whiting v. Hovey*, 13 Ont. App. 7.

⁶² *Kyle v. Wagner*, 45 W. Va. 349, 32 S. E. 213. See also chapter on Insolvency, *infra*.

⁶³ *Meloy v. Central Nat. Bank*, 7 Mackey (18 D. C.) 69.

Construction of particular statutes, see § 1197, *supra*.

⁶⁴ *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 318.

⁶⁵ *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 318, *aff'd* 149 Fed. 31.

⁶⁶ *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1.

⁶⁷ *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742.

⁶⁸ *Timme v. Kopmeier*, 162 Wis. 571, L. R. A. 1916 D 1114 with note, 156 N. W. 961.

⁶⁹ *Timme v. Kopmeier*, 162 Wis. 571, 156 N. W. 961.

§ 1977. Guaranty. If the corporation has power to execute a guaranty, the board of directors may act in behalf of the corporation in making the guaranty.⁷⁰

§ 1978. Advertising and publication of notices. Directors have power to advertise in newspapers in regard to a scheme on foot to induce a majority of the stockholders to part with their stock to a rival corporation. The court said: "The future career of the corporation itself, its increased or decreased activity—indeed, its very existence as a going concern—may depend upon whether such a scheme is or is not carried through. No one can tell in advance but what timely notice thus given to all may cause individual stockholders to bestir themselves, to get into communication with others, to procure and exchange information, and thus to organize successful opposition to a scheme which, if it were carried on secretly with the aid of directors who favored it, and without exploitation except to such individual stockholders as lacked the knowledge or the force to organize an opposition, might result in shutting down every plant which the corporation operated, and paralyzing the very industry it was created to carry on, or at least might involve the corporation in expensive litigation to vindicate its right to continue in active business.

* * * Whether the notice shall be long or short, in what form of words it shall be couched, whether it shall be sent by mail or advertised in newspapers are matters of detail, which should be left to the directors. Certainly the innocent party who undertakes to publish such a notice should not be mulcted because, besides giving notice of the proposed scheme, it also gives the names of individual directors who favor it, nor because it is unnecessarily verbose."⁷¹ On the other hand, it has been held that directors, in control of a corporation and engaged in a contest for the perpetuation of their control, cannot impose upon the corporation the unusual expense of publishing notices urging stockholders to execute proxies to them, even though the directors acted in good faith and felt that they were serving the best interests of the stockholders.⁷²

⁷⁰ See *Mechanics' & Traders' Bank v. Stettheimer*, 116 N. Y. App. Div. 198, 101 N. Y. Supp. 513.

Power of corporations as to, see §§ 923-931, *supra*.

⁷¹ *Rascovor v. American Linseed Co.*, 135 Fed. 341.

Powers of corporation as to advertising, see § 813, vol. 2.

⁷² *Lawyers' Advertising Co. v. Consolidated Railway, Lighting & Refrigerating Co.*, 187 N. Y. 305, 80 N. E. 199.

§ 1979. Dividends. Directors have power to determine whether the condition of the company is such as to warrant the payment of dividends, provided they act in good faith, and not unreasonably or oppressively.⁷³ Moreover, the bona fide exercise of discretion by the directors with reference to the declaration of a stock dividend out of surplus will not be interfered with by the court.⁷⁴ This matter is fully treated in connection with a chapter dealing with the law as to dividends.

§ 1980. Submission to arbitration. Directors have power to submit matters in dispute between the corporation and third persons to arbitration.⁷⁵

§ 1981. Compromise and settlement. Directors have power to compromise or settle claims in favor of or against the corporation, or actions pending against it.⁷⁶ So they may make settlements with officers of the corporation.⁷⁷

§ 1982. Releases. It seems that directors may, in a proper case, release the other party to a corporate contract; but even if they can release the other party to a contract from liability for breach of stipulations in the contract, they cannot by so doing admit away the right of the corporation to retain stock which the other party confessedly had failed to earn.⁷⁸

⁷³ *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. Ed. 363; *Pratt v. Pratt, Read & Co.*, 33 Conn. 446; *McNab v. McNab & Harlin Mfg. Co.*, 133 N. Y. 687, 31 N. E. 627, 62 Hun 18, 16 N. Y. Supp. 448.

⁷⁴ *Schell v. Alston Mfg. Co.*, 149 Fed. 439.

⁷⁵ *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. Ed. 60; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Moorville v. American Tract Society*, 123 Mass. 129, 25 Am. St. Rep. 40; *Remington Paper Co. v. London Assur. Corporation*, 12 N. Y. App. Div. 218, 43 N. Y. Supp. 431.

Power of corporation as to, see § 816, *supra*.

⁷⁶ *United States. Northern Liberty Market Co. v. Kelly*, 113 U. S. 199, 28 L. Ed. 948; *First Nat. Bank of*

Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122, 23 L. Ed. 679.

California. *Donohoe v. Mariposa Land & Mining Co.*, 66 Cal. 317, 5 Pac. 495.

Maine. *Lewis v. Eastern Bank*, 32 Me. 90.

Nebraska. *Farmers' Mut. Ins. Co. v. Meese*, 49 Neb. 861, 69 N. W. 113.

New York. *Moss v. Averell*, 10 N. Y. 449.

Pennsylvania. *Chambers v. Chambers & McKee Glass Co.*, 185 Pa. St. 105, 39 Atl. 822.

Power of corporation to make, see § 823, *supra*.

⁷⁷ *Frankfort Bank v. Johnson*, 24 Me. 490.

⁷⁸ *Lyon v. Dailey Copper, Mining &*

The directors ordinarily have no authority to release stockholders from liability on their subscriptions otherwise than in pursuance of a bona fide compromise or for a sufficient consideration.⁷⁹ But they may compromise with subscribers, as with other debtors, and may release a subscriber where there is a sufficient consideration, so that there is no fraud or wrong as against creditors or other stockholders.⁸⁰ They may cancel stock notes which they deem to be worthless.⁸¹

§ 1983. Preference of creditors. Directors may prefer certain creditors, although the corporation is insolvent, by giving a deed of trust,⁸² where the corporation has the power to grant a preference.⁸³

§ 1984. Acts of bankruptcy—Grounds for involuntary proceedings. Under the federal statutes one of the acts of bankruptcy, the existence of which is ground for involuntary proceedings in bankruptcy, is having "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."⁸⁴ Under this statute, it has been held, construing the statutes of Massachusetts⁸⁵ and Oregon⁸⁶ as to the powers of directors, that the board

Smelting Co., 46 Mont. 108, 126 Pac. 931.

⁷⁹ **United States.** Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731.

Kentucky. Gathright v. Oil City Land & Improvement Co.'s Receiver, 21 Ky. L. Rep. 1657, 56 S. W. 163.

Maryland. Rider v. Morrison, 54 Md. 429; Hughes v. Antietam Mfg. Co., 34 Md. 316.

Missouri. Chouteau Ins. Co. v. Floyd, 74 Mo. 286.

New York. Tuckerman v. Brown, 33 N. Y. 297, 88 Am. Dec. 386.

Pennsylvania. Bedford R. Co. v. Bowser, 48 Pa. St. 29.

Wisconsin. La Fayette County Monument Corporation v. Ryland, 80 Wis. 29, 49 N. W. 157.

England. In re Esparto Trading Co., 12 Ch. Div. 191; In re London & P. Consol. Coal Co., 5 Ch. Div. 525;

Spackman v. Evans, L. R. 3 H. L. 171.

⁸⁰ **United States.** New Albany v. Burke, 11 Wall. 96, 20 L. Ed. 155.

Alabama. Goodwin v. McGehee, 15 Ala. 232.

Michigan. Whitaker v. Grummond, 68 Mich. 249, 36 N. W. 62.

South Carolina. Nettles v. Marco, 33 S. C. 47, 11 S. E. 595.

England. Trevor v. Whitworth, 12 App. Cas. 409.

⁸¹ **Maine.** Mut. Marine Ins. Co. v. Neal, 50 Me. 301.

⁸² **Pullis v. Pullis Bros. Iron Co.**, 157 Mo. 565, 582, 57 S. W. 1095.

⁸³ Power to prefer creditors, see chapter on Insolvency, *infra*.

⁸⁴ 30 U. S. Stat. L. 546; 1 Fed. St. Ann. (2nd Ed.), p. 561.

⁸⁵ *In re Bates Mach. Co.*, 91 Fed. 625.

⁸⁶ *In re Quartz Gold Min. Co.*, 157 Fed. 243, *aff'd* without opinion 158 Fed. 1022 (me.n. dec.).

of directors could not commit an act of bankruptcy by admitting in writing the corporation's inability to pay its debts and its willingness to be adjudged a bankrupt, without authority from the stockholders; but the contrary has been held under the statutes of New York,⁸⁷ New Jersey,⁸⁸ Pennsylvania⁸⁹ and Wisconsin.⁹⁰ In any event, an admission by the directors personally and not as a corporate act is not sufficient to constitute an act of bankruptcy.⁹¹

§ 1985. — Filing voluntary proceeding in bankruptcy. If directors have power to make a general assignment for creditors,⁹² without authority from the stockholders, no good reason is apparent why they have not equal power to file a petition in bankruptcy.⁹³ The question is to be determined by the laws of the state where the company was incorporated, as to the power of the directors.⁹⁴ The power has been held to be vested in the directors in Arizona,⁹⁵ Minnesota,⁹⁶ Pennsylvania,⁹⁷ and some other jurisdictions.⁹⁸ Moreover, directors have been held to have such power, although several of the directors whose presence was necessary to make a quorum were creditors of the corporation, and their vote was necessary to pass the resolution.⁹⁹ The directors, said Judge Willard in a Federal decision, "ought to have the power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen that under the articles and by-laws of the corporation it would be impossible to hold a meeting of the stockholders for months. Under these circumstances, the bankruptcy of the corporation might be delayed so long that in many cases the purposes of the bankrupt law would be defeated and preferences given. I am

⁸⁷ *In re Lisk Mfg. Co.*, 167 Fed. 411; *In re C. Moench & Sons Co.*, 130 Fed. 685; *In re Marine Machine & Conveyor Co.*, 91 Fed. 630.

⁸⁸ *In re Mutual Mercantile Agency*, 111 Fed. 152.

⁸⁹ *Cresson & Clearfield Coal & Coke Co. v. Stauffer*, 148 Fed. 981.

⁹⁰ *In re T. L. Kelly Dry-Goods Co.*, 102 Fed. 747.

⁹¹ *In re Gold Run Mining & Tunnel Co.*, 200 Fed. 162.

⁹² See § 1975, *supra*.

⁹³ *In re Foster Paint & Varnish Co.*, 210 Fed. 652; *Home Powder Co. v. Geis*, 204 Fed. 568.

⁹⁴ *Home Powder Co. v. Geis*, 204 Fed. 568.

⁹⁵ *Home Powder Co. v. Geis*, 204 Fed. 568; *In re Guanacevi Tunnel Co.*, 201 Fed. 316.

⁹⁶ *Dodge v. Kenwood Ice Co.*, 204 Fed. 577, *aff'g* 189 Fed. 525.

⁹⁷ *In re Foster Paint & Varnish Co.*, 210 Fed. 652.

⁹⁸ See *In re Jefferson Casket Co.*, 182 Fed. 689, decided under New York statutes.

⁹⁹ *Home Powder Co. v. Geis*, 204 Fed. 568, 571.

satisfied that a board of directors at a duly called meeting has the power to put the corporation into bankruptcy.”¹

§ 1986. Calls or assessments on stockholders. Directors have power to make calls or assessments upon subscriptions to the capital stock, and to determine the necessity therefor,² subject to the rules laid down in a preceding chapter as to calls on unpaid subscriptions,³ and to the rules relating to assessments on paid-up stock as stated in a subsequent volume.⁴

§ 1987. Removal of officers. The power of a board of directors to remove one or more of its own directors or to remove other officers of the corporation has already been stated in a preceding subdivision of this chapter.⁵

§ 1988. Actions. Directors may bring, or authorize the bringing of, actions in behalf of the corporation or may defend suits brought against the corporation.⁶ Or they may refuse to institute suit in the corporate behalf where in their judgment it is unwise.⁷ They may direct a suit to be brought,⁸ and may prosecute an appeal.⁹

§ 1989. Signing petitions. Directors, as a board, have power to sign a petition for paving a city street upon which the property of the corporation abuts.¹⁰

§ 1990. Power to vote at meetings of stockholders. At a meeting of the stockholders of the corporation, a person owning shares of stock in the company is under no disability to vote merely because he is also a director of the corporation.¹¹

¹ In re Kenwood Ice Co., 189 Fed. 525.

² **United States.** Oglesby v. Attrill, 105 U. S. 605, 26 L. Ed. 1186.

Louisiana. Millaudon v. New Orleans & C. R. Co., 3 Rob. 488.

Mississippi. Smith v. Natchez Steamboat Co., 1 How. 479.

Missouri. Gorman v. Guardian Sav. Bank, 4 Mo. App. 180.

Vermont. Rutland & B. R. Co. v. Thrall, 35 Vt. 536.

³ See §§ 668-687, *supra*.

⁴ See chapter on Stock and Stockholders, *infra*.

⁵ See §§ 1814-1819, *supra*.

⁶ See Breathitt Coal, Iron & Lumber Co. v. Gregory, 25 Ky. L. Rep. 1507, 78 S. W. 148.

⁷ Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45, 43 S. E. 295.

⁸ Eagle Iron Co. v. Cblyar, 156 Fed. 954.

⁹ Eagle Iron Co. v. Colyar, 156 Fed. 954.

¹⁰ Trephagen v. South Omaha, 69 Neb. 577, 583, 111 Am. St. Rep. 570, 96 N. W. 248.

¹¹ See § 1657, *supra*.

§ 1991. Right to inspect corporate books and papers. The right of stockholders to inspect corporate books and papers is well settled,¹² and this right extends to directors.¹³ The rules as to inspection by a director are well stated by Justice Mestrezat in a recent decision of the Supreme Court of Pennsylvania as follows:¹⁴ "The right of a director to inspect the books of the corporation, like that of a stockholder, exists at common law; but the right of the former is unqualified, while the latter, to a certain extent, is a qualified right. The reason is that the duties of a director require him to be familiar with the affairs of the company in order that he may have sufficient information to enable him to join intelligently in the management of the concern. The protection of the interests of the company, therefore, requires that his right to an inspection of the books be absolute."

§ 1992. Enforcement of individual statutory liability of stockholders. The fact that a creditor of a corporation is also one of its directors is sometimes held to preclude his right as a creditor to enforce the individual statutory liability of the stockholders.¹⁵

§ 1993. Changes in the corporation or matters not within its regular business—In general. The powers and authority of the directors or trustees are restricted to the management of the regular business affairs of the corporation, unless more extensive power is expressly conferred. Their authority does not extend to changes in the character or organization of the corporation, or to a winding up of the corporation, etc., unless by express provision, since such matters do not relate to the ordinary business of the corporation.¹⁶ Moreover, a general provision in the charter of a corporation or a general corporation law, that "all the corporate powers shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint," refers merely to the ordinary business transactions of the corporation, and does not extend to other acts which are not ordinarily within the powers of the directors, but are done or authorized by the stockholders only—as the reconstruction of and fun-

¹² See Chap. 45, *infra*.

¹³ *People v. Bonwit Bros.*, 69 N. Y. Misc. 70, 125 N. Y. Supp. 958.

¹⁴ *Machen v. Machen & Mayer Electrical Mfg. Co.*, 237 Pa. 212, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914 B 420, 85 Atl. 100.

¹⁵ See chapter on Stock and Stockholders, *infra*, and see *Janney v. Minneapolis Industrial Exhibition*, 79 Minn. 488, 50 L. R. A. 273 with note, 82 N. W. 984.

¹⁶ *Chicago City Ry. Co. v. Allerton*, 18 Wall. (U. S.) 233, 21 L. Ed. 902.

damental changes in the corporate body, increase of the capital stock, etc.¹⁷

§ 1994. — Making, altering or repealing by-laws. The power to make, alter or repeal by-laws is sometimes expressly vested in the directors or trustees.¹⁸ They have no such power, however, unless it is expressly conferred upon them, but the power is vested in the stockholders.¹⁹ This matter has been fully considered in a preceding volume.²⁰

§ 1995. — Amendment or alteration of charter. The directors or trustees of a corporation have no implied authority to accept an amendment of the charter of the corporation, if the amendment fundamentally changes the character or constitution of the company, or if it confers new powers or privileges which are not within the general powers conferred upon them by the charter or by the stockholders. Such amendments must be accepted by the stockholders, to be binding upon them.²¹ Nor can the directors apply to the legislature for an enlargement of the corporate powers.²² The directors have no power to accept an act amending the charter so as to authorize cumu-

¹⁷ *Chicago City Ry. Co. v. Allerton*, 18 Wall. (U. S.) 233, 21 L. Ed. 902. See also *In re Baker's Appeal*, 109 Pa. St. 461.

¹⁸ *Heintzelman v. Druids' Relief Ass'n*, 38 Minn. 138, 36 N. W. 100; *Clark v. Brown* (Tex. Civ. App.), 108 S. W. 421; *Stevens v. Davison*, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

¹⁹ *Thayer v. Herrick*, Fed. Cas. No. 13,868; *Watson v. Sidney F. Woody Printing Co.*, 56 Mo. App. 145; *Albers v. Merchants' Exch. of St. Louis*, 39 Mo. App. 583; *United Fire Ass'n v. Benseman*, 4 Wkly. Notes Cas. (Pa.) 1. See also *Van Atten v. Modern Brotherhood of America*, 131 Iowa 232, 108 N. W. 313, as to power to amend or alter a provision of the "fundamental law."

²⁰ See § 486, vol. 1.

²¹ *United States. Chicago City Ry. Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902; *Venner v. Atchison, T. & S. F. R. Co.*, 28 Fed. 581.

Connecticut. Marlborough Mfg. Co. v. Smith, 2 Conn. 579.

Illinois. Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90.

Minnesota. State v. Oftedal, 72 Minn. 498, 75 N. W. 692.

Missouri. Hope Mut. Fire Ins. Co. v. Beckmann, 47 Mo. 93.

Pennsylvania. In re Baker's Appeal, 109 Pa. St. 461; *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450; *Brown v. Fairmont Gold & Silver Min. Co.*, 10 Phila. 32.

But their unauthorized acceptance of an amendment may be ratified or acquiesced in by the stockholders. *Venner v. Atchison, T. & S. F. R. Co.*, 28 Fed. 581.

As to the power of a majority of the stockholders to bind the minority by acceptance of an act amending the charter, see chapter on Stock and Stockholders, *infra*.

²² *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579.

lative voting; and such power is not included in a grant in the charter of "all the authority, powers and privileges necessary and proper for the management of the affairs" of the corporation.²³ The directors or trustees, however, have authority to accept an amendatory act which does not change the character or constitution of the company, but merely authorizes the corporation to exercise additional powers in furtherance of the objects of the corporation, and which would be within the general powers of the directors or trustees if they had been conferred by the charter. Thus, it has been held that, where the directors of a railroad company are authorized to purchase land and locate and erect stations, they may accept an act amending the charter so as to allow it to acquire land for a station by exercise of the power of eminent domain.²⁴ And it has been held that the directors or trustees of a corporation have authority generally to accept amendments of the charter, where they, and not the stockholders or members, are expressly vested with the entire government of the corporation, and not merely with the transaction of its business.²⁵ Of course, the board of directors, even when authorized to accept an amendment of the charter of the corporation, must act in good faith, and with a view to promoting the general good of the corporation. If they act in bad faith, their action may be repudiated by the stockholders.²⁶

§ 1996. — Increase or reduction of capital stock. The board of directors or trustees have no authority to increase or reduce the capital stock of the corporation under a charter or statutory provision authorizing an increase or reduction, unless the authority to do so is expressly conferred upon them by the charter or statute, or by the stockholders. Unless the authority is thus conferred upon the directors or trustees, a change in the amount of the capital stock is a change in the internal organization of the corporation, which must be consented to by the stockholders.²⁷ Such authority, however, may

²³ *In re Baker's Appeal*, 109 Pa. St. 461.

²⁴ *Eastern R. Co. v. Boston & M. R. R.*, 111 Mass. 125, 15 Am. Rep. 13.

²⁵ *Dayton & C. R. Co. v. Hatch*, 1 Disn. (Ohio) 84; *Com. v. Trustees of Roman Catholic Society*, 6 Serg. & R. (Pa.) 508.

Where there are different classes in a corporation, alterations of its charter must be consented to by a majority of each class. *In re St. Mary's*

Church, 7 Serg. & R. (Pa.) 517.

²⁶ *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

²⁷ *United States. Chicago City Ry. Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902; *Payson v. Stoeber*, 2 Dill. 427, Fed. Cas. No. 10,863.

Illinois. McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90.

be expressly conferred upon the directors or trustees by the stockholders or by the charter of the corporation or enabling act;²⁸ and if they act without authority, their action may be ratified by the stockholders, and thereby rendered valid.²⁹ In all cases, of course, the power must be conferred upon the corporation by the legislature, for, without authority from the legislature, the capital stock of a corporation cannot be increased or reduced even by the stockholders. All these questions are fully treated in a subsequent volume in connection with the law as to the increase or reduction of capital stock.³⁰

A contract which may affect the value of the shares of the corporation is not forbidden as an increase or reduction of the capital stock of the corporation.³¹

§ 1997. — Reorganization, reincorporation and consolidation. The directors of a corporation have no implied authority to bind the members or stockholders by proceedings to reincorporate or reorganize under a statute, unless authorized by them; but such authority may be expressly conferred, or proceedings taken without authority may be ratified.³² Nor is the consolidation of a corporation with another within the implied powers of the directors or trustees, even when consolidation is authorized by the charter or a general law.³³ Furthermore, consolidation is not within the powers of a corporation at all unless authorized by the legislature.³⁴

Louisiana. *Percy v. Millandon*, 3 La. 568, 8 Mart. (N. S.) 68.

Michigan. *Shoe & Leather Co. v. Kurtz*, 34 Mich. 89.

Nebraska. *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568.

New York. *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546.

Pennsylvania. *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

Tennessee. *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465, 53 S. W. 736.

Whether the managing board has power to decide with reference to the wisdom of the reduction of preferred stock by conversion thereof into bonds is doubtful. See *Berger v. United States Steel Corporation*, 68 N. J. Eq. 506, 53 Atl. 14.

²⁸ See *Payson v. Withers*, 5 Biss.

(U. S.) 269, Fed. Cas. No. 10,864; *Payson v. Stoeve*, 2 Dill. (U. S.) 427, Fed. Cas. No. 10,863; *Sutherland v. Olcott*, 95 N. Y. 93; *Sewell's Case*, 3 Ch. App. 131.

²⁹ See § 2177 et seq., *infra*.

³⁰ See chapter on Stock and Stockholders, *infra*.

³¹ *Trendley v. Illinois Traction Co.*, 241 Mo. 73, 145 S. W. 1.

³² *State v. Steele*, 37 Minn. 428, 34 N. W. 903.

³³ *Blatchford v. Ross*, 54 Barb. (N. Y.) 42, 37 How. Pr. 110.

Directors of a religious association cannot consolidate it with another without the unanimous consent of the members. *Clark v. Brown* (Tex. Civ. App.), 108 S. W. 421.

³⁴ See chapter on Consolidation, *infra*.

§ 1998. — Sale or lease of entire property. The power of corporations to sell or lease all of their property (including the difference between the power of public service corporations and other corporations) and the right of stockholders to object thereto, has already been considered at length in a preceding volume.³⁵ Of course, if all the stockholders consent, at least where the corporation is not a quasi public one, no question can arise except where the transaction is in fraud of creditors or is deemed ground of forfeiture of the charter by the state. The question arises whether (1) the directors can make such a sale or lease without the consent of all or a majority of the stockholders, and (2) whether the directors with the consent of a majority of the stockholders can so dispose of the property as against the objections of minority stockholders. In regard to the first question, which is the one considered here, the general rule is that the directors of a corporation have no power to sell out all the property of the corporation, without the consent of at least a majority of the stock as represented by the stockholders, unless it is necessary to do so in order to pay its debts.³⁶ "All the authorities in this state," said the New

³⁵ See §§ 1203-1229, vol. 2.

³⁶ **United States.** *Easun v. Buckeye Brewing Co.*, 51 Fed. 156.

Alabama. *Elyton Land Co. v. Dowdell*, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981.

Montana. *Forrester & MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 397, 76 Pac. 211, 74 Pac. 1088; *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353.

New York. *People v. Ballard*, 134 N. Y. 269, 17 L. R. A. 737, 32 N. E. 54.

South Dakota. *Summers v. Glenwood Gold & Silver Min. Co.*, 15 S. D. 20, 86 N. W. 749.

Wisconsin. *Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485.

England. *Ernest v. Nicholls*, 6 H. L. Cas. 401.

"The authorities seem to be unanimous to the proposition that it is not within the general power of president and secretary, nor probably even

within the power of the board of directors, to convey away the entire manufacturing plant of a going corporation. The principle is that such act is not in the line of any business contemplated to be done by the corporation, it being in its essence the very negation of corporate business." *Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485.

But this rule does not apply to a contract by the directors of an express company which had an exclusive contract with a carrier to give up such exclusive rights in consideration of additional territory. *Trendley v. Illinois Traction Co.*, 241 Mo. 73, 145 S. W. 1.

Transfer is void rather than voidable. *Forrester & MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 397, 76 Pac. 211, 74 Pac. 1088.

Directors cannot reduce the capital stock and then turn over the business of the corporation to a new company, without compensation. *Godley v.*

York Court of Appeals, "are uniform in holding that the trustees of a corporation cannot so dispose of its property as to virtually end its existence and prevent it from carrying on the business for which it was incorporated."³⁷ The directors, however, have the power, as the managers of a corporation, to sell all its assets, if necessary, in order to pay its debts.³⁸ And they may, without the consent of the stockholders, execute or authorize an assignment for the benefit of creditors.³⁹

Conditions may arise, however, in which directors will be deemed to possess power to part with the corporate property. Thus in a federal case the charter of a corporation read in part as follows: "The subscribers to and holders of the stock of the company, or any of them, * * * shall not, until January the 1st, 1910, be permitted to cast any vote, or participate in any way in the control and management of said corporation and its business, but the entire control and management of said corporation shall be until that date vested in the directors thereof, who shall be the parties whose names are signed thereto." The substance of this provision was repeated in the contracts of subscription, reference being made thereto, also, in the certificates of stock. A further provision was made by the charter that while the directors might call the stockholders together to obtain their views, that any action taken by the stockholders should be advisory only. The court held that the provision quoted was controlling and not in conflict with a statute which made provision with reference to meetings and powers of stockholders, such statute having reference only to corporations whose charters contained no such provisions as the corporation in the case at bar. Where, therefore, the main purpose in forming the corporation was to dispose of its property, it being unable to develop or hold same, and being heavily incumbered, the directors possessed power to make sale thereof.⁴⁰

The general rule is that the directors of a corporation cannot lease the entire property of the corporation when the exigencies of the business do not require such a step and the lease is not expressly authorized by the charter or articles of association.⁴¹ But such a lease has

Crandall & Godley Co., 212 N. Y. 121, L. R. A. 1915 D 632, 105 N. E. 818, modifying 153 N. Y. App. Div. 697, 139 N. Y. Supp. 236.

³⁷ People v. Ballard, 134 N. Y. 269, 296, 17 L. R. A. 737, 32 N. E. 54.

³⁸ Union Trust Co. of Maryland v. Carter, 139 Fed. 717; Beardstown

Pearl Button Co. v. Oswald, 130 Ill. App. 290; McElroy v. Minnesota Percheron Horse Co., 96 Wis. 317, 71 N. W. 652.

³⁹ See § 1975, *supra*.

⁴⁰ Union Trust Co. v. Carter, 139 Fed. 717.

⁴¹ See § 1242, vol. 2. See also Cass

been held within the powers of the directors if it is authorized by the charter or articles of association, and they are vested, as in New York, with the entire management and control of the corporation.⁴²

Where the stockholders have ratified a public sale of the corporate property to be made on a certain day, the directors may nevertheless postpone the sale to avoid a sacrifice of the property.⁴³

§ 1999. — Dissolution or winding up of corporation. Except as already noted,⁴⁴ the directors have no authority to dispose of all the property of the corporation, and wind up its affairs, or to surrender its charter or otherwise dissolve it, unless such authority is expressly conferred upon them by the charter or general law, or by the stockholders.⁴⁵ Such acts are clearly beyond the ordinary business of the corporation. This power, however, may be expressly conferred upon the directors by the charter or statute, or by the stockholders when they have the power themselves.⁴⁶

§ 2000. — Change of office to another state. It seems that the directors cannot change the offices of the corporation from a place within the state to a place in another state, where not authorized by statute or the charter.⁴⁷

§ 2001. — Waiver of fraud upon stockholders. When a fraud is practiced upon the stockholders of a corporation by the promoters,

v. Manchester Iron & Steel Co., 9 Fed. 640.

Directors of a railroad company have no authority, unless it is expressly conferred, to lease the road to another company for 999 years. *Metropolitan El. Ry. Co. v. Manhattan El. Ry. Co.*, 14 Abb. N. Cas. (N. Y.) 103, 11 Daly 373.

⁴² *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489; *Hennessy v. Muhleman*, 40 N. Y. App. Div. 175, 57 N. Y. Supp. 854, rev'g 27 N. Y. Misc. 232, 57 N. Y. Supp. 114.

⁴³ *Paducah & Illinois Ferry Co. v. Robertson*, 161 Ky. 485, 171 S. W. 171.

⁴⁴ See § 1998, *supra*, as to sale or lease of entire property.

⁴⁵ *Colorado. Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac. 272.

Maine. Rollins v. Clay, 33 Me. 132.

Michigan. Bank Com'rs v. Bank of Brest, Harr. Ch. 106.

Missouri. Lucas Market Sav. Bank v. Goldsoll, 8 Mo. App. 596.

New York. Lake Ontario Nat. Bank v. Onondaga County Bank, 7 Hun 549; *Abbot v. American Hard Rubber Co.*, 33 Barb. 578; *Ward v. Sea Ins. Co.*, 7 Paige 294.

Pennsylvania. Balliet v. Brown, 103 Pa. St. 546.

South Carolina. Smith v. Smith, 3 Desauss. 557.

England. Ernest v. Nicholls, 6 H. L. Cas. 401.

⁴⁶ *Wallamet Falls Canal & Lock Co. v. Kittredge*, 5 Sawy. (U. S.) 44, Fed. Cas. No. 17,105.

⁴⁷ *McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

it may be waived by the stockholders, but not by the directors. Knowledge of the fraud upon the part of the directors is not knowledge on the part of the stockholders, and the fraud cannot be ratified or waived by the directors so as to bind either the corporation or the stockholders.⁴⁸

XIV. POWERS OF EXECUTIVE COMMITTEE

§ 2002. **General considerations.** Generally, the powers of the executive committee are, in some way, stated in the by-laws; and ordinarily such a committee is given all the authority of the board of directors, at least in the intervals between the sittings of the board, to conduct the ordinary business of the company.⁴⁹ If the committee is empowered to exercise the powers of the board of directors "in the management of the business and affairs of the company," it has been held "to delegate 'ministerial,' 'current,' 'ordinary,' and 'routine,' powers, but not power to inaugurate radical reversals of or departures from fundamental policies and methods of conducting the business as prescribed by the directorate."⁵⁰ Of course, if the executive committee is given the "full powers" of the directors, it may employ one as superintendent of transportation of a railroad.⁵¹ It has authority to give negotiable notes for legitimate indebtedness incurred,⁵² and may indorse a note for a loan for the current business of the corporation,⁵³ or make ordinary purchases,⁵⁴ but it has no power to purchase shares of the corporation's own stock,⁵⁵ nor, it seems, to issue

⁴⁸ *Baifbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Simons v. Vulcan Oil & Mining Co.*, 61 Pa. St. 221.

⁴⁹ See *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298.

Vice presidents as members of executive committee, under particular by-laws, see *Lovell v. Women's Pennsylvania Soc. for Prevention of Cruelty to Animals*, 235 Pa. 601, 84 Atl. 518.

⁵⁰ *Fensterer v. Pressure Lighting Co.*, 85 N. Y. Misc. 621, 149 N. Y. Supp. 49.

⁵¹ *Young v. Canada, A. & P. S. S. Co., Ltd.*, 211 Mass. 453, 97 N. E. 1098.

⁵² *First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America*, 108 N. Y. App. Div. 78,

95 N. Y. Supp. 454, aff'd without opinion 185 N. Y. 575, 78 N. E. 1103.

⁵³ *Tilden v. Goldy Mach. Co.*, 9 Cal. App. 9, 98 Pac. 39.

⁵⁴ The executive committee of a railroad corporation, provided for by a by-law for the purpose of performing the general duties of directors, the assent of the directors being necessary in order to the binding force of the acts of the executive committee, was deemed to have power under the by-laws to purchase certain wire necessary for the safe operation of the road, although the directors had not given their previous consent. *John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co.*, 76 Vt. 131, 56 Atl. 530.

⁵⁵ *Maryland Trust Co. v. National*

stock.⁵⁶ Where an executive committee of an agricultural society was given power “to do all acts necessary for the prosperity of the society in the intervals of the meeting of the board,” the committee cannot purchase real estate where the society could have suffered no detriment by deferring the matter until it could be submitted to the action of the board.⁵⁷ Of course a resolution authorizing a committee to make and report an agreement is not sufficient authority to authorize a committee so appointed to make and enter into a binding contract without reporting.⁵⁸ A mere auditing committee cannot rescind a contract or determine the future action of the company.⁵⁹

§ 2003. Power not unrestricted. Where a by-law provides that the committee shall have “full powers of the board of directors when said board is not in session,” it does not confer unrestricted power but is confined to the ordinary business operations of the corporation.⁶⁰ For instance, in such a case, they cannot fix the compensation of one of their number as an officer of the corporation, nor so amend the by-law providing for their appointment that no special meeting of the stockholders could be called except by one of their number, nor act in their own pecuniary interests so as to absorb the entire powers of the corporation for an indefinite period.⁶¹

§ 2004. Power to act when meeting of full board has been called. It is generally provided by the by-laws that the executive committee may act when the board of directors “is not in session” or else the same rule is stated in similar language. This has been held to preclude action by the committee after a meeting of the full board of directors has been called. Thus, in a New York case, the executive committee entered into a contract at a time when a meeting of the directors had already been called for the afternoon of the same day. At the meeting of the directors they passed a resolution notifying the other party to the contract that the “proposed contract” was under consideration, and at a subsequent date rejected the contract and so

Mechanics' Bank, 102 Md. 608, 63 Atl. 70.

⁵⁶ *Ryder v. Bushwick R. Co.*, 134 N. Y. 83, 31 N. E. 251.

⁵⁷ *Tracy v. Guthrie County Agr. Society*, 47 Iowa 27.

⁵⁸ *Greensboro Gas Co. v. Home Oil & Gas Co.*, 222 Pa. 4, 6, 128 Am. St. Rep. 790, 70 Atl. 940.

⁵⁹ *Skinner v. Walter A. Wood Mowing & Reaping Mach. Co.*, 140 N. Y. 217, 224, 37 Am. St. Rep. 540, 35 N. E. 491.

⁶⁰ *Hayes v. Canada, Atlantic & Plant S. S. Co., Ltd.*, 181 Fed. 289.

⁶¹ *Hayes v. Canada, Atlantic & Plant S. S. Co., Ltd.*, 181 Fed. 289.

notified the other party to it. In considering this question, Justice Gray of the Court of Appeals said that "within the spirit and intentment of the by-laws, a session of the board had then so far moved, if not initiated, by the previous calling of a meeting, as to preclude such exercise by the committee meanwhile in the administration of the company's affairs. * * * In delegating authority to those of their number who had been selected to form an executive committee, it was intended, and plainly implied, that such subordinate agency of the board of directors should not exercise any powers of government, when the board itself was about to sit for that purpose."³²

§ 2005. Necessity for action as a whole, quorum and vote of majority. The executive committee can act only as a whole,⁶³ although it has been held that where one of an executive committee of three orders goods for the corporation and another acquiesces therein, the corporation is bound if the committee could bind it.⁶⁴ A reasonable notice of a meeting of the committee is necessary;⁶⁵ and there is no such notice where two members of the committee came into the office of the third and said "We are going to have a meeting right away and the meeting will come to order!"⁶⁶ A majority constitutes a quorum unless it is otherwise provided,⁶⁷ the same as in case of meetings of the full board.⁶⁸ Thus, two members of the executive committee may act without the presence or consent of the third.⁶⁹ The executive committee may be bound by the acts of a majority,⁷⁰ and if all the executive committee are present, the decision of the majority controls.⁷¹ In other words, the same rules prevail as to notice

⁶² Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 190 N. Y. 1, 123 Am. St. Rep. 529, 82 N. E. 730, aff'g 115 N. Y. App. Div. 388, 100 N. Y. Supp. 960.

⁶³ Young v. United States Mortgage & Trust Co., 156 N. Y. App. Div. 515, 141 N. Y. Supp. 364, modifying 131 N. Y. Supp. 33; Caldwell v. Mutual Reserve Fund Life Ass'n, 53 N. Y. App. Div. 245, 65 N. Y. Supp. 826.

⁶⁴ John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co., 76 Vt. 131, 56 Atl. 530, where ordering of supplies by one member was held binding where another acquiesced therein, and the third knew nothing

of the transaction and took no active part in the management.

⁶⁵ Hayes v. Canada, Atlantic & Plant S. S. Co., Ltd., 181 Fed. 289.

⁶⁶ Hayes v. Canada, Atlantic & Plant S. S. Co., Ltd., 181 Fed. 289, 291.

⁶⁷ See § 1887; supra.

⁶⁸ See § 1882, supra.

⁶⁹ Canada, Atlantic & Plant S. S. Co., Ltd. v. Flanders, 145 Fed. 875.

⁷⁰ Young v. Canada, A. & P. S. S. Co., Ltd., 211 Mass. 453, 97 N. E. 1098.

⁷¹ Young v. Schenck, 64 Wash. 90, 116 Pac. 588.

of meeting, quorum and number necessary to decide where a quorum is present, as in the case of meetings of the full board.⁷²

Of course, if a by-law requires bills against the company to be certified as correct by a majority of the committee, a bill approved by only two of a committee of five is not properly audited.⁷³

XV. POWERS OF PRESIDENT

§ 2006. General considerations. The powers of a president include (1) those inherent in the office; (2) those conferred on him by the charter, by-laws or resolution of the board of directors; (3) those implied from the express powers conferred on him; and (4) the apparent powers which the corporation permits him to exercise without objection. In determining the power of a president of a corporation, it is necessary to keep constantly in mind that what is herein stated, except where otherwise expressly designated, is his power merely by virtue of his office, i. e., *ex officio*, or, as it is sometimes termed, his inherent power. Of course he may have more extensive powers, and in fact he generally has, than arise merely by virtue of his office. Thus, he may have greater powers conferred on him by express authority given by the charter or by-laws or a resolution of the board of directors. So his powers may be enlarged by the practice of permitting him to do certain things without objection, although not expressly authorized, so as to create an apparent power on which persons dealing with the corporation may rely.⁷⁴ Furthermore it is not uncommon for the by-laws to expressly provide that he shall be the general manager of the company, or the same result is reached by permitting him to assume the management of the corporation by acquiescence therein. In the latter case, his powers are not those merely of a president but are the broader ones possessed by a general manager,⁷⁵ and in determining his powers reference should also be made to a succeeding subdivision of this chapter stating the powers of a general manager.⁷⁶ In fact it is doubtful whether a president who is also general manager has any greater powers than are possessed by a general manager, and hence in the subdivision on the powers of general managers there has been no attempt to differentiate or separate

⁷² "Generally speaking, a committee of a corporation is subject to the same rules as the directors." *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 282, 13 L. R. A. 559, 28 N. E. 245.

⁷³ *Rockford, R. I. & St. L. R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587.

⁷⁴ General rules as to apparent power, see §§ 1916-1925, *supra*.

⁷⁵ See §§ 2033, 2098, *infra*.

⁷⁶ See §§ 2096-2136, *infra*.

the decisions relating to the powers of one who is both president and general manager and one who is merely general manager without holding another office.

§ 2007. Express authority—In general. The president of a corporation may be given the power to make particular contracts, or to execute conveyances, borrow money, execute mortgages and do other acts, by the charter of the corporation, or, subject to charter or statutory restrictions, by the board of directors or the stockholders.⁷⁷ The board of directors may vest in the president a wide discretion and authority with respect to the ordinary business of the corporation,⁷⁸ and the president is sometimes given broad powers by the by-laws.⁷⁹ Moreover, if valid by-laws provide that the president shall make all contracts for the company, there can be no question as to his power to make ordinary contracts.⁸⁰ Furthermore, power to make a contract includes power to renew or ratify a contract invalid because not in writing.⁸¹ But a provision that all notes "entered into by the company signed by the president, shall be binding upon the company," does not authorize the president to make any contract.⁸² So when the board of directors refers a matter to a committee of three,

⁷⁷ Authority to erect a building includes authority to contract debts for the purpose. *Cattron v. First Universalist Soc. of Manchester*, 46 Iowa 106.

A resolution by the directors of a corporation, conferring on the president full power to act for it with reference to municipal street work, authorizes him to contract with the city on behalf of the corporation for the improvement of the street. *Oakland Paving Co. v. Rier*, 52 Cal. 270.

Under authority conferred by the directors of a steam packet company to make arrangements to induce persons to buy freight for the boats, the president may guarantee shippers against loss upon merchandise shipped, to the extent of the freight. *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846.

Where a corporation authorizes its president to contract for the construc-

tion of a railroad, he is authorized to advance bonds and stock of the company to a contractor agreeing to construct it. *Hudson River & W. County Midland R. Co. v. Hanfield*, 36 N. Y. App. Div. 605, 55 N. Y. Supp. 877.

⁷⁸ *Taylor v. Vossburg Mineral Springs Co.*, 128 La. 364, 54 So. 907.

⁷⁹ *New Haven Trust Co. v. Doherty*, 74 Conn. 353, 50 Atl. 887.

For forms of by-law provisions fixing the powers of the president, including those of the United States Steel Corporation, see *Fletcher's Corporation Forms*, 690, 697, 704, 709, 721, 727, 732.

⁸⁰ *Fleitmann v. John M. Stone Cotton Mills*, 186 Fed. 466.

⁸¹ *San Antonio Light Pub. Co. v. Moore*, 46 Tex. Civ. App. 259, 101 S. W. 867.

⁸² *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812.

one of whom is the president, the president cannot act alone so as to bind the corporation.⁸³

If the directors themselves make a contract, or authorize another to make it, this revokes any special authority in the matter previously given to the president.⁸⁴

§ 2008.—Limitations on powers. The president cannot, in the absence of express authority, make a contract on different terms, when the terms are fixed by a resolution of the board of directors.⁸⁵

§ 2009. Powers in general merely as incident to office. In most jurisdictions, it is the well settled rule that the president of a corporation has no greater powers, except to preside at the meetings of directors, than any other director, and that he has no power to act as agent for the corporation, or to make contracts in its behalf.⁸⁶ In other jurisdictions, at least in so far as the more recent decisions are concerned, the tendency is to consider the president as the real head of the corporation with certain limited powers connected with the ordinary business of the corporation, or at least to hold that there is a rebuttable presumption that he has such powers.⁸⁷ Now, it is necessary to keep in mind in connection with the statement of the law in this subdivision as to the powers of a president, that when it is stated that he has not power to do a certain act or make a certain contract, without qualification, what is meant is that so far as the adjudicated cases are concerned it has been so held, although it might well be that if the question arose in another jurisdiction where the powers of the president are more liberally considered the contrary would be held. On the other hand, a decision in a state like Illinois, where there is a presumption in favor of the authority of a president in case of dealings in the ordinary course of business, is no precedent in a state adher-

⁸³ Third Ave. R. Co. v. Ebling, 12 Daly (N. Y.) 99. See also § 1908, supra.

⁸⁴ East Rome Town Co. v. Brower, 80 Ga. 258, 7 S. E. 273.

A by-law giving the president "the general charge and direction of the business of the company, as well as all matters connected with the interests and objects of the corporation," does not authorize him to do an act which by another by-law is required to be done by a separate committee.

Twelfth St. Market Co. v. Jackson, 102 Pa. St. 269.

⁸⁵ Hodges v. Rutland & B. R. Co., 29 Vt. 220.

Where a resolution of the directors establishes a rate to be paid for certain services, the president cannot bind the corporation by an agreement to pay a higher rate. Hodges v. Rutland & B. R. Co., 29 Vt. 220.

⁸⁶ See § 2010, *infra*.

⁸⁷ See §§ 2012-2030, *infra*.

ing to the rule that a president has no power to contract and that there is no presumption in favor of his authority so to do.

§ 2010. View that president has no greater power than any other director—Statement of rule. The general rule is that whether the president has authority to do a particular act depends upon the powers conferred upon him, either by the charter or by the stockholders or directors. He may be expressly authorized to do a particular act, or he may be expressly given the general management of the corporation, or he may be clothed with apparent authority, so that his acts will be binding on the corporation; or he may be a mere figurehead, with no other duties than to preside at the meetings of directors; or his authority may range anywhere between these extremes. The mere fact that he is president, without more, does not imply that he has any greater power than any other director.⁸⁸ Thus, the rule which for-

⁸⁸ **United States.** *Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135.

Alabama. *Brush Elec. Light & Power Co. of Montgomery v. City Council of Montgomery*, 114 Ala. 433, 21 So. 960; *Stanley v. Sheffield Land, Iron & Coal Co.*, 83 Ala. 260, 4 So. 34; *W. A. Handley Mfg. Co. v. International Recording Co.*, 6 Ala. App. 219, 60 So. 557.

Arkansas. *City Elec. St. Ry. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535, 54 Am. St. Rep. 282, 34 S. W. 89.

California. *Blen v. Bear River & A. Water & Mining Co.*, 20 Cal. 602, 81 Am. Dec. 132.

Georgia. *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 451, 69 S. E. 734; *Merchants' Bank of Macon v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394.

Indiana. *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759. Compare *National State Bank of Terre Haute v. Vigo County Nat. Bank*, 141 Ind. 352, 355, 50 Am. St. Rep. 330, 40 N. E. 799.

Iowa. *Templin v. Chicago, B. & P. Ry. Co.*, 73 Iowa 548, 35 N. W. 634.

Kentucky. *Mt. Sterling & Jeffer-*

sonville Turnpike Road Co. v. Looney, 1 Metc. 550, 71 Am. Dec. 491.

Louisiana. *Bradshaw v. Knoll*, 132 La. 829, 61 So. 839.

Minnesota. *Grant v. Duluth, M. & N. Ry. Co.*, 66 Minn. 349, 69 N. W. 23.

Nevada. *Ex parte Riekey*, 31 Nev. 82, 135 Am. St. Rep. 651, 100 Pac. 134.

New Hampshire. *Wait v. Nashua Armory Ass'n*, 66 N. H. 581, 14 L. R. A. 356, 49 Am. St. Rep. 630, 23 Atl. 77.

New Jersey. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237; *Titus v. Cairo & Fulton R. Co.*, 37 N. J. L. 98.

New York. *Rockefeller v. Lamora*, 96 App. Div. 91, 89 N. Y. Supp. 1; *Westerfield v. Radde*, 7 Daly 326.

North Carolina. *Rumbough v. Southern Improvement Co.*, 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. 536.

Texas. *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123; *El Fresnal Irrigated Land Co. v. Bank of Washington*, — Tex. Civ. App. —, 182 S. W. 701; *Wharton v. Washington County State Bank*, — Tex. Civ. App.

merly was the only one prevailing, and which is the rule to-day in perhaps a majority of the states, with very few exceptions, is that the president of a corporation has no inherent power to enter into contracts binding upon the corporation.⁸⁹ The general rule is that the

—, 153 S. W. 699; *Standard Underground Cable Co. v. Southern Independent Tel. Co.*, — Tex. Civ. App. —, 134 S. W. 429.

Vermont. *Lyndon Mill Co. v. Lyndon Literary & Biblical Institution*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

West Virginia. *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 70 W. Va. 169, 73 S. E. 321.

Wisconsin. *Chicago & N. W. Ry. Co. v. James*, 22 Wis. 194; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325.

Ordinarily the president has only the powers of an individual director or such as may be directly conferred upon him by the by-laws or by the board of directors. *Lochwitz v. Pine Tree Mining & Milling Co.*, 37 Utah 349, 108 Pac. 1128.

“The naked act of investing the individual with the office of president gives him very little power to act for the corporation.” *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759.

In Texas, however, it has recently been held that the president may contract for repairs on a building owned by the corporation. *Texas Mfg. Co. v. Fitzgerald*, — Tex. Civ. App. —, 176 S. W. 891.

It is to be noted, however, that some of the states laying down this rule have departed from it to a greater or less extent in subsequent cases. See §§ 2012-2030, *infra*.

⁸⁹ **United States.** *Tobin v. Roaring Creek & C. R. Co.*, 86 Fed. 1020; *Central Trust Co. of New York v. Condon*, 67 Fed. 84.

Alabama. *Stanley v. Sheffield Land, Iron & Coal Co.*, 83 Ala. 260, 4 So. 34.

California. *Black v. Harrison Home Co.*, 155 Cal. 121, 99 Pac. 494; *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580.

Indiana. *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8; *National State Bank of Terre Haute v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799.

Iowa. *Ney v. Eastern Iowa Tel. Co.*, 162 Iowa 525, 144 N. W. 383; *Griffith v. Chicago, B. & P. Ry. Co.*, 74 Iowa 85, 36 N. W. 901; *Templin v. Chicago, B. & P. Ry. Co.*, 73 Iowa 548, 35 N. W. 634.

Kentucky. *Macbean v. Irvine's Ex'r*, 4 Bibb. 17; *Mt. Sterling & J. Turnpike Road Co. v. Looney*, 1 Mete. 550, 71 Am. Dec. 491.

Minnesota. *Grant v. Duluth, M. & N. Ry. Co.*, 66 Minn. 349, 69 N. W. 23.

New Hampshire. *Hilliard v. Upper Coos R. R.*, 77 N. H. 129, 88 Atl. 993; *Wait v. Nashua Armory Ass'n*, 66 N. H. 581, 14 L. R. A. 356, 23 Atl. 77.

New Jersey. *Depew v. Colton (N. J. Eq.)*, 46 Atl. 728; *Colton v. Depew*, 59 N. J. Eq. 126, 44 Atl. 662.

New York. *Bright v. Canadian International Stock Yard & Abattoir Co.*, 83 Hun 482, 32 N. Y. Supp. 71; *Western R. Co. v. Bayne*, 11 Hun 166; *Bohm v. V. Loewer's Gambrinus Brewery Co.*, 16 Daly 80; *Westerfield v. Radde*, 7 Daly 326.

Oregon. *Wilson v. Investment Co.*, 80 Ore. 233, 156 Pac. 249; *Harding v. Oregon-Idaho Co.*, 57 Ore. 34, 110 Pac. 412.

Pennsylvania. *Tift v. Quaker City Nat. Bank*, 141 Pa. St. 550, 21 Atl.

president has no power, by virtue of his office alone, to bind the corporation by his contracts, but that "his power to do so must be found in the organic law of the corporation or in a delegation of authority from it, directly or through its board of directors formally expressed, or implied from a habit or custom of doing business."⁹⁰ "The mere fact that a man is president of a corporation does not give him any power to bind the corporation in any way."⁹¹ "The naked act of investing the individual with the office of president gives him very little power to act for the corporation. He has no power to bind it in

660, 47 Leg. Int. 308; *Farmers' Bank of Bucks County v. McKee*, 2 Pa. St. 318.

Texas. *Standard Underground Cable Co. v. Southern Independent Tel. Co.*, — Tex. Civ. App. —, 134 S. W. 429.

Vermont. *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220.

West Virginia. *Williams v. S. M. Smith Ins. Agency*, 75 W. Va. 494, Ann. Cas. 1917 A 813, 84 S. E. 235, and *West Virginia* cases cited therein; *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 70 W. Va. 169, 73 S. E. 321.

Wisconsin. *Chicago & N. W. Ry. Co. v. James*, 22 Wis. 194.

"Generally speaking, the president of a corporation has no power to buy, sell, or contract for a corporation, nor to control its property, funds, or management. Of course the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract, or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director." *Quaker Oil & Gas Co. v. Jane Oil & Gas Co.*, — Okla. —, 164 Pac. 671.

Where the powers of the president are not increased by provision in the

corporate charter or by-laws, his general functions are those of presiding officer. He has no implied power to contract in behalf of the corporation. *Bloch Queensware Co. v. Metzger*, 70 Ark. 232, 65 S. W. 929; *Minnesota Lumber Co. v. Hobbs*, 122 Ga. 20, 49 S. E. 783; *Groeltz v. Armstrong Real Estate Co.*, 115 Iowa 602, 89 N. W. 21.

The president of a railroad company has no implied authority to make construction contracts. *Griffith v. Chicago, B. & P. R. Co.*, 74 Iowa 85, 36 N. W. 901; *Templin v. Chicago, B. & P. Ry. Co.*, 73 Iowa 548, 35 N. W. 634.

The president of a savings bank, on making a building loan, and taking a mortgage on the premises, has no authority to bind the bank by an agreement to pay for materials to be furnished the mortgagor for completion of the building, retaining proceeds of the loan for such purpose. *Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

The president of the vestry of an episcopal church has no implied authority to bind the church on a contract. *Cann v. Church of the Redeemer*, 111 Mo. App. 164, 85 S. W. 994.

⁹⁰ *Marqusee v. Insurance Co. of North America*, 211 Fed. 903, 905.

⁹¹ *Wilson v. Investment Co.*, 80 Ore. 233, 156 Pac. 249.

material matters, except as he may be authorized by law or by the board of directors.”⁹²

§ 2011. — Criticism of rule. It is high time, at this day when corporations are so common and when so much of the business of the country is transacted by them, to break away from the early rules laid down when corporations were more or less in their infancy, and to cease blindly following precedents in regard to this matter, and to adopt the sensible rule, in accordance with the well recognized ideas of the people at large, that a president of a corporation is the head of the corporation subject to the control of the board of directors as to matters out of the ordinary, but with power to bind the corporation in regard to contracts involved in the everyday business of the corporation, such as hiring help, executing and transferring negotiable paper to pay debts, selling the products of the company, purchasing supplies and other property necessary to run the company, accepting payments, compromising claims, etc. In other words, when one's name is put on corporate stationery as its president, where an office at the principal place of business or elsewhere has his name on the door with the word “president” added, and where he appears to be something more than a mere figurehead, the public should be protected in dealing with him, at least as to the ordinary everyday business of the corporation.

§ 2012. View that president has power or is presumed to have power to act in ordinary course of business—In general. In view of the fact that presidents of corporations are often given general supervision and control over their management, it has been held by some courts that contracts or acts made or done by the president of a corporation in the course of its ordinary business will be presumed to have been within his authority, unless the contrary appears, or else it is expressly stated that the president has such powers.⁹³ The rule

⁹² *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759.

⁹³ **United States.** *American Exch. Nat. Bank v. Oregon Pottery Co.*, 55 Fed. 265.

Illinois. *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213, 50 N. E. 655, rev'g 67 Ill. App. 300; *Bank of Minneapolis v. Griffin*. 168 Ill. 314, 48

N. E. 154, aff'g 66 Ill. App. 577; *Board of Trade City of Chicago v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. 743, rev'g 62 Ill. App. 541; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640, aff'g 34 Ill. App. 500; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Smith v. Smith*, 62 Ill. 493; *Chicago, Burlington & Q. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec.

so often stated that the president has very little or no authority merely by virtue of his office, that he has no powers other than those delegated him by the board of directors or otherwise expressly conferred upon him, that he has no more authority than any other director, etc., as already set forth above, is gradually being supplanted by the more reasonable view that he has certain more or less limited power, merely by virtue of his office, or at least that there is a presumption that such authority exists, in case of the ordinary routine business of the corporation. The courts which have, at least to some extent, broken away from the rule making the president a mere dummy, will be found to state their conclusions to the contrary in somewhat different language, and the rule enunciated by some of them is broader than the rule laid down by other courts. In some jurisdictions the rule is stated as a presumption of authority, while in other jurisdictions it seems that certain powers inhere in the office without regard to the actual or apparent authority conferred, where not otherwise limited. It is therefore deemed advisable to take up, one by one, and state the views of the courts in those jurisdictions rejecting the old rule wholly or in part. In stating this so-called modern doctrine it is oftentimes difficult to ascertain just what rule the courts, in particular decisions, intend to lay down, because of the hair line dividing his powers as a general manager and his powers merely as president. If he is expressly declared by the by-laws or by a resolution of the directors to be a general manager, then of course his powers are to be measured by those of a general manager rather than by those of a president.⁹⁴ So if the directors are mere dummies and leave the management entirely to the president, then he is in effect a general manager and his powers are those of a general manager rather than those of a president.⁹⁵ So if he has been permitted in the past to exercise certain powers, then his authority is to be determined by the rules relating to apparent powers.⁹⁶

544; *Consolidated Perfume Co. v. National Bank*, 86 Ill. App. 642; *Lake St. El. R. Co. v. Carmichael*, 82 Ill. App. 344, aff'd 184 Ill. 348, 56 N. E. 372; *Gubbins v. Bank of Commerce*, 79 Ill. App. 150.

Iowa. *White v. Elgin Creamery Co.*, 108 Iowa 522, 79 N. W. 283.

Kansas. *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569.

Kentucky. *Kentucky Tobacco Ass'n v. Ashby*, 9 Ky. L. Rep. 109.

New York. *Powers v. Schlicht Heat, Light & Power Co.*, 165 N. Y. 662, 59 N. E. 1129, 23 App. Div. 380, 48 N. Y. Supp. 237; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *White v. Sheppard*, 41 App. Div. 113, 58 N. Y. Supp. 563.

⁹⁴ See § 2033, *infra*.

⁹⁵ See § 2097, *infra*.

⁹⁶ See §§ 1916-1925, *supra*.

On the other hand, if the president is "apparently in charge of its affairs," as some of the courts put it,⁹⁷ it is difficult to say just what is meant or what constitutes being "apparently in charge of its affairs," or whether in such a case he occupies a position putting him in the class with general managers. In other words it is not always easy, in construing particular decisions, to ascertain whether the court intends to define the inherent powers of a president or his powers as a general manager or his apparent powers. As has been stated, the essential inquiry is "whether the courts allow the usage or custom of corporations generally to act through their presidents to be taken into consideration without proof of such custom or usage in the case of the particular corporation involved."⁹⁸

§ 2013. — Illinois rule. The Illinois rule is that an act of the president, pertaining to the business of the corporation and not clearly foreign to the general power of the president, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporate body.⁹⁹ The president is "presumed" to have authority to transact the ordinary business of the corporation, "in the absence of any showing to the contrary." In one of the earliest cases in Illinois where this common sense rule was laid down, the Supreme Court, in referring to a railroad company, said that the extensive and multifarious business transactions of the company, incapable of execution

⁹⁷ See *Meating v. Tigerton Lumber Co.*, 113 Wis. 379, 384, 89 N. W. 152, concurring opinion of Justice Marshall.

⁹⁸ Note in 7 L. R. A. (N. S.) 376.

⁹⁹ *Jones & Dommersnas Co. v. Crary*, 234 Ill. 26, 84 N. E. 651, aff'g 138 Ill. App. 225, waiver of provision in contract; *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172, aff'g 119 Ill. App. 546; *Lake St. El. R. Co. v. Carmichael*, 184 Ill. 348, 56 N. E. 372, aff'g 82 Ill. App. 344; *Hanover Coal Co. v. Pullen*, 137 Ill. App. 559; *Cozzens & Beaton Type-setting Co. v. Western Ranch & Irrigation Co.*, 112 Ill. App. 309; *Chicago Pneumatic Tool Co. v. Munsell*, 107 Ill. App. 344; *Chicago Pneumatic Tool*

Co. v. H. W. Johns Mfg. Co., 101 Ill. App. 349.

Where a contract which a corporation might properly make is shown to have been executed by its president, proof of the contract as that of the corporation will be deemed to have been sufficiently made unless it be shown that the president was in fact without authority in reference thereto. *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172, aff'g 119 Ill. App. 546.

A contract for the sale of the real property of a building association is within the apparent scope of the authority of the president and secretary. *Domestic Bldg. Ass'n v. Guadiano*, 195 Ill. 222, 63 N. E. 98.

by a board of directors, required a chief officer and executive head, "with power to act in the transaction of the ordinary business of the corporation, as the exigencies of that business may require. The business of such corporations can be carried on only through their officers, agents and servants; through them only can they act or speak, and the president is treated by the public, and made by usage, the chief officer and executive head of the corporation. Through him numerous everyday affairs are transacted, and such acts as are incident to the execution of the trust reposed in him—of an ordinary character, arising in the routine of business—such as custom or necessity has imposed upon the office, he may perform for the corporation, without special or express authority."¹ Now it is to be noted that this decision says nothing about presumptions. A little later, however, in a case where the power of the president of a bank to assign an instrument for the delivery of personal property was concerned, the Supreme Court said that "in the absence of proof to the contrary, it must be presumed the president had authority to transfer it."² And later decisions almost invariably state the rule as a rebuttable presumption. Thus, the Supreme Court, in 1906, states the rule as follows: "He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation."³ It will be noted that this statement confines the presumption to contracts "within the general powers of such officer." What is meant by that clause is explained by the court in the same decision in the statement that "the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts and to bind the company in so doing." It may be said, however, that these two statements are conflicting in that in the latter the power is to be deemed absolute while in the former the rule laid down is merely that there is a presumption that authority was conferred. That the presumption is a rebuttable one, however, is stated in the same case as follows: "If the contract in question had been executed by some agent who ordinarily does not have the power to sign such instruments, and the

¹ Chicago, B. & Q. R. Co. v. Coleman, 18 Ill. 297, 68 Am. Dec. 544.

² Moser v. Kreigh, 49 Ill. 84, 86.

³ George E. Lloyd & Co. v.

Matthews, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N.

E. 172, aff'g 119 Ill. App. 546.

execution had been put in issue by properly verified plea, as is the case here, then it would be necessary to go beyond the mere fact of the execution of the instrument and prove the authority of the agent to execute the same; but when the contract is properly executed for the corporation by its president and it is such a contract as the corporation might lawfully make, the proof of the execution by the president is all that is required, in the absence of any evidence to the contrary showing that the contract was not made by the authority of the corporation." It will also be noticed in this decision, as stated above, that the power, or presumption of authority, is limited to (1) contracts in the ordinary course of business, and (2) in furtherance of the corporate interests, of which more anon.⁴ In Illinois the president is presumed to have authority to deliver its bonds which have been duly authorized to be issued.⁵

§ 2014. — California rule. In California, in speaking of the president of a bank, a district court of appeal, in a comparatively recent decision, stated that "under the usages and customs of modern banking the president of a bank is no longer regarded as an ornamental magnet with which to attract deposits, but, on the contrary, is now, and has been for several years, recognized as the executive head and most important agent in connection with banking operations. The reason for the rule that through banking usage the president's power was limited to transactions expressly authorized by the board of directors no longer obtains, and the rule should cease."⁶ However, outside of this statement, the law in California seems to be that the president has no inherent powers.⁷

§ 2015. — District of Columbia rule. In the District of Columbia, it is held that "while the board of directors or trustees, or by whatever name it may be called, is the usual governing body of all private corporations and entitled to direct and control all its business, great or small, and to give direction to its other officers, yet the president and other officers, and not the board of directors, are those who are usually brought into contact with third persons in the conduct of the business of the organization; and custom and usage, and the necessities of the social order, demand that these executive officers should be regarded as entitled to bind the organization in all matters

⁴ See § 2031, *infra*.

⁶ *Bartlett Estate Co. v. Fraser*, 11

⁵ *McCormick v. Unity Co.*, 239 Ill. 306, 87 N. E. 924, *aff'd* 142 Ill. App. 159,

Cal. App. 373, 105 Pac. 130.

⁷ See cases cited § 2010, *supra*.

which such organizations are accustomed to transact through such officers. * * * Now, that the president of a bank is its chief representative and entitled to act as its general agent in the transaction of its business cannot be questioned.”⁸

§ 2016. — Florida rule. In Florida, it is held that the president may be “presumed” to have authority to employ agents to negotiate the sale of property owned by the company.⁹ Furthermore, the tendency of the decisions in this state is decidedly in favor of the rule that a presumption of authority exists in the case of acts of the president in the ordinary course of business.¹⁰

§ 2017. — Iowa rule. In Iowa the Supreme Court stated that it is “well settled” that, “in the absence of any showing to the contrary, the president of a corporation will be presumed to have authority to act in all matters arising in the ordinary course of its business. As the head of the corporation, which, of necessity, must act through some agency, the natural inference is that he, as its president, has been endowed with the power to direct its operation, and manage the transactions for which it was organized.”¹¹ In later cases in Iowa, however, the Supreme Court places itself among the reactionaries by making the president a mere dummy.¹² Thus, it is held that he cannot make contracts where the articles of incorporation provide that the affairs of the corporation shall be conducted by its directors who shall elect a president whose duties shall be prescribed by by-laws, where no by-law conferring power on the president to make contracts has been

⁸ Russell v. Washington Sav. Bank, 23 App. Cas. (D. C.) 308, 497, where it was conceded that president of bank had power to employ counsel to appear for the bank and defend its interests in pending or prospective litigation.

⁹ Skinner Mfg. Co. v. Douville, 54 Fla. 251, 44 So. 1014.

¹⁰ Cotton States Belting & Supply Co. v. Florida R. Co., 69 Fla. 52, 67 So. 568; McGehee Lumber Co. v. Tomlinson, 66 Fla. 536, 63 So. 919.

“The details of the corporate business are usually carried on and attended to by him and his representatives; the usual or ordinary administrative and fiscal affairs of the corporation

are transacted through him. The scope of his agency is wide in all matters arising in the ordinary course of the corporation’s business. In this position of trust and confidence the corporation places him, and invites the public to transact business with it through him.” Cotton States Belting & Supply Co. v. Florida R. Co., 69 Fla. 52, 67 So. 568.

¹¹ White v. Elgin Creamery Co., 108 Iowa 522, 526, 79 N. W. 283.

¹² Ney v. Eastern Iowa Tel. Co., 162 Iowa 525, 144 N. W. 383, holding that president cannot make contracts for the company; Groeltz v. Armstrong Real Estate Co., 115 Iowa 602, 89 N. W. 21.

adopted.¹³ So it is held that if the answer denies under oath the signature of the corporation, plaintiff must prove the authority of the president to execute the note sued on, the statute providing that signatures are to be deemed genuine and admitted unless the genuineness of the signature is denied under oath.¹⁴

§ 2018. — Kansas rule. In Kansas, it is held that "where the president and secretary of a corporation execute a contract in behalf of the company, which is regular on its face, and not shown to be outside of the regular business of the corporation, it is prima facie evidence that it was executed with authority; and those who deny the authority take upon themselves the burden of establishing their claim."¹⁵

§ 2019. — Kentucky rule. It has been held in Kentucky that the "president is the chief officer, and ought to be presumed to have authority to make contracts pertaining to the business of the corporation, unless the contrary be shown."¹⁶ However, the authority of the president has not always been recognized even in ordinary transactions, as evidenced by other decisions.¹⁷

§ 2020. — Michigan rule. In Michigan, it was said in one case that "there is nothing in the objection that no authority is shown in the president and secretary of defendants to agree on arbitration. They are the officers presumably empowered to make ordinary agreements, and such a company [hydraulic company] cannot exist without power somewhere to agree on rights of flowage. A right to

¹³ Groeltz v. Armstrong Real Estate Co., 115 Iowa 602, 89 N. W. 21.

¹⁴ Marshall Field & Co. v. Orin Ruffcorn Co., 117 Iowa 157, 160, 90 N. W. 618.

¹⁵ Town Co. v. Swigart, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569, followed in Neosho Valley Inv. Co. v. Hannum, 10 Kan. App. 499, 63 Pac. 92.

¹⁶ Burkamp v. Healey, 24 Ky. L. Rep. 1926, 72 S. W. 759. See also Savings Bank v. Benton, 59 Ky. 240, 244, where the court said that "the president of the bank, being its chief

executive officer, had a right as such to appear and answer for it, and employ counsel for its defense." And see, as applicable to presidents of banks, Boyd's Ex'r v. First Nat. Bank of Williamsburg, 128 Ky. 468, 473, 108 S. W. 360.

"The president is the chief officer, and ought to be presumed to have authority to make contracts pertaining to the business of the corporation, unless the contrary be shown." Kentucky Tobacco Ass'n v. Ashby, 9 Ky. L. Rep. 109, 110.

¹⁷ See cases cited in § 2010, supra.

arbitrate any difference on this head is incidental.”¹⁸ However, in this state, the doctrine that the president has no power to contract is generally adhered to.

§ 2021. — Mississippi rule. In Mississippi, the Illinois rule is followed by holding that “the acts done by the president pertaining to the business of the corporation, not clearly foreign to its powers, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation. This, we think, is a salutary rule, and imposes no hardship upon either party to the contract. The corporation selects its president, and the ordinary business man, generally speaking, assumes that the man made president is the head and front of the corporation. If it be true that the president of any particular corporation is a mere figurehead, with no powers or duties, except as a presiding officer of the board of directors, this fact can be readily established by the corporation.”¹⁹

§ 2022. — Missouri rule. In Missouri, it is held that the president “may, without any special authority from the board of directors, perform all acts of an ordinary nature, which, by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business.”²⁰ So it was held in Missouri as early as 1854 that the president being the proper person upon whom to serve process against the company, he could appear and confess a judgment for the corporation.²¹

§ 2023. — Nebraska rule. In Nebraska, it is held that “the weight of modern authority, as well as the better reasoning, supports the general principle that a contract pertaining to the business of a corporation, when formally executed in its name by its president, will,

¹⁸ *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74, 6 N. W. 91.

¹⁹ *Moyse Real Estate Co. v. First Nat. Bank of Commerce*, 110 Miss. 620, 70 So. 821, applying rule to execution by president of accommodation note. See also *Case v. Hawkins*, 53 Miss. 702, holding that the president of a bank may contract with defendant in a judgment in favor of the bank, to enter a remittitur of the judgment.

²⁰ *Sparks v. Dispatch Transfer Co.*,

104 Mq. 531, 540, 12 L. R. A. 714 with note, 24 Am. St. Rep. 351, 15 S. W. 417. To same effect, see *Tuttle & Pike v. Bracey-Howard Const. Co.*, 136 Mo. App. 309, 117 S. W. 86. See also, as to powers of president of episcopal vestries, *Cann v. Rector, Wardens & Vestrymen of Church of Redeemer*, 111 Mo. App. 164, 188, 85 S. W. 994.

²¹ *Chamberlin & Churchill v. Mammoth Min. Co.*, 20 Mo. 96.

in the absence of proof to the contrary, be presumed to have been authorized by the corporation''; and the presumption is not rebutted by mere failure of the record of the board of directors to show affirmatively that such authority had been given.²²

§ 2024. — Nevada rule. In Nevada, it is held that the president may act in case of necessity. In one case, where the question was as to the power of the president of a water company to institute a suit to enjoin the diversion of water, the court said: "In the general course of business of corporations it often becomes necessary to institute legal proceedings for the enforcement of their rights. Prompt action is frequently indispensable, and the delay consequent upon the calling together of a board of directors and the passing of a formal resolution of authorization might produce damaging results. This suit was commenced at the instance of the president of the plaintiff, the chief executive officer of the corporation. As such officer he was presumably empowered to commence suits in its name, and perform such other acts in its behalf as the necessities of the case demanded."²³

§ 2025. — New Jersey rule. In New Jersey, the powers of a president are defined as follows: "His powers over its business and property are strictly the powers of an agent, powers delegated to him by the directors, who are the managers of the corporation, and the persons in whom the control of its business and property is vested. He may, without any special authority from the board of directors, perform all acts of an ordinary nature, which, by usage, or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. To this extent, by virtue of his office, he is the agent of the corporation; but beyond this his official position gives him no more control over its property, funds, or business, than any other director."²⁴ However, there is more or less authority to the contrary in this state.²⁵

²² Omaha Wool & Storage Co. v. Chicago Great Western R. Co., 97 Neb. 50, Ann. Cas. 1917 A 358, 149 N. W. 55.

²³ Reno Water Co. v. Leete, 17 Nev. 203, 207, 30 Pac. 702.

²⁴ Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 679, 64 Atl. 801, 63 Atl. 610, adopting to a large extent

the language used in Stokes v. New Jersey Pottery Co., 46 N. J. L. 237. See also Cogan v. Conover Mfg. Co., 69 N. J. Eq. 816, 65 Atl. 484, holding that the president may sell book accounts for their face value as a means of collecting money.

²⁵ See cases cited in § 2010, supra.

§ 2026. — New York rule. In New York, the decisions are more or less conflicting. It has been held that where a contract made by a president is one which the board of directors had power to authorize the president to make, or to ratify after it had been made, the presumption of authority exists and the burden is on the corporation or those attacking the contract to show that it was not authorized or ratified by the board of directors.²⁶ The president of a corporation has been held to have power *prima facie* to sign and execute corporate conveyances or contracts which the corporation could authorize the president to make or which it could ratify after they were made.²⁷ In case of executed contracts, made without express authority by the president of the corporation, the power of the president is presumed.²⁸

Even a stronger rule appears in some of the decisions. Thus the Appellate Division has laid down the rule as follows: "A business corporation organized for the transaction of ordinary business must have some agent or representative who is authorized to transact such business. The president of the company, its principal executive officer, is impliedly vested with such authority; and, in the absence of express notice, a person dealing with such corporation is entitled to assume that in the ordinary transaction of its business the president is authorized to act for it, and the corporation is liable for contracts made in the conduct of its business."²⁹

§ 2027. — Pennsylvania rule. In Pennsylvania, at an early day, the rule was stated as follows: "Who, then, was the proper person to make the contract? Certainly, the president. We must bear in mind that these kinds of artificial men, or persons, are becoming very common in this state. The legislature turns them out, almost as rapidly as a miller does his grist. They compose a new element, or ingredient, of modern society. They contract with everybody, and about all manner of things; and they can contract by their chief officers; and such is their usual course of business. The president of a

²⁶ *Patterson v. Robinson*, 116 N. Y. 193, 200, 22 N. E. 372; *Norman v. Loomis-Manning Filter Co.*, 123 N. Y. App. Div. 739, 108 N. Y. Supp. 261.

²⁷ *White v. Sheppard*, 41 N. Y. App. Div. 113, 116, 53 N. Y. Supp. 563; *Hudson River & W. County Midland R. Co. v. Hanfield*, 36 N. Y. App. Div. 605, 55 N. Y. Supp. 877.

²⁸ *Davies v. Harvey Steel Co.*, 6 N. Y. App. Div. 166, 39 N. Y. Supp. 791.

²⁹ *Powers v. Schlicht Heat, Light & Power Co.*, 23 N. Y. App. Div. 380, 48 N. Y. Supp. 237. Followed in *Aaronson v. David Meyer Brewing Co.*, 26 N. Y. Misc. 655, 56 N. Y. Supp. 387, holding that the president may execute a guaranty; *Reedy Elevator Co. v. American Grocery Co.*, 23 N. Y. Misc. 520, 51 N. Y. Supp.

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company presents himself to make a contract, evidently connected with the business. He declares the object and purpose of the contract. Who doubts him? We are a dealing people. Is he asked to produce the books of the company to show that he is authorized to make the contract *secundum artem*? Such is not the custom. Society must be protected from mischief, arising from the multiplication of these bodies.”³⁰ However, the courts of that state seem to have departed from this rule.³¹

§ 2028. — Virginia rule. In Virginia, in 1869, in referring to the authority of a railroad president to make contracts for the necessary labor for the company, the Court of Appeals said that such authority “was incident to his office, and has not been disputed. So he might furnish evidence of the amount payable under the contract, either before or after the performance of the service, and put the evidence, in his discretion, into the form of a due-bill or promissory note. Such incidental powers exist by law and general usage, and exist in all cases where the authority of the president is not restricted by special legislation, or by regulations of the company known to the other contracting party.”³²

§ 2029. — West Virginia rule. In West Virginia, inherent powers of the president are recognized to some extent. It must be admitted, said Justice Green, “that these inherent powers of presidents of corporations, that is, the powers not derived from the express action of the board of directors or those to be deduced from the continued exercise by the president with the silent acquiescence of the board of directors, are to a large extent undefined and are quite limited. But it does seem to me, that the decisions do show, that where a bank or any other corporation, which does a large amount of business, from the character of which it must often be required in the regular course of business to bring suits and to defend suits brought against it, is silent as to the duties and powers of its president, and he is entirely unrestrained by any action of the board of directors, it is a duty pertaining to the office of president of such a corporation to take charge of the litigation of the corporation; and that therefore he has the inher-

³⁰ Baltimore & P. Steamboat Co. v. McCutcheon & Collins, 13 Pa. St. 13. See also as to presumptions, Little Sawmill Val. Turnpike or Plank-Road Co. v. Federal St. & P. V. Passenger Ry. Co., 194 Pa. St. 144, 75

Am. St. Rep. 690, 45 Atl. 66.

³¹ See cases cited in § 2010, *supra*.

³² Richmond, F. & P. R. Co. v. Snead & Smith, 19 Gratt. (Va.) 354, 364, 100 Am. Dec. 670.

ent power to institute and carry on legal proceedings for the purpose of collecting debts due to the corporation, and that he may in like manner appear and defend in any suits brought against his corporation. He has an inherent right to employ counsel * * * either to institute or defend suits.”³³ Later decisions, however, have not followed this rule.³⁴

§ 2030. — Wisconsin rule. In Wisconsin, while it is stated that the president of a corporation has no power, by virtue of his office alone, to make a contract binding on the corporation, it is said that the effect of such ancient doctrine in many jurisdictions, and especially in that state, “has long since been done away with, so far as otherwise, a person dealing in good faith with the president of a corporation apparently in charge of its affairs, in respect to the ordinary business of his company, would be in danger of having the authority of such officer thereafter questioned by such company to such person’s prejudice, or, so far as otherwise, a person relying on an instrument made in the name of a corporation by its president, of a class which is ordinarily so made, would primarily be obliged to produce proof of the authority of the president to act in the given case or cases of like character. * * * A person who finds the president of a corporation apparently in charge of its business, or assuming to have the right to act as its general agent, there being nothing to put him on guard to the contrary, may freely and safely deal with such officer in respect to the ordinary business of the corporation—business which, by common usage, is managed in that way—on the assumption that the officer possesses the power of a general agent.” Continuing, this flat-footed statement is made: “The custom is so general for such an officer to exercise such power, that the character given to him by the corporation, by making him its president, is a sufficient holding out on its part, nothing appearing to the contrary, to impliedly give him the requisite authority.”³⁵ All this was said in a concurring opinion written by Justice Marshall, but in a later case where the decision of the court was rendered by him, the same doctrine is practically reiterated by holding that if the president is held out by the corporation as its general agent, and as having authority to do certain acts, it is bound thereby “to the

³³ Colman v. West Virginia Oil & Oil Land Co., 25 W. Va. 148, 168, distinguishing Ashuelot Mfg. Co. v. Marsh, 1 Cush. (Mass.) 507, as involving a small corporation having only a few stockholders,

³⁴ See cases cited in § 2010, supra.

³⁵ Meating v. Tigerton Lumber Co., 113 Wis. 379, 384, 385, 89 N. W. 152. See also statement of rule on page 388 of 113 Wis.

same extent as if authority were conferred in the most formal manner. That an artificial person is estopped from denying that its agents possess all the authority which it gives them the appearance of, the same as a natural person, is just as well established as the principle that the president of a corporation is not, *ex officio*, its general agent or possessed of authority to make contracts binding upon it. * * *

A general agent in fact of a corporation may be and commonly is its president, and when such is the case his official position is by no means a limitation upon his powers as such agent. * * * As has often been said, intolerable mischief would result from requiring every person, at his peril, in dealing with the president of a corporation in a matter outside the scope of his duties as such, to first examine its records. The business world is not subject to any such dangers. * * * What will sufficiently evidence apparent authority of the president of a corporation to make a contract in its name must be considered with reference to the character of the business involved, common knowledge of the manner in which corporate business is usually carried on, and many other circumstances,—significant among them the fact that it has come to pass that the president of a business corporation almost universally exercises the powers of a general agent of his company. * * * The gist of those decisions is that whenever the president of a corporation is found from day to day in general charge of the company's affairs, it is conclusively presumed, as to innocent third persons, that he possesses all the powers ordinarily incident to the position of a general agent, and such other powers as he in fact has customarily exercised for such a period of time as to charge the governing board of the company with knowledge thereof, and which appearance of power they have taken no reasonable means to protect the public from being imposed upon by.”³⁶

§ 2031. — Powers as limited to acts in ordinary course of business.

The president of a corporation is its general administrative agent, “although his powers are by no means without limits,”³⁷ even under the so-called modern doctrine extending the powers of presidents. When it is held that the president has no authority to do a certain act or make a certain contract, and the act or contract is one not in the ordinary course of business, it sometimes does not appear whether the ground for holding the want of authority is that the president has

³⁶ Per Justice Marshall in *St. Clair v. Fiske Trust Co. v. Van Valkenburgh*, 115 Wis. 583, 589, 590, 132 Wis. 638, 112 N. W. 1083.
³⁷ *West Penn Chemical & Manufacturing Co. v. Prentice*, 236 Fed. 891.

no power to act or contract at all, or that he has limited power to act or contract but no power where the act or contract is not in the ordinary course of business. Even if the president be deemed to have power to act in behalf of the corporation, or there is a presumption in favor of his authority, the power does not extend to acts outside the ordinary course of business nor to acts merely for his own benefit.³⁸

In other words, if the terms of a contract entered into on behalf of a corporation by its officers are extraordinary or unusual, such as are not ordinarily made by the president or other officer in the ordinary course of the transaction of the current business of the corporation, the party contracting with the officer is put upon inquiry as to his authority.³⁹ Thus, a contract to pay interest at the rate of one hundred and thirty per cent. per annum is not within the apparent scope of the president or even a general manager.⁴⁰ So, *prima facie*, he cannot make a contract involving a sum much in excess of the capital stock of the corporation.⁴¹ And the president has no authority to

³⁸ He cannot bind the company to pay for publishing his picture and biography where not for the purpose of advertising the corporate business. *Chicago Journal Co. v. Union Life Ins. Co.*, 185 Ill. App. 462.

He cannot borrow securities from a director to cover his own defalcations. *Logan v. Fidelity-Phenix Fire Ins. Co. of New York*, 161 N. Y. App. Div. 404, 146 N. Y. Supp. 678.

A corporation is not bound by an agreement, relative to the disposition of corporate funds, made by one who is its president and general manager with certain parties who are his partners in an independent enterprise. *Leigh v. American Brake-Beam Co.*, 205 Ill. 147, 68 N. E. 713, aff'g 107 Ill. App. 444.

³⁹ *Watkins Salt Co. v. Mulkey*, 225 Fed. 739, 745; *United States Nat. Bank v. First Nat. Bank of Little Rock*, 79 Fed. 296; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237, 241, holding that execution of bond and warrant of attorney for the entry of a judgment by confession was not "within the ordinary business of a corporation, which the president, as

its executive officer, is, in virtue of his office, authorized to transact"; *Stanley v. Franco-American Ferment Co.*, 97 N. Y. Misc. 401, 161 N. Y. Supp. 365.

"Again, the transaction was so far out of the ordinary business of a savings bank that the plaintiff was reasonably put upon inquiry as to the authority of the president and treasurer to make the purchase." *Slattery v. North End Sav. Bank*, 175 Mass. 380, 383, 56 N. E. 606.

⁴⁰ *Stanley v. Franco-American Ferment Co.*, 97 N. Y. Misc. 401, 161 N. Y. Supp. 365.

"A contract to pay interest at the rate of 130 per cent. per annum, a rate of interest so extraordinary that it could not be within the usual course of the business of the corporation, the sums borrowed amounting to as much as \$30,000, cannot be held to be within the apparent scope of the authority of the president or general manager having charge of the current business." *Stanley v. Franco-American Ferment Co.*, 97 N. Y. Misc. 401, 161 N. Y. Supp. 365.

⁴¹ *Thompson v. Marseillaise French*

agree in behalf of a manufacturing corporation to advance money in aid of the reorganization of another manufacturing corporation and to operate and conduct the affairs of the reorganized company.⁴² So the president of a building construction company cannot award sub-contracts involving large sums of money.⁴³ And a president cannot make a contract for compensation to a promoter of the corporation, or ratify contracts made by promoters.⁴⁴ He cannot surrender or transfer the franchises of the corporation.⁴⁵ The president of a lumber company has no authority to consent to the stocking of certain waters, flowing through its property, with trout.⁴⁶ Likewise, on the ground that the exercise of the power cannot be claimed from any necessity that could possibly arise, it has been held that the president of a transportation company cannot assign an account due the corporation.⁴⁷ The propriety of this decision, however, is doubtful, since the assignment of accounts to pay debts or raise money cannot be said to be unusual or outside the ordinary course of business of most corporations.

Further illustrations of acts or contracts deemed not within the powers of the president because not within the ordinary course of the corporate business are given in following sections in this subdivision in connection with the law relating to particular acts or contracts.

§ 2032. Inherent powers as dependent on nature of corporation.
The inherent powers of a president of a corporation depend somewhat

Baking Co., 85 N. Y. Misc. 392, 147 N. Y. Supp. 402.

⁴² Watkins Salt Co. v. Mulkey, 225 Fed. 739, 745.

⁴³ Murphy v. W. H. & F. W. Cane, Inc., 80 N. J. L. 163, 76 Atl. 323.

⁴⁴ Risley v. Indianapolis, B. & W. Ry. Co., 62 N. Y. 240, 1 Hun 202; Tift v. Quaker City Nat. Bank, 141 Pa. St. 550, 21 Atl. 660, 47 Leg. Int. 308. But see Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461.

See generally § 155, supra.

⁴⁵ Sebastian v. Covington & C. Bridge Co., 21 Ohio St. 451; Appeal of Pennsylvania R. Co., 80 Pa. St. 265.

⁴⁶ Rockefeller v. Lamora, 96 N. Y. App. Div. 91, 89 N. Y. Supp. 1.

⁴⁷ Ferguson & Wheeler v. Venice

Transp. Co., 79 Mo. App. 352, 359, where the court said: "It seems to us that the assets of a corporation are its very life blood, the things upon which it subsists, and is enabled to transact business, and to accomplish the purposes of its erection, and for these reasons are, and of right should be, under the exclusive control of the board of directors, who are the representatives and trustees of the body corporate; and it also seems to us that to concede that the president of a corporation, without express authority from the board of directors, may assign an asset of a corporation, is to concede that he may make away with all of its assets, for if he can assign one he may assign another, and another, and so on until the assets are all disbursed."

on the nature of the corporation or perhaps it is better to say that the inherent powers of the president of some corporations, conceding there are inherent powers, are greater than those of the president of other corporations. Thus, it is held that the inherent powers of the president of a nontrading corporation are not as great as those of the president of a trading corporation, in some respects.⁴⁸ So it has been held that the powers of the president of a mining company are much more restricted than the powers of the president of a banking company.⁴⁹ It would seem that in some respects, as for instance in regard to negotiable paper, the powers of the president of a bank might well be considered as broader than those of the president of other companies, although it has been said that "we can perceive no reason why a bank president should be clothed with ex officio powers greater than those of the president of any other corporation."⁵⁰

Illustrations of these rules will be found in subsequent sections of this subdivision.

§ 2033. Apparent authority and powers as general manager—In general. The management of the entire business of a corporation may be intrusted to its president either by express resolution of the directors or by their acquiescence in a course of dealing.⁵¹ In fact, it is a very common custom for the president of a business corporation to be its active manager,⁵² and the president is often expressly appointed "general manager" of the company by a resolution of the board of directors.⁵³ The president may be given general authority to supervise and manage the business of the corporation or a particular part of it. In such a case, his authority extends impliedly to any contract or other act which is incident to the ordinary business of the corporation, or to that part with which he is intrusted, without special authority to make the particular contract or do the particular act;⁵⁴

⁴⁸ *St. Vincent College v. Hallett*, 201 Fed. 471.

⁴⁹ *Hazleton Coal Co. v. Megargel*, 4 Pa. St. 324.

⁵⁰ *Pacific Bank v. Stone*, 121 Cal. 202, 208, 53 Pac. 634.

⁵¹ *Watson v. Proximity Mfg. Co.*, 147 N. C. 469, 478, 61 S. E. 273.

⁵² *Wales-Riggs Plantations v. Caston*, 105 Ark. 641, 152 S. W. 282.

⁵³ See *E. W. McLellan Co. v. East San Mateo Land Co.*, 166 Cal. 736, 137 Pac. 1145.

⁵⁴ *United States. Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707; *Missouri Pac. Ry. Co. v. Sidell*, 67 Fed. 464; *Leroy & C. Val. Air-Line R. Co. v. Sidell*, 66 Fed. 27.

California. Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 Pac. 439; *Crowley v. Genesee Min. Co.*, 55 Cal. 273; *Hudson v. Seeley Specialties Co.*, 19 Cal. App. 213, 124 Pac. 1051.

Illinois. Chicago, B. & Q. R. Co. v. Coleman, 18 Ill. 297, 68 Am. Dec.

but it does not extend to contracts or other acts which are not incident to the ordinary business.⁵⁵ In other words, in such a case, his powers are measured by those of a general manager rather than by those of a president, and in determining his powers reference should be made to a succeeding subdivision of this chapter relating to the powers of general managers of corporations.⁵⁶ If the president is expressly named or appointed as general manager, or if he is put in active charge of all or a part of the corporate business, or if he is held out or permitted to act in behalf of the corporation in all matters or in regard to matters in a particular place, then his authority is measured by the rules relating to the authority of general or branch managers and not by the rules relating to the authority of a president by virtue of his office. Thus, it has been said that "a general agent in fact of a corporation may be and often is its president, and when such is the

544; *Loeb Foundry Co. v. Stout*, 61 Ill. App. 166.

Indiana. *National State Bank of Terre Haute v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799; *Bossert v. Geis*, 57 Ind. App. 354, 107 N. E. 95.

Kansas. *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

Kentucky. *Kentucky Tobacco Ass'n v. Ashby*, 9 Ky. L. Rep. 109.

Maryland. *Northern Cent. Ry. Co. v. Bastian*, 15 Md. 494.

Michigan. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205; *Ceeder v. H. M. Loud & Sons Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; *Preston Nat. Bank of Detroit v. George T. Smith Middlings Purifier Co.*, 84 Mich. 364, 47 N. W. 502.

Mississippi. *Memphis & C. B. Co. v. Scruggs*, 50 Miss. 284.

Missouri. *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, 12 L. R. A. 714, 24 Am. St. Rep. 351, 15 S. W. 417; *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846.

New York. *Oakes v. Cattaraugus*

Water Co., 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; *McComb v. Barcelona Apartment Ass'n*, 134 N. Y. 598, 31 N. E. 613; *Rathbun v. Snow*, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *Smith v. Martin Anti-Fire Car Heating Co.*, 64 Hun 639, 19 N. Y. Supp. 285.

Oregon. *Calvert v. Idaho Stage Co.*, 25 Ore. 412, 36 Pac. 24.

South Dakota. *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

Wisconsin. *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

⁵⁵ *Blen v. Bear River & A. Water & Mining Co.*, 20 Cal. 602, 81 Am. Dec. 132; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237; *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263.

⁵⁶ See §§ 2096-2136, *infra*.

Of course if the president is the managing agent of the company, his implied powers are greater than as if he is merely the president. *West v. Will C. Prather & Co.*, 7 Cal. App. 81, 93 Pac. 892.

case his official position is by no means a limitation upon his powers as such agent."⁵⁷ For instance, the authority of one who is both president and general manager of a corporation to enter into an oral contract is not restricted, as to his powers as general manager, by a by-law requiring the president to execute with the secretary contracts directed by the board of directors.⁵⁸ If the directors turn over the full and absolute management of all corporate affairs to the president, and in no way interfere with his acts, he has power to do any act which the directors could authorize or ratify.⁵⁹

The president of a foreign corporation will be deemed to have *ex officio* authority to make a return of the property held by the corporation in trust for the purpose of taxation in the state, where in addition to presiding at all corporate meetings he is authorized by the charter and by-laws to exercise such general direction over the business of the corporation at all times as its interests may require.⁶⁰

§ 2034. — Apparent authority. Apparent authority of the president may be created by clothing him with apparent authority to act for the corporation in making contracts or doing other acts, as where it allows him (1) habitually to make such contracts or do such acts, or (2) to manage the business generally, although no authority may have been expressly conferred upon him.⁶¹ In other words, the appar-

⁵⁷ *St. Clair v. Rutledge*, 115 Wis. 583, 589, 95 Am. St. Rep. 964, 92 N. W. 234.

The powers of one who is both president and general manager of the corporation are ordinarily greater than in case of one who is merely president. See *Seevers v. Cleveland Coal Co.*, — Iowa —, 159 N. W. 194; *Rosewater v. Glen Tel. Co.*, 81 N. Y. App. Div. 275, 80 N. Y. Supp. 880.

⁵⁸ *Freyberg v. Los Angeles Brewing Co.*, 4 Cal. App. 403, 88 Pac. 378.

⁵⁹ *Chestnut St. Trust & Savings Fund Co. v. Record Pub. Co.*, 227 Pa. 235, 136 Am. St. Rep. 874, 75 Atl. 1067.

⁶⁰ *Boston Safe Deposit & Trust Co. v. Assessors of Taxes of Providence*, 25 R. I. 524, 57 Atl. 301.

⁶¹ *United States. Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707; *Salem Iron*

Co. v. Lake Superior Consol. Iron Mines, 112 Fed. 239; *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. 23; *Missouri Pac. Ry. Co. v. Sidell*, 67 Fed. 464; *Leroy & C. Val. Air-Line R. Co. v. Sidell*, 66 Fed. 27.

Arkansas. *Texarkana & Ft. Smith Ry. Co. v. Bemis Lumber Co.*, 67 Ark. 542, 55 S. W. 944.

Illinois. *Loeb Foundry Co. v. Stout*, 61 Ill. App. 166.

Kansas. *Sherman Center Town Co. v. Swigart*, 43 Kan. 292, 19 Am. St. Rep. 137, 23 Pac. 569; *Sherman Center Town Co. v. Morris*, 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569.

Kentucky. *Kentucky Tobacco Ass'n v. Ashby*, 9 Ky. L. Rep. 109.

Louisiana. *Berlin v. P. L. Cusachs, Ltd.*, 114 La. 744, 38 So. 539.

Maryland. *Northern Cent. Ry. Co. v. Bastian*, 15 Md. 494.

Michigan. *Ceeder v. H. M. Louc*

ent authority may extend merely to the doing of certain acts or may extend to the general management of the business. In the former case, the rules governing apparent power as already laid down are applicable,⁶² while in the latter case the rules governing the powers of general managers are applicable.⁶³ Furthermore, the president may have all the powers of the board of directors where they abandon the management of the corporation and leave the conduct of its business to him.⁶⁴ Thus, if the president is in full charge of the corporation, and has been permitted by both stockholders and directors for a long time to exercise unrestrained control, he has *prima facie* authority to execute a note.⁶⁵ Moreover, if the corporation is in effect a one-man corporation, and the directors have held no meetings for years, and such one man is the president who absolutely dominates, manages and controls its property and affairs as his own, any contract made by him is binding on the corporation.⁶⁶

& Sons Lumber Co., 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575.

New York. *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707; *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; *Smith v. Martin Anti-Fire Car Heater Co.*, 64 Hun 639, 19 N. Y. Supp. 285.

As has often been said, "intolerable mischief would result from requiring every person, at his peril, in dealing with the president of a corporation in a matter outside the scope of his duties as such, to first examine its records. The business world is not subject to any such dangers." *St. Clair v. Rutledge*, 115 Wis. 583, 590, 95 Am. St. Rep. 964, 92 N. W. 234.

⁶² See §§ 1916-1925, *supra*.

⁶³ See §§ 2096-2136, *infra*.

⁶⁴ *Edwards v. Plains Light & Water Co.*, 49 Mont. 535, 143 Pac. 962; *Chestnut St. Trust & Savings Fund Co. v. Record Pub. Co.*, 227 Pa. 235, 136 Am. St. Rep. 874, 75 Atl. 1067; *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; *Senour Mfg. Co. v. Clarke*, 96 Wis. 469, 71 N. W. 883; *McElroy v. Minnesota Percheron Horse Co.*, 96 Wis. 317, 71 N. W. 652.

"At the time this indebtedness was incurred Hanson [president] and his wife held all the stock, and, by the continued acquiescence of the latter permitting him to exercise all the powers and functions of the corporation, he became for the time the board of directors, with all the powers it possessed. The corporation cannot now question any act of his within the scope of its legal powers." *Hanson Sheep Co. v. Farmers' & Traders' State Bank*, — Mont. —, 163 Pac. 1151.

If the directors for a long time neglect to hold meetings, and permit the president to carry on the business without interference, his authority to act as general manager may be presumed by third persons. *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234.

⁶⁵ It is no defense that the officer misappropriated the money and that the corporation never received any benefit from the loan. *Chestnut St. Trust & Savings Fund Co. v. Record Pub. Co.*, 227 Pa. 235, 136 Am. St. Rep. 874, 75 Atl. 1067.

⁶⁶ *Phoenix Land Co. v. Exall*, — Tex. Civ. App. —, 159 S. W. 474.

§ 2035. **Ratification of acts.** A corporation may expressly or impliedly ratify contracts made or other acts done by the president without authority. And if it accepts the benefit of the contract or act or acquiesces therein with knowledge, it impliedly ratifies it.⁶⁷

§ 2036. **Contracts of employment—General rule.** Of course, the president may be expressly authorized to hire and discharge employees,⁶⁸ as in case where there is a by-law conferring such power.⁶⁹ Furthermore, if the president is also the general manager either expressly or in effect, he may make ordinary contracts of employment,⁷⁰

⁶⁷ **United States.** Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 33 L. Ed. 157; Blanchard v. Commercial Bank of Tacoma, 75 Fed. 249; Prentiss Tool & Supply Co. v. Godchaux, 66 Fed. 234.

California. Illinois Trust & Savings Bank v. Pacific Ry. Co., 117 Cal. 332, 49 Pac. 197.

Colorado. Henry v. Colorado Land & Water Co., 10 Colo. App. 14, 51 Pac. 90.

Connecticut. Perry v. Simpson Waterproof Mfg. Co., 37 Conn. 520.

Maryland. Edelhoff v. Horner-Miller Mfg. Co., 86 Md. 595, 39 Atl. 314; Grape Sugar & Vinegar Mfg. Co. v. Small, 40 Md. 395.

Minnesota. Willis v. St. Paul Sanitation Co., 53 Minn. 370, 55 N. W. 550.

Missouri. Jones v. Williams, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486.

Nebraska. Omaha Consol. Vinegar Co. v. Burns, 49 Neb. 229, 68 N. W. 492.

New York. Scott v. Middletown, U. & W. R. Co., 86 N. Y. 200; Davis v. Harvey Steel Co., 6 App. Div. 166, 39 N. Y. Supp. 791.

⁶⁸ Alabama Securities Co. v. Dewey, 156 Ala. 530, 47 So. 55.

⁶⁹ Hooke v. Financier Co., 99 N. Y. App. Div. 186, 90 N. Y. Supp. 1012.

⁷⁰ **United States.** Egbert v. Sun Co., 126 Fed. 508.

Illinois. Loeb Foundry Co. v. Stout, 61 Ill. App. 166.

Maryland. Northern Cent. Ry. Co. v. Bastian, 15 Md. 494.

Michigan. Ceeder v. H. M. Loud & Sons Lumber Co., 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; Hardy v. Tittabawassee Boom Co., 52 Mich. 45, 17 N. W. 235.

New York. Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; Hooker v. Eagle Bank of Rochester, 30 N. Y. 83, 68 Am. Dec. 351; Pollok v. Shultze, 1 Hun 320.

Oregon. Calvert v. Idaho Stage Co., 25 Ore. 412, 36 Pac. 24.

Texas. Johnson v. Armstrong, 83 Tex. 325, 29 Am. St. Rep. 648, 18 S. W. 594.

Virginia. Richmond, F. & P. R. Co. v. Snead, 19 Gratt. 354, 100 Am. Dec. 670.

Wisconsin. Meating v. Tigerton Lumber Co., 113 Wis. 379, 89 N. W. 152.

One who is both president and general manager of a corporation, may employ a broker to sell its lands located at a distance from its main office, especially where authorized by another who with himself owned practically all the stock of the corporation. Seevers v. Cleveland Coal Co., — Iowa —, 159 N. W. 194.

That he cannot fix salaries of officers even if intrusted largely with the management of the business, see

and may employ a general manager for a year.⁷¹ But he cannot employ one for life, although a by-law gives the president authority to appoint, remove and fix the compensation of every employee of the company, where the office of the board of directors continues for only four years.⁷² So he has no power to make an oral contract with a general agent of the company to pay him, on a certain contingency, a sum every month during the remainder of his life, sufficient for his support, after the termination of the agency, although the president be conceded to have power to make ordinary contracts.⁷³

In those jurisdictions where the strict rule that the president has no inherent or implied power to contract was or is adhered to, it ought to be and is, held that he cannot employ managers, clerks, laborers, brokers or other agents, or bind the corporation in any way by the appointment of an agent or by a contract for services.⁷⁴ However,

Sioux City R. R. Contracting Co. v. Walker, 47 Iowa 699.

Power of general manager as to contracts of employment, see §§ 2104, 2105, *infra*.

⁷¹ **Arkadelphia Lumber Co. v. Asman**, 85 Ark. 568, 107 S. W. 1171.

⁷² **Carney v. New York Life Ins. Co.**, 162 N. Y. 453, 49 L. R. A. 471, 76 Am. St. Rep. 347, 57 N. E. 78, *aff'g* 19 App. Div. 160, 45 N. Y. Supp. 1103.

The president and actuary of a life insurance company, authorized by its by-laws to appoint, remove and fix the compensation of employees, cannot make a contract of employment for the life of the employee. **Carney v. New York Life Ins. Co.**, 162 N. Y. 453, 49 L. R. A. 471, 76 Am. St. Rep. 347, 57 N. E. 78, *aff'g* 19 N. Y. App. Div. 160, 45 N. Y. Supp. 1103.

⁷³ **Rennie v. Mutual Life Ins. Co. of New York**, 176 Fed. 202.

⁷⁴ **Idaho. Johnson v. Sage**, 4 Idaho 758, 44 Pac. 641.

Kentucky. Mt. Sterling & J. Turnpike Road Co. v. Looney, 1 Metc. 550, 71 Am. Dec. 491.

Massachusetts. Murray v. C. N. Nelson Lumber Co., 143 Mass. 250, 9 N. E. 634.

Missouri. Vogel v. St. Louis Museum, Opera & Fine-Art Gallery, 8 Mo. App. 587.

Montana. Mathias v. White Sulphur Springs Ass'n, 19 Mont. 359, 48 Pac. 624.

New Hampshire. Wait v. Nashua Armory Ass'n, 66 N. H. 581, 14 L. R. A. 356, 49 Am. St. Rep. 630, 23 Atl. 77.

New York. Bright v. Canadian International Stock Yard & Abattoir Co., 83 Hun 482, 32 N. Y. Supp. 71; **De Bost v. Albert Palmer Co.**, 35 Hun 386; **Risley v. Indianapolis, B. & W. R. Co.**, 1 Hun 202, 62 N. Y. 240.

Pennsylvania. Twelfth St. Market Co. v. Jackson, 102 Pa. St. 269; **Allegheny County Workhouse v. Moore**, 95 Pa. St. 408.

Wisconsin. Chicago & N. W. Ry. Co. v. James, 22 Wis. 194.

Employment of an agent or servant by the president without authority may be rendered binding by express ratification or by acquiescence on the part of the directors. **Grape Sugar & Vinegar Mfg. Co. v. Small**, 40 Md. 395; **Jones v. Williams**, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436, 40 S. W. 353, 39 S. W. 486.

the common sense rule, adopted in many jurisdictions, is that he has implied power to hire necessary help,⁷⁵ including attorneys,⁷⁶ and of course he may be clothed with apparent power to make contracts of employment.⁷⁷ He has no implied power to discharge other officers or to employ others after such a discharge.⁷⁸ He cannot bind the corporation by an agreement for compensation to a director or other officer.⁷⁹

It has been held that he has implied power to contract for services in auditing the books of the company, where apparently in ordinary course and conduct of its business;⁸⁰ and that he may employ an expert to assist the corporation in a legal controversy.⁸¹

It has been held in Missouri that the president may employ a physician to attend an employee injured in the line of his employment.⁸² A fortiori, if the president is held out by the corporation as possessing full power to act in its behalf in all matters arising and transacted in a particular vicinity, he may, at least in some states, employ medical assistance for an injured employee.⁸³ It has been held, however, that where it is not shown that a contract for the employment of the services of a physician to render services to its em-

⁷⁵ *Richmond, F. & P. R. Co. v. Snead & Smith*, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

The president of a small corporation conducting a clothing business, there being only three stockholders, is presumed to have authority to employ the necessary help. *Vincent v. S. Alexander Sons Co.*, 85 Conn. 512, 84 Atl. 84.

In Illinois he may employ subordinates and fix the term of their office. *Kennedy v. Supreme Lodge Knights of Pythias*, 124 Ill. App. 55. He is presumed to be authorized to hire a bookkeeper. *Trawick v. Peoria & Ft. C. St. Ry. Co.*, 68 Ill. App. 156.

⁷⁶ See § 2054, *infra*.

⁷⁷ *Rowland v. P. P. Carroll Loan & Investment Co.*, 44 Wash. 413, 87 Pac. 482.

He may be clothed with apparent authority to hire a person as civil engineer. *Rowland v. P. P. Carroll Loan & Investment Co.*, 44 Wash. 413, 87 Pac. 482.

He may be authorized, or clothed with apparent authority, to agree to pay a commission to an agent for selling goods for the company. *Northern Cent. Ry. Co. v. Bastian*, 15 Md. 494.

⁷⁸ *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

⁷⁹ *Henry Wood's Sons Co. v. Schaef-er*, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881; *Bailey v. Buffalo Crosstown Ry. Co.*, 14 Hun (N. Y.) 483; *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220.

⁸⁰ *Reardon v. Richmond Land Co.*, 21 Cal. App. 357, 131 Pac. 894; *Teele v. Consolidated Amusement Co.* (N. Y. Misc.), 102 N. Y. Supp. 666.

⁸¹ *Rosewater v. Glen Tel. Co.*, 81 N. Y. App. Div. 275, 80 N. Y. Supp. 880.

⁸² *Weinsberg v. St. Louis Cordage Co.*, 135 Mo. App. 553, 116 S. W. 461.

⁸³ *Scott v. Monte Cristo Oil & Development Co.*, 15 Cal. App. 453, 115 Pac. 64.

ployees is within the scope of the purposes for which the corporation was created, or that the officers possess direct authority, or that benefit has inured to the corporation from the contract, the corporation is not liable for services rendered to its employees by a physician at the request of the president and secretary.⁸⁴

In any event, the president has no implied power to make unusual or extraordinary contracts of employment or connected with the employees. Thus, he cannot ordinarily contract to furnish its employees suits of clothes.⁸⁵ So he cannot agree to go into the market and buy its stocks and bonds for the purpose of paying an increased compensation to one of the servants of the corporation.⁸⁶ And even if a president may make ordinary contracts of employment, he cannot make a contract whereby the other party is to procure a one hundred and fifty thousand dollar loan and to receive ten per cent. as commission.⁸⁷ Likewise, the president cannot bind the corporation by a contract to pay a commission for the sale of his own stock.⁸⁸

Power to employ servants includes authority to raise their salaries.⁸⁹

§ 2037. — Employment of brokers or sales and purchasing agents.

As to the implied power to employ persons to sell corporate property, it is generally held that such power exists,⁹⁰ provided that the president himself would have the power to make the sale.⁹¹ In Florida it is held that the president "may be presumed to have authority to employ agents to negotiate the sale of property,"⁹² and that if the agent sues to recover commissions for effecting such sale, the burden is on the corporation to show that the president had no power to employ him.⁹³ In any event, he may employ a person to sell corporate stock on commission, where authorized "to make any contract he saw fit, to employ whom he pleased."⁹⁴ So power to sell at par corporate stock authorizes the president to employ a broker to sell on commis-

⁸⁴ *Harris v. Vienna Ice Cream Co.*, 46 N. Y. Misc. 125, 91 N. Y. Supp. 317.

⁸⁵ *Wolford v. Soter Co.* (N. Y. Misc.), 151 N. Y. Supp. 516.

⁸⁶ *Minshull v. New Jersey Terminal R. Co.*, 76 N. J. L. 684, 71 Atl. 663.

⁸⁷ *Tobin v. Roaring Creek & C. R. Co.*, 86 Fed. 1020.

⁸⁸ *Demarest v. Spiral Riveted Tube Co.*, 71 N. J. L. 14, 58 Atl. 161.

⁸⁹ *Model Clothing House v. Hirsch*, 42 Ind. App. 270, 85 N. E. 719.

⁹⁰ *Skinner Mfg. Co. v. Douville*, 54 Fla. 251, 44 So. 1014.

⁹¹ The president, when authorized to sell stock or other property belonging to the corporation, may employ a broker or other agent to sell the same. *Sistare v. Best*, 88 N. Y. 527.

⁹² *Skinner Mfg. Co. v. Douville*, 54 Fla. 251, 44 So. 1014.

⁹³ *McGehee Lumber Co. v. Tomlinson*, 66 Fla. 536, 63 So. 919.

⁹⁴ *Rideout v. National Homestead Ass'n*, 14 Cal. App. 349, 112 Pac. 192.

sion, where there is the custom in such a case.⁹⁵ And a contract by the president of a land corporation in the corporate behalf, with a third party, to sell lands of the corporation on salary and commission, is binding on the corporation where the president is likewise general manager and by action of the board of directors has been intrusted with authority to make conveyances and to do the planning and work of the corporation.⁹⁶ On the other hand, it has been held that he has no implied power to employ a person to sell corporate bonds,⁹⁷ or to hire a broker to sell the property occupied by the corporation as a plant,⁹⁸ or to employ a broker to purchase real estate.⁹⁹

§ 2038. Negotiable paper.—In general. As to the power of the president to issue notes, merely by virtue of his office, it appears that the authorities are in conflict. As said in a recent federal decision by Justice Mack, "three rules may be found: First. That there is no presumption in favor of such authority. This conservative view is supported probably by the weight of authority. Second. That there is a presumption in favor thereof, but the presumption may be rebutted. The weight of the more recent authorities supports this view. Third. The so-called Illinois doctrine, that as against an innocent party the act of the president binds the corporation. This is not limited to negotiable paper, but extends to any ordinary business transaction."¹

It is generally held that the president of a corporation has no power, merely by virtue of his office, to execute negotiable paper,² or to accept

⁹⁵ *Henderson v. Western Gas Engine Co.*, 8 Cal. App. 247, 96 Pac. 787.

⁹⁶ *Pettibone v. Lake View Town Co.*, 134 Cal. 227, 66 Pac. 218.

⁹⁷ *East Cleveland R. Co. v. Everett*, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493.

⁹⁸ *McCorry v. John C. Wiarda & Co.*, 149 N. Y. App. Div. 863, 134 N. Y. Supp. 667.

⁹⁹ *Jackson Brewing Co. v. Canton*, 118 La. 823, 43 So. 454.

Where the corporate management is intrusted by the corporate charter to a board of directors, and, although the board is authorized to define the duties of the several corporate officers, it does not appear that the directors have so done, the president does not possess authority to employ

a broker for the purpose of purchasing real estate. *Jackson Brewing Co. v. Canton*, 118 La. 823, 43 So. 454.

¹ *St. Vincent College v. Hallett*, 201 Fed. 471, 476.

² *United States*. See *St. Vincent College v. Hallett*, 201 Fed. 471, disapproving *American Exch. Nat. Bank v. Oregon Pottery Co.*, 55 Fed. 265.

Arkansas. *City Elec. St. Ry. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535, 54 Am. St. Rep. 282, 34 S. W. 89.

Iowa. *Catron v. First Universalist Soc. of Manchester*, 46 Iowa 106.

Kentucky. *Reeder v. Lewis & Mason Turnpike Road Co.*, 7 Ky. L. Rep. 364 (abstract).

Michigan. *Gould v. W. J. Gould & Co.*, 134 Mich. 515, 104 Am. St. Rep.

a bill of exchange for the corporation.³ A fortiori, the president has

624, 2 Ann. Cas. 519, 10 Det. L. N. 561, 96 N. W. 576; *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321.

Minnesota. *Bloomington v. Cushman*, 134 Minn. 445, 159 N. W. 1078.

Mississippi. *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116.

Nevada. *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 Pac. 381.

New York. *Columbia Bank v. Gospel Tabernacle Church*, 127 N. Y. 361, 28 N. E. 29; *People's Bank of City of New York v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408; *National Bank of Newport v. H. P. Snyder Mfg. Co.*, 107 App. Div. 95, 94 N. Y. Supp. 982; *Hitchings v. St. Louis, N. O. & O. Canal & Transportation Co.*, 68 Hun 33, 22 N. Y. Supp. 719; *Dabney v. Stevens*, 40 How. Pr. 341; *Stallcup v. National Bank of Republic*, 15 N. Y. St. Rep. 39.

Oregon. *Crawford v. Albany Ice Co.*, 36 Ore. 535, 60 Pac. 14.

Pennsylvania. *Monongahela Nat. Bank v. Harmony Land Co.*, 226 Pa. 440, 18 Ann. Cas. 727, 75 Atl. 687; *Worthington v. Schuylkill Elec. Ry. Co.*, 195 Pa. St. 211, 45 Atl. 927.

Washington. *Elwell v. Puget Sound & C. R. Co.*, 7 Wash. 487, 35 Pac. 376.

West Virginia. *Flanagan v. Flanagan Coal Co.*, 88 S. E. 397; *Williams v. S. M. Smith Ins. Agency*, 75 W. Va. 494, Ann. Cas. 1917 A 813, 84 S. E. 235; *Third Nat. Bank of Cumberland v. Laboringman's Mercantile & Manufacturing Co.*, 56 W. Va. 446, 49 S. E. 544.

In regard to agents in general, Professor Mechem lays down the rule that "authority to bind the principal by negotiable paper will only be implied where it is practically indispensable to accomplish the object." 1 Mechem, *Agency* (2nd Ed.), § 971.

It is the general rule that the president of a corporation is without implied power to bind the corporation by his signature to negotiable paper. "There should be proof of the specific authority to affix the corporate name to the note as its obligation, or that the corporation received the avails of the note or that there was a course of business which justified the bank in accepting it as the obligation of the corporation." *National Bank of Newport v. H. P. Snyder Mfg. Co.*, 107 N. Y. App. Div. 95, 94 N. Y. Supp. 982.

"Our attention has not been directed to any case, and we have been unable to find any, holding that the authority of the president of a private corporation to execute a promissory note in its name, when specifically denied, may be inferred from his official station and the doing of the act in question." *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812.

The president of a bank has no power to draw checks against the account kept with another bank. *Putnam v. United States*, 162 U. S. 687, 713, 40 L. Ed. 1118.

It is beyond the implied power of the president of a building association to determine the amount to which a holder of a matured certificate is entitled and to execute a note of the association for such sum. *Bohn v. Boone Building & Loan Ass'n (Iowa)*, 108 N. W. 1025.

Burden is on plaintiff to show the authority of the president to execute a note. *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812.

As to the province of the court and jury, see *Fifth Nat. Bank of Providence v. Navassa Phosphate Co.*, 119 N. Y. 256, 23 N. E. 737.

³ *Lazarus v. Shearer*, 2 Ala. 718, 724.

no authority to give the note of the corporation for his individual debt, or for money to be used in his private business, and one who takes it under such circumstances, with knowledge, does so at his peril.⁴ Thus, he has no power to make a corporate note payable to his own order.⁵ And a custom whereby the president executed notes in behalf of the company in order to carry on the company's business does not tend to show a custom to execute notes in the name of the company for his own benefit.⁶

On the other hand, the power of the president, or at least a presumption of power, is recognized in some jurisdictions,⁷ especially in Illinois, where the rule is well settled that the president is presumed

⁴Third Nat. Bank v. Marine Lumber Co., 44 Minn. 65, 46 N. W. 145; Wilson v. Metropolitan El. R. Co., 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

⁵Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 S. E. 92; Porter v. Winona & D. Grain Co., 78 Minn. 210, 80 N. W. 965.

Apparent power, see § 2039, *infra*.

"Such a note is a danger signal, which the discounter or purchaser disregards at his peril." Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 S. E. 92.

⁶C. L. Kraft Co. v. Grubbs, 116 Ark. 520, 174 S. W. 245.

⁷Dexter Sav. Bank v. Friend, 90 Fed. 703; American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. 265. See Gold Glen Mining, Milling & Tunneling Co. v. Dennis, 21 Colo. App. 284, 121 Pac. 677; Bacon v. Montauk Brewing Co., 130 N. Y. App. Div. 737, 115 N. Y. Supp. 617.

Where a note is signed by the president, secretary or treasurer, however, it has been held in New York that proof of their specific authority is necessary. National Bank of Newport v. H. P. Snyder Mfg. Co., 107 N. Y. App. Div. 95, 94 N. Y. Supp. 982. In New York, however, in a recent case, it was held that the production of a note signed by the president in behalf of the corporation

makes out a *prima facie* case without proving the authority of the president to make the note, except in the case of a nonbusiness corporation. Westchester Mortgage Co. v. Thomas B. McIntire, Inc., — N. Y. App. Div. —, 161 N. Y. Supp. 390, *rev'g* on rehearing 171 N. Y. App. Div. 518, 157 N. Y. Supp. 725.

In Arkansas there is no presumption of authority. City Elec. St. Ry. Co. v. First Nat. Exch. Bank, 62 Ark. 33, 31 L. R. A. 535, 54 Am. St. Rep. 282, 34 S. W. 89, distinguishing *Crowley v. Genesee Min. Co.*, 55 Cal. 273, and explaining *American Exch. Nat. Bank v. Oregon Pottery Co.*, 55 Fed. 265, as based on dicta in *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 604, 644, 19 L. Ed. 1008. "Those cases which hold that the president and secretary, or any other officer, of a corporation, will be presumed to have authority where they have exercised it, provided, under any circumstances, it might have been conferred upon them, proceed upon the theory of a usage or custom from which authority will be implied. But such a theory cannot be maintained as to electric street railways in this state, for the reason that no such usage as to them exists." *City Elec. St. Ry. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 41, 31 L. R. A. 535, 54 Am. St. Rep. 282, 34 S. W. 89,

to have such power.⁸ Of course, such acts may be ratified, in which case the question of inherent power becomes of no importance.⁹

It seems, however, that even if it should be held that the president of a trading corporation has such power, the power should not be extended to the president of a corporation not for pecuniary profit, such as a college for instance.¹⁰ Thus it has been held that the president of a college or other nontrading corporation has no power, in any event, to issue notes for money borrowed.¹¹ So in New York there is no presumption of authority in case of a religious corporation.¹²

Furthermore, even if the power to execute notes is implied, the president has no authority to execute notes for a large sum not in the ordinary course of the corporate business.¹³ Thus, it would seem that the president of a college has no inherent power to issue notes running from five to forty thousand dollars, since not a transaction in the ordinary course of the business of a college.¹⁴ Moreover, whatever may be the presumptive authority of the president of a corporation to execute notes for its ordinary business transactions, there is no such presumption in favor of a payee who knows that the notes were given for other purposes.¹⁵

§ 2039. — Express or apparent authority or where president is in effect general manager. The president may be expressly authorized

⁸ *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172, aff'd 119 Ill. App. 546; *Consolidated Perfume Co. v. National Bank*, 86 Ill. App. 642; *Fisk v. Carbonized Stone Co.*, 67 Ill. App. 327. Compare *St. Vincent College v. Hallett*, 201 Fed. 471, reviewing Illinois decisions and concluding that the presumption is rebuttable.

⁹ *United States. Blanchard v. Commercial Bank of Tacoma*, 75 Fed. 249.

California. *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

Minnesota. *Willis v. St. Paul Sanitation Co.*, 53 Minn. 370, 55 N. W. 550.

New York. *Martin v. Niagara Falls Paper Mfg. Co.*, 44 Hun 130, aff'd 122 N. Y. 165, 25 N. E. 303.

Wisconsin. *McLaren v. First Nat.*

Bank of Milwaukee, 76 Wis. 259, 45 N. W. 223.

What constitutes ratification, see § 2177 et seq., *infra*.

¹⁰ *St. Vincent College v. Hallett*, 201 Fed. 471. To same effect, see *Westchester Mortgage Co. v. Thomas B. McIntire, Inc.*, — N. Y. App. Div. —, 161 N. Y. Supp. 390.

¹¹ *St. Vincent College v. Hallett*, 201 Fed. 471.

¹² *Columbia Bank v. Gospel Tabernacle Church*, 127 N. Y. 361, 368, 28 N. E. 29; *People's Bank of City of New York v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408.

¹³ *St. Vincent College v. Hallett*, 201 Fed. 471, 477.

¹⁴ *St. Vincent College v. Hallett*, 201 Fed. 471, 477.

¹⁵ *In re Continental Engine Co.*, 234 Fed. 58.

to execute negotiable paper, such as notes, checks, and bills of exchange, on behalf of the corporation; and authority to do so for the legitimate purposes of the corporation may be implied where he has been accustomed to so act as to clothe him with apparent authority, and such power is also generally held to exist where he is intrusted with the management of the corporation,¹⁶ although it is sometimes

16 United States. Fitzgerald & Malory Const. Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Dexter Sav. Bank v. Friend, 90 Fed. 703; United States Nat. Bank v. First Nat. Bank of Little Rock, 79 Fed. 296; American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. 265.

Florida. Cotton States Belting & Supply Co. v. Florida R. Co., 69 Fla. 52, 67 So. 568.

Illinois. McDonald v. Chisholm, 131 Ill. 273, 23 N. E. 596.

Iowa. Shaver v. Hardin, 82 Iowa 378, 48 N. W. 68.

Maine. Castle v. Belfast Foundry Co., 72 Me. 167.

Michigan. Preston Nat. Bank of Detroit v. George T. Smith Middlings Purifier Co., 84 Mich. 364, 47 N. W. 502.

Missouri. First Nat. Bank of Hannibal v. North Missouri Coal & Mining Co., 86 Mo. 125.

New York. Fifth Nat. Bank of Providence v. Navassa Phosphate Co., 119 N. Y. 256, 23 N. E. 737; Marine Bank City of New York v. Clements, 31 N. Y. 33; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Martin v. Niagara Falls Paper Mfg. Co., 44 Hun 130; National Park Bank of New York v. German American Mut. Warehousing & Security Co., 53 N. Y. Super. Ct. 367. See also Davis Sewing Mach. Co. v. Best, 105 N. Y. 59, 11 N. E. 146.

South Dakota. Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

The president may execute notes where that has been his custom to the

knowledge of the directors. Texarkana & Ft. S. Ry. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944, holding it immaterial that proceeds of note were for his own use.

"It is well settled in this state that, where a president of a trading or business corporation is given general management and control of its property, business, and affairs, the corporation is *prima facie* bound by contracts entered into by him in the name of the corporation, if the contracts are within the apparent power of the corporation to make, and third parties entering into such contracts are not bound by secret limitations of his authority contained in the by-laws. * * * While it is true that, as between the directors or officers and the corporation or the stockholders, a fiduciary relationship exists, and at the suit of either the corporation, or in a derivative action by stockholders the directors, are accountable in equity as trustees, as between the corporation and third persons the officers are agents, and so long as they act within the actual or implied scope of their employment, or their acts are subsequently ratified, the corporation is liable. As between the corporation and third parties there is no obligation to inquire whether the act is advantageous or disadvantageous to the corporation. Nor are the obligations which are imposed upon one dealing with a trustee in relation to the property of a *cestui que trust* applicable to a person dealing with the officers of a corporation. The sole duty is that which rests upon one

held that even a general manager cannot execute negotiable paper.¹⁷ If the president is expressly authorized "to incur indebtedness, negotiate loans, to enter into any contracts or agreements, * * * and otherwise to act as the agent of the corporation," he has power to make promissory notes.¹⁸ Power to borrow money authorizes the president to execute the usual securities, such as bills or notes;¹⁹ but power to borrow money and execute notes therefor does not include power to execute notes for existing debts.²⁰ Express authority to borrow money and execute notes therefor does not include power to include in a note a contract for the payment of attorney's fees, unless such a clause is customary.²¹ Express power to sign notes "subject to the control of the board of directors" confers authority to so sign, it has been held, unless the board affirmatively directs otherwise.²² But power conferred on the president to execute notes does not by implication confer power to execute liens to secure such notes.²³ Furthermore, power to execute or indorse commercial paper does not include power to execute accommodation paper or to indorse for accommodation.²⁴ Moreover, it is held that the president has no implied power to execute notes alone, where a by-law requires them to be signed both by the president and by the secretary.²⁵ But a provision in the by-laws that notes signed by the president and secretary shall be binding on the company has been held not to prevent a note signed only by the president from binding the company, where he was expressly authorized to make contracts.²⁶

dealing with an agent of a principal, which is to ascertain that the agreement is one that the agent has either express or implied power to make. If the agreement is improvident, or negligently made, the loss must fall upon the principal." *Aetna Explosives Co. v. Bassick*, — N. Y. App. Div. —, 163 N. Y. Supp. 917.

¹⁷ See § 2111, *infra*.

¹⁸ *McCormick v. Stockton & T. C. R. Co.*, 130 Cal. 100, 62 Pac. 267.

¹⁹ *Hatch v. Coddington*, 95 U. S. 48, 24 L. Ed. 339.

²⁰ *Wharton v. Washington County State Bank*, — Tex. Civ. App. —, 153 S. W. 699.

²¹ *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046; *Hardin v. Iowa Ry. & Const. Co.*, 78

Iowa 726, 6 L. R. A. 52, 43 N. W. 543. And see *Pacific Rolling Mill v. Dayton, S. & G. R. Ry. Co.*, 5 Fed. 852.

²² *Peek v. Skelley Lumber Co.*, 59 Ore. 374, 117 Pac. 413.

²³ *El Fresno Irrigated Land Co. v. Bank of Washington*, — Tex. Civ. App. —, 182 S. W. 701.

²⁴ Authority generally to make or indorse notes in the business of the company gives no authority to indorse or make a note for the accommodation of another person or corporation. *Aetna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167.

²⁵ *Bloomingtondale v. Cushman*, 134 Minn. 445, 159 N. W. 1078.

²⁶ *McCormick v. Stockton & T. C. R. Co.*, 130 Cal. 100, 62 Pac. 267. To the same effect, see *Allison v. Hubbell*,

A by-law giving the president power to "execute all instruments of every kind" does not authorize him to issue notes where another by-law provides that no "note to secure a loan shall be made unless authorized by resolution of and at a meeting of the members of the college," but it merely designates him as the officer who is to perform the ministerial duty of signing such instruments when properly authorized.²⁷ Power conferred on the president to "execute all instruments of every kind in and about the business of the college," does not authorize him to issue notes, but merely designates him "as the one officer who is to perform the ministerial duty of signing such instruments as may, under proper authority, be required in and about the business of the corporation."²⁸

§ 2040. — Indorsement of negotiable paper. As to the power of the president of a corporation to transfer title to negotiable paper by indorsement so as to pass title and make the holder a bona fide holder, and also thereby to bind the corporation as indorser, there is some conflict in the opinions of the courts, although the general tendency of the decisions is in favor of the existence of the power, at least in case of bank presidents whose acts have been the basis of most of the cases decided on this point. A few early decisions deny the power of the president to indorse negotiable paper,²⁹ but the later decisions hold that there is implied authority, or at least a presumption of authority, to indorse such paper, not only in case of presidents of banks³⁰ but also in case of the presidents of ordinary trading corporations.³¹ So in

17 Ind. 559. See also Chap. 35, *supra*.

²⁷ *St. Vincent College v. Hallett*, 201 Fed. 471.

²⁸ *St. Vincent College v. Hallett*, 201 Fed. 471, 476.

²⁹ *Marine Bank v. Clements*, 3 Bosw. (N. Y.) 600; *Smith v. Lawson*, 18 W. Va. 212, 228, 41 Am. Rep. 688.

Where the president indorses a note in the name of the corporation wholly without authority, he cannot charge the corporation with an amount which he personally pays thereafter to apply on the note. *Triplett v. Fauver*, 103 Va. 123, 48 S. E. 875.

³⁰ *Palmer v. Nassau Bank*, 78 Ill. 380; *State v. Corning Sav. Bank*, 139 Iowa 338, 344, 115 N. W. 937; *City Nat. Bank of Hastings v. Thomas*, 46

Neb. 861, 65 N. W. 895; *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083. See also *People's Bank v. National Bank*, 101 U. S. 181, 25 L. Ed. 907; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. 591; *Merrick v. Bank of Metropolis*, 8 Gill (Md.) 59.

³¹ *Jones v. Stoddart*, 8 Idaho 210, 67 Pac. 650; *Iowa Nat. Bank of Ottumwa v. Sherman & Bratager*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12, modified 19 S. D. 238, 117 Am. St. Rep. 941, 103 N. W. 19. See also 1 *Daniel Neg. Inst.* (6th Ed.) § 416.

"We think the following authorities sustain the proposition that the president of an ordinary corporation has the implied power to transfer its

Illinois the president of a corporation is presumed to have authority to execute a guaranty of payment on transferring a note.³² In a federal decision rendered in 1897, Justice Thayer states the rule as to presidents of banks as follows: "There are some authorities, it is true, which maintain that the president of a bank has no implied power to bind the bank by an indorsement of commercial paper, and that, when an indorsement by the president is relied upon as transferring a title thereto, a special authority to indorse must be shown. * * *³³ But we think the weight of reason and authority is in favor of the view that it is within the scope of the implied powers of the president of a bank to indorse negotiable paper in the ordinary transaction of the bank's business, and that a special authority to that end need not be conferred by the board of directors. Such implied power is generally conceded to bank cashiers, and we know of no sufficient reason why the implied powers of the chief executive officer of a bank should be more limited in this respect than those of its cashier. * * * It can

negotiable instruments, so as to enable a purchaser for value to take the same freed from all equities or infirmities of which he had no notice. *Citizens' Nat. Bank v. Wintler*, 14 Wash. 558, 45 Pac. 38, 53 Am. St. Rep. 890; *Thomas v. City Nat. Bank*, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; *Saunders v. Bates*, 54 Neb. 209, 74 N. W. 578; *Aiken v. Marine Bank*, 16 Wis. 679; 1 *Randolph Com. Paper*, § 135." *Jones v. Stoddart*, 8 Idaho 210, 67 Pac. 650.

In South Dakota it is held that where a corporation is engaged in a business in which it receives notes from its agents and customers, "the president, in the absence of any evidence to the contrary, may reasonably be presumed to be authorized to discount and transfer the notes of the company." *Iowa Nat. Bank of Ottumwa v. Sherman & Bratager*, 17 S. D. 396, 400, 106 Am. St. Rep. 778, 97 N. W. 12, following *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

Where a note is indorsed by the name of the president of the payee, with his title added, it will be pre-

sumed, in the absence of a showing to the contrary, that he was authorized to act for the corporation and to transfer title to the instrument. *Jones v. Stoddart*, 8 Idaho 210, 216, 67 Pac. 650; *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172, aff'g 119 Ill. App. 546 (distinguishing cases where the president, in the execution of the contract, was using the credit of the company to serve his own private interests or those of some third person); *Merrill v. Hurley*, 6 S. D. 592, 600, 55 Am. St. Rep. 859, 62 N. W. 958, followed in *Iowa Nat. Bank of Ottumwa v. Sherman & Bratager*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12; *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083.

³² *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, 79 N. E. 172, aff'g 119 Ill. App. 546.

³³ *Citing Gibson v. Goldthwaite*, 7 Ala. 281, 293, 42 Am. Dec. 592; *Bank v. Hamlin*, 14 Mass. 178, 180; *Smith v. Lawson*, 18 W. Va. 212, 228, 41 Am. Rep. 688.

hardly be expected that the cashier of a bank will be in attendance on all occasions when it becomes necessary for the bank to indorse notes and bills, draw drafts and checks, certify checks or issue certificates of deposit. Such transactions as these are of hourly occurrence in all banks located in large business centers, and the exigencies of business demand that the power to perform such acts should be vested in some other officer as well as in the cashier. Our observation teaches us that such power is very generally exercised by bank presidents; and in ordinary transactions, no layman, we think, would hesitate to accept negotiable paper which had passed through a bank, because it was indorsed by the president, rather than by the cashier. In its practical operation the rule that a bank president has no implied power to indorse commercial paper for and in behalf of his bank would seriously interfere with the transaction of business, and put the public to great inconvenience, while it would have no marked tendency to prevent fraud or breaches of trust on the part of bank officers. The public interest requires that the same presumptions should attend an indorsement made by the president of a bank which exists in favor of an indorsement made by a cashier, and that banks should be held bound by acts of that nature when done by either of such officers in the ordinary course of business."³⁴

Of course, if the president is given general management and control of the corporate property he may indorse notes for transfer.³⁵ Thus, a president of an insurance company who is authorized by its by-laws to make contracts and transact the ordinary business of the company has power to indorse corporate notes for transfer.³⁶

Power to sign commercial paper includes, it seems, power to indorse it for transfer.³⁷ A by-law authorizing the president to sign all contracts and other instruments in writing which have first been approved by the board of directors, has been held to be merely permissive, and not to limit the power of the directors, by usage, to permit the presi-

³⁴ *United States Nat. Bank v. First Nat. Bank of Little Rock*, 79 Fed. 296, 299.

³⁵ *Union Iron Works Co. v. Union Naval Stores Co.*, 157 Ala. 645, 47 So. 652.

Power of general manager to transfer, see § 2113, *infra*.

³⁶ *Howland & Aspinwall v. Myer*, 3 N. Y. 290.

³⁷ *Page v. Ford*, 65 Ore. 450, 45 L. R. A. (N. S.) 247, Ann. Cas. 1915 A 1048, 131 Pac. 1013.

In New York, however, it has been held that authority to sign checks and drafts does not include or authorize indorsement of commercial paper. *Hitchings v. St. Louis, N. O. & O. Canal & Transportation Co.*, 68 Hun (N. Y.) 33, 22 N. Y. Supp. 719.

dent to transfer by indorsement commercial paper without the approval of the directors.³⁸

The president cannot indorse notes for accommodation,³⁹ since such act is ultra vires of the corporation.

§ 2041. Borrowing. The president has no implied authority to borrow money for the corporation, unless he is intrusted with the management of its business.⁴⁰ A fortiori, he cannot borrow securities from a director to cover his own defalcations.⁴¹ However, he may have such authority because expressly conferred on him, or where he is clothed with apparent authority, or has general authority to manage the business,⁴² although even in the case of a general manager there is some conflict as to his power to borrow money.⁴³ Of course, an unauthorized borrowing of money may be ratified, either expressly, or impliedly, by retaining and using the money.⁴⁴

³⁸ *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

³⁹ *Worthington v. Schuylkill Elec. Ry. Co.*, 195 Pa. St. 211, 45 Atl. 927. See also *National Union Bank of Maryland v. Hollingsworth*, 143 N. C. 520, 55 S. E. 809.

⁴⁰ *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470; *Tobin v. Roaring Creek & C. R. Co.*, 86 Fed. 1020; *Alabama Nat. Bank v. O'Neil*, 128 Ala. 192, 29 So. 688; *Star Mills v. Bailey*, 140 Ky. 194, 130 S. W. 1077; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 31. But see *N. H. Martin & Co. v. Logan*, 30 Ky. L. Rep. 799, 99 S. W. 648.

In case of national banks, however, it is said that "it is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use." *Cherry v. City Nat. Bank of Kansas City, Missouri*, 144 Fed. 587, 590.

⁴¹ *Logan v. Fidelity-Phenix Fire Ins. Co. of New York*, 161 N. Y. App. Div. 404, 146 N. Y. Supp. 678.

⁴² *United States. Hatch v. Cod-*

dington, 95 U. S. 48, 24 L. Ed. 339; *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. 23.

Arkansas. *Texarkana & Ft. S. Ry. Co. v. Bemis Lumber Co.*, 67 Ark. 542, 55 S. W. 944.

Illinois. *McDonald v. Chisholm*, 131 Ill. 273, 23 N. E. 596, aff'g 30 Ill. App. 176.

Louisiana. *Taylor v. Vossburg Mineral Springs Co.*, 128 La. 364, 54 So. 907.

Maine. *Castle v. Belfast Foundry Co.*, 72 Me. 167.

Michigan. *Preston Nat. Bank of Detroit v. George T. Smith Middlings Purifier Co.*, 84 Mich. 364, 47 N. W. 502.

Minnesota. *Africa v. Duluth News-Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019, where president and general manager was sole stockholder; *Rosemond v. Northwestern Autographic Register Co.*, 62 Minn. 374, 64 N. W. 925.

New York. *Kraft v. Freeman Prtg. & Pub. Ass'n*, 87 N. Y. 628; *Martin v. Niagara Falls Paper Mfg. Co.*, 44 Hun 130, aff'd 122 N. Y. 165, 25 N. E. 303.

⁴³ See § 2110, *infra*.

⁴⁴ *Blanchard v. Commercial Bank of Tacoma*, 75 Fed. 249; *Prentiss Tool &*

§ 2042. Purchases. The president has no power, merely by virtue of his office, to purchase property for the corporation, real or personal,⁴⁵ but he may be expressly authorized to purchase property, and he generally has implied power in the usual course of business where he has the control and management of the business.⁴⁶ However, au-

Supply Co. v. Godchaux, 66 Fed. 234; Willis v. St. Paul Sanitation Co., 53 Minn. 370, 55 N. W. 550.

45 California. Bliss v. Kaweah Canal & Irrigation Co., 65 Cal. 502, 4 Pac. 507; Blen v. Bear River & A. Water & Mining Co., 20 Cal. 602, 81 Am. Dec. 132.

Michigan. In re Seymour, 82 Mich. 496, 47 N. W. 321.

New York. Bohm v. V. Loewer's Gambrinus Brewery Co., 16 Daly 80; Westerfield v. Radde, 7 Daly 326.

Pennsylvania. First Nat. Bank of Allentown v. Hoch, 89 Pa. St. 324, 33 Am. Rep. 769.

South Dakota. Des Moines Manufacturing & Supply Co. v. Tilford Milling Co., 9 S. D. 542, 70 N. W. 839.

Texas. Franco-Texan Land Co. v. McCormick, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123. See also Standard Underground Cable Co. v. Southern Independent Tel. Co., — Tex. Civ. App. —, 134 S. W. 429.

Vermont. Lyndon Mill Co. v. Lyndon Literary & Biblical Inst., 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

He cannot execute an order for the purchase of machinery. W. A. Handley Mfg. Co. v. International Recording Co., 6 Ala. App. 219, 60 So. 557.

He cannot purchase expensive machinery, such as a portable engine and a sawmill, for a lumber company. Varney & Evans v. Hutchinson Lumber & Manufacturing Co., 70 W. Va. 169, 73 S. E. 321.

A fortiori, the president of a lumber company cannot purchase an option on a large tract of timberland. Weathersby v. Texas & O. Lumber Co.,

— Tex. Civ. App. —, 146 S. W. 243.

An unauthorized purchase may be ratified by the board of directors; and it is generally ratified if they retain and use the property, or if they acquiesce. Blen v. Bear River & A. Water & Mining Co., 20 Cal. 602, 81 Am. Dec. 132; Scott v. Middletown, U. & W. R. Co., 86 N. Y. 200; Dent v. North American Steamship Co., 49 N. Y. 390; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; West Salem Land Co. v. Montgomery Land Co., 89 Va. 192, 15 S. E. 524.

Unauthorized covenants inserted by the president in a conveyance of land to the corporation are ratified by acceptance of the conveyance. Mobile & M. Ry. Co. v. Gilmer, 85 Ala. 422, 5 So. 138.

An unauthorized purchase of property is not ratified because of its use by the company, where the directors have agreed among themselves to pay for it. Lyndon Mill Co. v. Lyndon Literary & Biblical Institution, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575.

46 Castle v. Belfast Foundry Co., 72 Me. 167; Sparks v. Dispatch Transfer Co., 104 Mo. 531, 12 L. R. A. 714, 24 Am. St. Rep. 351, 15 S. W. 417; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298. But see Getty v. C. R. Barnes Milling Co., 40 Kan. 281, 19 Pac. 617.

Power of general manager to make purchases, see § 2114, *infra*.

If the president of a corporation is authorized to open an office at a certain place, he has implied power to bind the corporation by purchasing furniture for the office. Cross v. An-

thority to "sign and execute all documents" does not include power to purchase land.⁴⁷ So a resolution of directors "that the president and vice-president be empowered to take charge of the fiscal affairs until the by-laws are adopted," is not a grant of power to purchase land, but merely confers the powers ordinarily possessed by the treasurer.⁴⁸ If he is authorized to buy property for the corporation he may buy on credit.⁴⁹ Of course, he cannot contract to purchase real estate where forbidden to do so.⁵⁰

Notwithstanding the decisions are to the contrary, it is respectfully submitted that there is no good reason why, under the modern doctrine as to the powers of presidents of corporations, they should not be held to have power, or at least there should be a presumption of power, to make purchases in the usual course of business of the corporation; and there is no doubt in the mind of the author that when the question is squarely presented in a state such as Illinois, Missouri, Nebraska or Wisconsin, all of which have broken away from the ancient doctrine that the president is a mere figurehead, it will be so held. Moreover, there are dicta to support this theory. For instance, it was said by the late Colorado Court of Appeals that "the president being the principal executive officer of a company, and as such charged with the management and operation of the property of the company, his acts in purchasing necessary supplies, * * * etc., would clearly be within the scope and extent of the authority conferred upon him by virtue of his office."⁵¹

glo-American Banking Co., 79 Hun (N. Y.) 424, 29 N. Y. Supp. 960.

If the president has charge generally of the business of the company, he may purchase machinery to be used in a new branch of manufacturing. "The president of a corporation in charge of its affairs has the implied power to purchase chattels used, or to be used, in the ordinary course of its business, and, as the evidence discloses that the company was arranging to engage in the manufacture of articles by means of a plant of which the machinery purchased from plaintiff would form a part, it appears the president, in making the purchase, was acting within the apparent scope of his authority as the

agent of the defendant company." *Denver Pressed Brick Co. v. Young*, 49 Colo. 498, 113 Pac. 499.

⁴⁷ *Catholic Foreign Mission Soc. of America v. Oussani*, 215 N. Y. 1, Ann. Cas. 1917 A 479, 109 N. E. 80.

⁴⁸ *Catholic Foreign Mission Soc. of America v. Oussani*, 215 N. Y. 1, Ann. Cas. 1917 A 479, 109 N. E. 80.

⁴⁹ *Siebe v. Joshua Hendy Machine-Works*, 86 Cal. 390, 25 Pac. 14; *Arapahoe Cattle & Land Co. v. Stevens*, 13 Colo. 534, 22 Pac. 823.

⁵⁰ *McKibbin v. Hulton Dyeing & Finishing Co.*, 227 Pa. 153, 75 Atl. 1038.

⁵¹ *Albro Mining & Milling Co. v. Chinn*, 20 Colo. App. 238, 244, 77 Pac. 1097.

§ 2043. Sales or exchanges. The president of a corporation, although, of course, the power may be expressly or impliedly conferred upon him, has no implied authority, merely by virtue of his office, to sell and convey or to contract to sell the real or personal property of the corporation.⁵² Nor can he enter into a valid contract to exchange

52 United States. Ansley Land Co. v. H. Weston Lumber Co., 152 Fed. 841; Kansas City Hay-Press Co. v. Devol, 72 Fed. 717.

California. Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494; Bliss v. Kaweah Canal & Irrigation Co., 65 Cal. 502, 4 Pac. 507; Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981.

Idaho. Johnson v. Sage, 4 Idaho 758, 44 Pac. 641.

Illinois. Koch v. National Union Bldg. Ass'n, 137 Ill. 497, 27 N. E. 530, aff'g 35 Ill. App. 465; State Nat. Bank of St. Joseph v. John Moran Packing Co., 68 Ill. App. 25, aff'd 168 Ill. 519, 48 N. E. 82. Contra, see Domestic Bldg. Ass'n v. Guadiano, 195 Ill. 222, 63 N. E. 98.

Kansas. Asher v. Sutton, 31 Kan. 286, 1 Pac. 535.

Maryland. Hadden v. Linville, 86 Md. 210, 38 Atl. 37.

New York. In re Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521; Giebler Mfg. Co. v. Kranenberg, 102 App. Div. 471, 92 N. Y. Supp. 843.

Ohio. Sebastian v. Covington & C. Bridge Co., 21 Ohio St. 451.

Pennsylvania. Pittsburgh Melting Co. v. Reese, 118 Pa. St. 355, 12 Atl. 362; In re Appeal of Pennsylvania R. Co., 80 Pa. St. 265.

Texas. Franco-Texan Land Co. v. McCormick, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123; Fitzhugh v. Franco-Texan Land Co., 81 Tex. 306, 16 S. W. 1078; Morgan v. Washburn Lumber Co., — Tex. Civ. App. —, 180 S. W. 911.

Virginia. Crump v. United States

Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

West Virginia. Smith v. Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Wisconsin. Walworth County Bank v. Farmers' Loan & Trust Co., 14 Wis. 325.

Compare *Ida County Sav. Bank v. Johnson*, 156 Iowa 234, 244, 136 N. W. 225.

In a leading New Jersey case it was said: "In the absence of anything in the act of incorporation bestowing special power upon the president, he has from his mere official station, no more control over the corporate property and funds, than any other director." Per Van Syckel, J., in *Titus v. Cairo & F. R. Co.*, 37 N. J. L. 98.

"Merely as president, he had no power to sell the lands of the complainant company." *Ansley Land Co. v. H. Weston Lumber Co.*, 152 Fed. 841.

He cannot sell the output of the company in a certain line for the year. *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981.

He has no authority to sell a machine which was a part of the manufacturing plant of the corporation. *Giebler Mfg. Co. v. Kranenberg*, 102 N. Y. App. Div. 471, 92 N. Y. Supp. 843.

He cannot sell the rights of the company in a lease contract. *Brown v. Bass*, 132 Ga. 41, 63 S. E. 788.

If the president is not authorized to sell property, he cannot bind it by false representations as to the boundaries or otherwise. *Crump v. United States Min. Co.*, 7 Gratt. (Va.)

the same,⁵³ or make a valid conveyance of corporate property,⁵⁴ although authority is sometimes presumed.⁵⁵ He has no implied power

352, 56 Am. Dec. 116. But it is otherwise if he is authorized to sell. *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305.

An unauthorized sale and transfer of property by the president may be ratified by the directors if they could have made the sale, or by the stockholders, and ratification may be implied from acquiescence. *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216, 16 S. W. 551, 14 S. W. 843. But compare *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306, 16 S. W. 1078.

In Louisiana, however, it is held that the president of a nonresident corporation owning timberlands in the state may sell with warranty certain dead and cut trees found on the lands. *Jefferson Sawmill Co. v. Iowa & Louisiana Land Co.*, 122 La. 983, 48 So. 428.

⁵³ *Bliss v. Kaweah Canal & Irrigation Co.*, 65 Cal. 502, 4 Pac. 507; *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123; *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306, 16 S. W. 1078.

⁵⁴ *In re Cullman Fruit & Produce Ass'n*, 155 Fed. 372.

But where a certain person is the equitable owner and entitled to a legal transfer of property held by a corporation, its president is the proper one to perform the duty. *Graham v. Burgess*, 78 S. C. 404, 59 S. E. 29.

He may authorize the delivery of a deed where consented to by the holders of practically all the corporate stock. *Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co.*, 31 Colo. 158, 71 Pac. 1121.

Under a by-law providing that corporate deeds must be authorized by the board of trustees, a deed executed

pursuant to a resolution of the trustees that the president be employed to sell any of the corporate lands and execute proper deeds therefor containing such covenants as he might deem proper will be deemed to have been executed under due authority. *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234; *West Seattle Land & Improvement Co. v. Novelty Mill Co.*, 31 Wash. 435, 72 Pac. 69. See also *Manchester Building & Loan Ass'n v. Beardsley*, 72 N. J. Eq. 714, 66 Atl. 1; *Freifeld v. Groh's Sons*, 116 N. Y. App. Div. 409, 101 N. Y. Supp. 863.

⁵⁵ "It may be conceded that the president of a corporation by virtue of his office merely is not authorized or does not have the power to execute a deed in its behalf conveying its real estate. However, a corporation can act only through the agency of some officer or other authorized person. There is no statute in this state providing that it shall be the specific duty of any certain officer of such a corporation as the Rushville Milling Company to execute deeds in its behalf. There is a general statute that such a corporation may elect all necessary officers and define their duties. Section 4046, Burns, 1914. Under such statute, the Rushville Milling Company was authorized to make it the general duty of its president to execute deeds in its name under the direction of its governing body. Moreover, there is no reason why the president here may not have been specially authorized to execute the deed under consideration. He did execute it so that in form it appears to have been done in behalf of the corporation, and he affixed also the corporate seal. The record discloses nothing to indicate that he proceeded without authority.

to sell treasury stock.⁵⁶ A fortiori, he is without implied power to convey the entire corporate plant,⁵⁷ or to sell real estate after the corporation has ceased to do business.⁵⁸ These decisions, while practically unanimous, are subject to criticism in so far as they hold that the president has no power to make sales in the usual line of the company's business, as, for instance, sales of its products.

It seems that the president of a corporation has no implied power, by a verbal agreement, to bind the corporation by a contract that title to horses sold to the corporation should remain in the seller until full payment made.⁵⁹

On the other hand, he may be expressly given the power to sell the property of the corporation or the general authority conferred on him may be broad enough to include authority to sell property.⁶⁰

Possession followed the conveyance. That deed forms a link in appellant's chain of title, as title formerly rested in him. Pursuant to that deed and others following it, he entered into possession of the lands involved. He executed mortgages on the lands, a deed executed on the foreclosure of which forms a link in appellee's chain of title. There is nothing to indicate that the milling company is questioning the authority of its president as apparently exercised in the executing of the deed involved here. Aside from all questions of estoppel which possibly may also be invoked under the circumstances here, the authority of the president to execute the deed should be presumed." *Bickart v. Henry*, — Ind. App. —, 116 N. E. 15.

⁵⁶ *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523; *In re Utica Nat. Brewing Co.*, 154 N. Y. 268, 48 N. E. 521.

⁵⁷ *Little Butte Consol. Mines Co. v. Girand*, 14 Ariz. 9, 123 Pac. 309; *Feld v. Roanoke Inv. Co.*, 123 Mo. 603, 27 S. W. 635; *Lyon v. West Side Transfer Co.*, 132 N. Y. App. Div. 777, 117 N. Y. Supp. 648; *Consolidated Water Power Co. v. Nash*, 109 Wis. 490, 85 N. W. 485. Compare *Northwestern Fuel Co. v. Lee*, 102 Wis. 426, 78 N. W. 584.

But it has been held that where the directors have never held a regular meeting, and the president has managed the business as if his own, the corporation may be bound by his act in selling the entire corporate property where the other director joined in making the sale, and the stock was practically all held by the two directors and a third person who apparently assented to the sale, on the theory that "the law neither does nor requires idle acts." *Magowan v. Groneweg*, 16 S. D. 29, 91 N. W. 335.

⁵⁸ *Dickinson v. Harris*, 155 Ala. 613, 47 So. 78.

⁵⁹ *In re Farmers' Dairy Ass'n*, 234 Fed. 118.

⁶⁰ *Illinois*. *Springer v. Bigford*, 55 Ill. App. 198, aff'd 160 Ill. 495, 43 N. E. 751.

Iowa. *Steinke v. Yetzer*, 108 Iowa 512, 79 N. W. 286.

Maine. *Augusta Bank v. Hamblet*, 35 Me. 491.

New York. *Quee Drug Co. v. Plant*, 55 App. Div. 87, 67 N. Y. Supp. 10; *J. M. Horton Ice Cream Co. v. Merritt*, 63 Hun 628, 17 N. Y. Supp. 718.

Texas. *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306, 16 S. W. 1078; *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216, 16 S. W. 551, 14 S. W. 843.

Thus, a corporation will be deemed bound by the action of its president with respect to a sale of its product where the directors have intrusted him with the power of making contracts in respect thereto.⁶¹ Power conferred upon the president to "execute and deliver" corporate bonds includes power to sell them.⁶² Authority conferred to do acts necessary to the proper and successful conduct of the business of a distillery includes power to sell its output for the next five years.⁶³ Where the buying and selling of saloons in behalf of the corporation have been intrusted to the president, the president and general manager may sell the furniture and fixtures of a saloon, together with the good-will and saloon license.⁶⁴

If the president purchases property for the corporation, but in his individual capacity, the fact that he must account for the profits derived from a resale does not preclude his authority to sell the property.⁶⁵

§ 2044. Gifts and dedications. The president cannot make a gift of the corporation's property.⁶⁶ So, also, it does not lie within the

Wisconsin. *Senour, Mfg. Co. v. Clarke*, 96 Wis. 469, 17 N. W. 883; *McElroy v. Minnesota Percheron Horse Co.*, 96 Wis. 317, 71 N. W. 652.

When the president is authorized "to sell and convey" a tract of land, he may bind the corporation by executing a bond to convey. *Augusta Bank v. Hamblet*, 35 Me. 491.

But authority given him, expressly or by usage, to sell property of the corporation, reserving a vendor's lien, gives him no authority to sell without reserving a lien. *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306, 16 S. W. 1078. And see *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123.

And general authority to sell land of the corporation gives no authority to sell in consideration of a note payable in property, as this is not a sale, but a barter. *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815, 23 S. W. 123; *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306, 16 S. W. 1078.

Authority to sell bonds or other property does not give authority to lend it. *Second Ave. R. Co. v. Mehrbach*, 49 N. Y. Super. Ct. 267.

A resolution authorizing the president or other officer "to make contracts of sale of the land of the company" does not authorize him to execute a conveyance as attorney in fact for the company. *Green v. Hugo*, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79.

Power of general manager to sell property, see § 2116, *infra*.

⁶¹ *Curtis v. Natalie Anthracite Coal Co.*, 89 N. Y. App. Div. 61, 85 N. Y. Supp. 413.

⁶² *McCormick v. Unity Co.*, 239 Ill. 306, 87 N. E. 924, *aff'd* 142 Ill. App. 159.

⁶³ *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 21 Ann. Cas. 611, 123 S. W. 271.

⁶⁴ *Freyberg v. Los Angeles Brewing Co.*, 4 Cal. App. 403, 88 Pac. 378.

⁶⁵ *Tevis v. Hammersmith*, 170 Ind. 286, 84 N. E. 337.

⁶⁶ *Henry R. Worthington v. Worth-*

power of the president to dedicate lands of the corporation to public uses,⁶⁷ except, perhaps, in case of the president of a land company.⁶⁸ However, it has been held that the president of a land company may subscribe to a fund, in behalf of the company, in relation to a freight yard in the vicinity of the land.⁶⁹

§ 2045. Assignments. Unless expressly or impliedly authorized,⁷⁰ the president has no power, it has been held, to assign choses in action and other like personal property.⁷¹ A fortiori, he cannot

ington, 100 N. Y. App. Div. 332, 91 N. Y. Supp. 443.

⁶⁷ *Town of West Point v. Bland*, 106 Va. 792, 56 S. E. 802.

President of railroad company has no power to dedicate land for a street. *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155.

That the president may convey land by way of donation, when authorized to convey at his discretion, see *State v. Glenn*, 18 Nev. 34, 1 Pac. 186.

⁶⁸ See *West End v. Eaves*, 152 Ala. 334, 44 So. 588, holding that authority may be inferred from silence and acquiescence in the public use.

⁶⁹ "Defendant's further objection, to the effect that the subscription signed in its name by its president does not bind it, because it was not shown that the president had authority in the premises, is not good, because the contract is one reasonably within the apparent scope of the authority of the president of a corporation which holds and deals in real estate." *Levy v. West Side Const. Co.*, — N. Y. Misc. —, 162 N. Y. Supp. 661.

⁷⁰ *United States. Cox v. Robinson*, 82 Fed. 277; *Irwin v. Bailey*, 8 Biss. 523, Fed. Cas. No. 7,079.

California. Greig v. Riordan, 99 Cal. 316, 33 Pac. 913.

Illinois. Commercial Nat. Bank v. Burch, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, modifying 40 Ill. App. 505; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621.

Iowa. Guernsey v. Black Diamond Coal & Mining Co., 99 Iowa 471, 68 N. W. 777.

Maine. Baker v. Cotter, 45 Me. 236.

Michigan. Preston Nat. Bank of Detroit v. George T. Smith Middlings Purifier Co., 84 Mich. 364, 47 N. W. 502.

New York. Marine Bank City of New York v. Clements, 31 N. Y. 33; *Howland v. Myer*, 3 N. Y. 290; *Aspinwall v. Meyer*, 2 Sandf. 186.

South Dakota. Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

West Virginia. Smith v. Lawson, 18 W. Va. 212, 41 Am. Rep. 688; *Parker v. Donnally*, 4 W. Va. 648.

A resolution of the directors of an insolvent corporation, authorizing the president "to execute judgment notes, chattel mortgages, bills of sale, or other instruments in their judgment necessary to the financial interests of the company," gives him power to assign book accounts of the company to a creditor holding its judgment notes. *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, modifying 40 Ill. App. 505.

⁷¹ *United States. Kansas City Hay-Press Co. v. Devol*, 72 Fed. 717.

Alabama. Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

Massachusetts. Hallowell & A. Bank v. Hamlin, 14 Mass. 178.

Missouri. Degnan v. Thoroughman,

assign a contract made with him individually to the corporation of which he is president, by accepting such assignment;⁷² nor can he assign all or practically all of the assets of the corporation to certain creditors by way of preference.⁷³ However, it has been held in Iowa that the president of a bank has authority to make a valid assignment of a judgment in favor of the bank;⁷⁴ and in Illinois that a president may assign policies of insurance, after a loss, to secure a corporate liability.⁷⁵ In Illinois, the rule is that the president is presumed to have authority to transfer an instrument for the delivery of personal property to the corporation.⁷⁶ In New Jersey, it is held that the president has authority to sell outstanding accounts for their face value,⁷⁷ although it is also held that the president cannot assign money not yet earned under contracts made with the corporation,⁷⁸

88 Mo. App. 62; *Hyde v. Larkin*, 35 Mo. App. 365.

Nebraska. *First Nat. Bank v. Lucas*, 21 Neb. 280, 31 N. W. 805.

New Jersey. *Titus v. Cairo & F. R. Co.*, 37 N. J. L. 98.

New York. *Marine Bank City of New York v. Clements*, 31 N. Y. 33, 3 Bosw. 600; *Hoyt v. Thompson*, 5 N. Y. 320.

West Virginia. *Smith v. Lawson*, 18 W. Va. 212, 41 Am. Rep. 688.

He has no implied authority to assign a patent right of the corporation in payment of its debt. *Kansas City Hay-Press Co. v. Devol*, 72 Fed. 717.

⁷² *Woodruff v. Shimer*, 174 Fed. 584; *In re Roanoke Furnace Co.*, 166 Fed. 944.

⁷³ *State Nat. Bank of St. Joseph v. John Moran Packing Co.*, 68 Ill. App. 25, aff'd 168 Ill. 519, 48 N. E. 82; *Hadden v. Linville*, 86 Md. 210, 38 Atl. 37; *Degnan v. Thoroughman*, 88 Mo. App. 62.

⁷⁴ *Guernsey v. Black Diamond Coal & Mining Co.*, 99 Iowa 471, 68 N. W. 777.

⁷⁵ *Lemars Shoe Co. v. Lemars Shoe Mfg. Co.*, 89 Ill. App. 245.

⁷⁶ *Moser v. Kreigh*, 49 Ill. 84. See also *Mitchell v. Deeds*, 49 Ill. 416, 59 Am. Dec. 621.

⁷⁷ *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 816, 64 Atl. 973, rev'g 69 N. J. Eq. 358, 60 Atl. 408.

⁷⁸ *Budke v. Schalkenbach & Budke*, 84 N. J. Eq. 467, 94 Atl. 586; *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 816, 65 Atl. 484.

The ground of the distinction between selling book accounts at their face value or assigning them in discharge of corporate obligations, and an assignment of money not yet earned under a contract "is twofold: First that the general authority of the president is limited to the ordinary business of the corporation; and, second, that a contract made by the corporation cannot be varied or interfered with by a single officer thereof under his general authority. The assignment of a contract generally carries with it the right of the assignee to perform such contract; whereas the ordinary business of a corporation is to perform its own contracts; similarly if the money to be earned by a corporation under a contract is diverted to some other object by its assignment by a single officer, the contract of the corporation has been interfered with in a material respect without its authority or assent, and such assignment is in-

and that express power to borrow money to be returned to the lender "out of the first collections following such loans" does not confer power to make an equitable assignment to the lender of certain money to be earned in the future by the corporation under a contract.⁷⁹ Where a bridge company was engaged in constructing bridges, its president and general manager may borrow money to conduct the business by assigning the payments to be made under the contract or by pledging property bought with the money borrowed, at least where such act is approved by an advisory committee created by the board of directors.⁸⁰

§ 2046. Assignments for benefit of creditors. The president cannot make or authorize an assignment of the corporate property for the benefit of creditors,⁸¹ unless expressly or impliedly authorized.⁸² So he cannot consent to the appointment of a receiver to wind up its affairs.⁸³ This rule is plainly correct since the act is not, in any event, one in the ordinary course of the business, regardless of the amount

valid." *Budke v. Schalkenbach & Budke*, 84 N. J. Eq. 467, 94 Atl. 586.

⁷⁹ *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 358, 60 Atl. 408, rev'd on other grounds 69 N. J. Eq. 816, 65 Atl. 484, 64 Atl. 973.

⁸⁰ *In re Cincinnati Iron Store Co.*, 167 Fed. 486.

⁸¹ *United States*. *In re Jefferson Casket Co.*, 182 Fed. 689.

Alabama. *Norton v. Alabama Nat. Bank*, 102 Ala. 420, 14 So. 872; *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592.

District of Columbia. *Meloy v. Central Nat. Bank*, 7 Mackey 69, 17 Wash. L. R. 63.

Illinois. *Friedman v. Leshner*, 198 Ill. 21, 92 Am. St. Rep. 255, 64 N. E. 736, aff'g 99 Ill. App. 42; *Wagg-Anderson Woolen Co. v. J. H. Leshner & Co.*, 78 Ill. App. 678.

Michigan. See *Richardson v. Rogers*, 45 Mich. 591, 8 N. W. 526.

New York. *Schaefer v. Scott*, 40 App. Div. 438, 57 N. Y. Supp. 1035.

Utah. *Cupit v. Park City Bank*, 20 Utah 292, 58 Pac. 839.

Cannot assign for benefit of creditors nor petition to be adjudged a voluntary bankrupt. *In re Jefferson Casket Co.*, 182 Fed. 689.

⁸² *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965.

A resolution of the directors "that the company execute a general assignment * * * to a trustee to be nominated by the president" impliedly authorizes the president, as the executive officer, to execute the assignment, but does not authorize him to select himself as trustee. If he does select himself, however, his action is merely voidable at the election of the corporation. *Rogers v. Pell*, 154 N. Y. 518, 49 N. E. 75, rev'g 89 Hun 159, 35 N. Y. Supp. 17.

After the president has executed an assignment in pursuance of a resolution of the directors, his authority is exhausted, and he cannot afterwards execute another and different assignment. *Richardson v. Rogers*, 45 Mich. 591, 8 N. W. 526.

⁸³ *Walters v. Anglo-American Mortgage & Trust Co.*, 50 Fed. 316.

of authority the president is deemed to have in the particular jurisdiction.

§ 2047. Leases or contracts of hire. A lease either of corporate property or of property of a third person for the corporation, under most circumstances, can hardly be said to be an act within the ordinary business of the corporation and therefore within the powers of the president even in those jurisdictions where enlarged powers of the president are recognized. On the other hand, it is easy to think of cases where it would seem that the president should be held to have power to take a lease in jurisdictions where he is held to have power to act in the ordinary business of the corporation. For instance, suppose a corporation is engaged in the restaurant business and operates a chain of stores in a city or in several cities. Is it not reasonable in such a case to hold that the president may lease a store to be occupied as a restaurant? The decisions, however, although not numerous, are almost unanimous in denying the president the power to give or take a lease unless he is expressly or impliedly a general manager.⁸⁴ Thus, it is held that the president cannot lease its property,⁸⁵ especially its real property,⁸⁶ unless such authority is conferred on him.⁸⁷ This applies to the president of a mining company, as to a lease of its mining property.⁸⁸

⁸⁴ "Though the president of a bank or other corporation may perform the duties incident to the trust reposed in him including such as custom or necessity has imposed upon his office, without express authority, he is without implied power as a matter of law to either lease the corporation's real estate or cancel leases it has outstanding with respect thereto or enter into new ones for it as lessee." *People's Bank v. Bennett*, 159 Mo. App. 1, 10, 139 S. W. 219.

⁸⁵ *People's Bank v. Bennett*, 159 Mo. App. 1, 10, 139 S. W. 219. Compare *King v. West Coast Grocery Co.*, 72 Wash. 132, 129 Pac. 1081.

The president of a bank cannot lease or authorize the lease of an elevator included in a chattel mortgage to the bank, unless authorized by the directors. *Tulley v. Citizens' State*

Bank, 18 Ind. App. 240, 47 N. E. 850.

⁸⁶ *Koch v. National Union Bldg. Ass'n*, 35 Ill. App. 465, aff'd without deciding this question 137 Ill. 497, 27 N. E. 530; *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224.

An unauthorized lease by the president may be ratified, and thereby rendered binding. *Mt. Washington Hotel Co. v. Marsh*, 63 N. H. 230.

⁸⁷ *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305.

Authority to lease property includes authority to make representations as to the boundaries, etc. *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305.

⁸⁸ *Franklin v. Havalena Min. Co.*, 16 Ariz. 200, 141 Pac. 727; *Yellow Jacket Silver Min. Co. v. Stevenson*, 5 Nev. 224.

So it is held that he cannot take a lease of property,⁸⁹ subject to an exception where he has the general management and control of the corporation, and the property is leased in the ordinary course of the business.⁹⁰ If he actively manages the affairs of the company in establishing branch stores, he may take a lease of a store to be occupied as a branch.⁹¹ He cannot lease property from the seller, in order to reconvey the title to the seller,⁹² nor can he consent to a sale of the property by a tenant subject to the landlord's lien.⁹³ However, he may accept a lease to the corporation, without a formal signing of the lease by the corporation.⁹⁴ Prima facie the president of an investment company may hire automobiles to take prospective purchasers from the city, or from the end of a street car line, to the addition, so that they may inspect the lots and meet the president who was making sales.⁹⁵

§ 2048. Mortgage or pledge. The president has no power, merely by virtue of his office, to mortgage or pledge its real or personal property, or its notes and other securities,⁹⁶ although such au-

⁸⁹ *Hawley v. Gray Bros. Artificial Stone Paving Co.*, 106 Cal. 337, 39 Pac. 609. But see *Baltimore & P. Steamboat Co. v. McCutcheon & Collins*, 13 Pa. St. 13, where president of foreign corporation was held to have power to lease an office.

Power to surrender lease, see § 2053, *infra*.

If the president takes a lease without authority, his act may be ratified, and it is impliedly ratified if the corporation takes possession. *Jacksonville, M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515.

⁹⁰ *Hawley v. Gray Bros. Artificial Stone Paving Co.*, 106 Cal. 337, 39 Pac. 609. See also *Jacksonville, M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515.

Power of general manager to lease property, see § 2122, *infra*.

Thus, if the president is authorized by resolution of the directors "to make and sign contracts," and "to do a general business for the corporation," he has authority to take a lease of an office, store or other

premises, which are necessary for carrying on its business. *Hawley v. Gray Bros. Artificial Stone Paving Co.*, 106 Cal. 337; 39 Pac. 609. And see *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 19 So. 318.

⁹¹ *Hosteter v. Wear-U-Well Shoe Co.*, 171 Iowa 346, 152 N. W. 1.

⁹² *In re Cullman Fruit & Produce Ass'n*, 155 Fed. 372.

⁹³ *Bell v. State*, 14 Ga. App. 425, 81 S. E. 253.

⁹⁴ *Starwich v. Washington Cut Glass Co.*, 64 Wash. 42, Ann. Cas. 1913 A 262, 116 Pac. 459.

⁹⁵ *Merrill v. Caro Inv. Co.*, 70 Wash. 482, 127 Pac. 122.

⁹⁶ *United States*. *In re Plymouth Elevator Co.*, 191 Fed. 633, construing South Dakota statutes; *Kansas City Hay-Press Co. v. Devol*, 72 Fed. 717; *Corbett v. Woodward*, 5 Sawy. 403, Fed. Cas. No. 3,223.

Alabama. *American Savings & Loan Ass'n v. Smith*, 122 Ala. 502, 27 So. 919.

California. *Alta Silver Min. Co. v.*

thority may be expressly conferred or may be implied, it is sometimes held, if he is in charge and control of the management of the company.⁹⁷ Of course, he may execute a mortgage where expressly au-

Alta Placer Min. Co., 78 Cal. 629, 21 Pac. 373.

Indiana. *National State Bank of Terre Haute v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799.

Kentucky. *Mason & Ford Co. v. Metcalfe Mfg. Co.*, 44 S. W. 629.

Massachusetts. *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837.

Missouri. *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 78 Am. St. Rep. 560, 55 S. W. 989; *Tyler Estate v. Hoffman*, 146 Mo. App. 510, 124 S. W. 535; *State v. Perkins*, 90 Mo. App. 603; *Hyde v. Larkin*, 35 Mo. App. 365.

New Jersey. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237; *Titus v. Cairo & F. R. Co.*, 37 N. J. L. 98; *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

New York. *Tradesmen's Nat. Bank v. Manhattan Lumber Co.*, 64 Hun 635, 18 N. Y. Supp. 920.

Oregon. *Currie v. Bowman*, 25 Ore. 364, 35 Pac. 848; *Luse v. Isthmus Transit Ry. Co.*, 6 Ore. 125, 25 Am. Rep. 506.

Compare Interstate Trust & Banking Co. v. Powell Bros. & Sanders Co., 126 La. 22, 52 So. 179.

"This rule applies to presidents of banks as well as presidents of other corporations." *Montgomery Bank & Trust Co. v. Walker*, 181 Ala. 368, 380, 61 So. 951.

He cannot pledge assets of the bank, to secure an antecedent and questionable debt. *Montgomery Bank & Trust Co. v. Walker*, 181 Ala. 368, 61 So. 951.

He has no implied power to deposit title deeds to secure a debt. *Parker v. Carolina Sav. Bank*, 53 S. C. 583,

595, 69 Am. St. Rep. 888, 31 S. E. 673.

In Kentucky, however, it is held that where a chattel mortgage is executed by the president and secretary, their authority to execute it will be presumed. *Burkamp v. Healey*, 24 Ky. L. Rep. 1926, 72 S. W. 759.

So in Texas it has been held that where a corporate mortgage is executed by the president he will be presumed to have been authorized. *Brownwood Ice Co. v. York Mfg. Co.*, — Tex. Civ. App. —, 37 S. W. 339.

An unauthorized mortgage or pledge by the president may be ratified by the corporation, and it does ratify the same if it acquiesces therein or accepts the benefits of the transaction. See the following decisions:

United States. *Prentiss Tool & Supply Co. v. Godchaux*, 66 Fed. 234.

California. *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

Iowa. *Krider v. Western College*, 31 Iowa 547.

Maryland. *Edelhoff v. Horner-Miller Mfg. Co.*, 86 Md. 595, 39 Atl. 314.

Massachusetts. *Sherman v. Fitch*, 98 Mass. 59.

New York. *Martin v. Niagara Falls Paper Mfg. Co.*, 122 N. Y. 165, 25 N. E. 303, 44 Hun 130.

In Louisiana, executory process on a notarial act of mortgage, executed by the president of a private corporation, will not lie, in the absence of authentic proof of the president's authority to act in the premises. *Holliday v. Logan*, 134 La. 427, 64 So. 277; *Interstate Trust & Banking Co. v. Powell Bros. & Sanders Co.*, 126 La. 22, 52 So. 179.

⁹⁷ **United States.** *Galbraith v. First Nat. Bank of Alexandria*, Minnesota,

thorized so to do by a resolution of the board of directors.⁹⁸ The president of a corporation cannot mortgage its property without the direction of the directors even though he owns all of the stock of the company.⁹⁹ Authority conferred on the president to execute a mort-

221 Fed. 386; *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. 23, modifying *First Nat. Bank of Hailey v. G. V. B. Min. Co.*, 89 Fed. 439.

California. *Boggs v. Lakeport Agr. Park Ass'n*, 111 Cal. 354, 43 Pac. 1106.

Illinois. *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420, modifying 40 Ill. App. 505.

Indiana. *National State Bank of Terre Haute v. Sandford Fork & Tool Co.*, 157 Ind. 10, 60 N. E. 699.

Iowa. *Shaver v. Hardin*, 82 Iowa 378.

Michigan. *Kalamazoo Spring & Axle Co. v. Wimans, Pratt & Co.*, 106 Mich. 193, 64 N. W. 23; *Preston Nat. Bank of Detroit v. George T. Smith Middlings Purifier Co.*, 84 Mich. 364, 47 N. W. 502.

Missouri. *Tyler Estate v. Hoffman*, 146 Mo. App. 510, 124 S. W. 535.

New York. *Simis v. Davidson*, 54 N. Y. Super. Ct. 235.

Virginia. *Merchants' Bank of Baltimore v. Goddin*, 76 Va. 503.

He may execute a mortgage where he has for years managed the corporate finances and executed contracts. *National State Bank of Terre Haute v. Sandford Fork & Tool Co.*, 157 Ind. 10, 60 N. E. 699.

Authority to mortgage gives no authority to stipulate in the mortgage that the mortgagee may require payment of the principal, at his option, upon default in payment of interest, or any other unusual term. *Jesup v. City Bank of Racine*, 14 Wis. 331.

Authority to execute a mortgage gives no authority to stipulate therein for payment of attorney's fees on

foreclosure. *Pacific Rolling Mill v. Dayton, S. & G. R. Ry. Co.*, 5 Fed. 852. See also *Hardin v. Iowa Ry. & Const. Co.*, 78 Iowa 726, 6 L. R. A. 52, 43 N. W. 543.

When the board of directors authorizes its president to borrow money, and stipulates in the resolution that the money shall be secured by a mortgage if the corporation shall be sued, or its note protested, or if it shall become insolvent, the president cannot, in executing a mortgage, give the creditor the power to sell all the assets of the company after ten days' notice. *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449, 34 S. E. 176.

But the fact that the president of a corporation is also its superintendent and treasurer gives him no implied authority to mortgage its property. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

And it has been held that authority upon the part of the president to mortgage property of the corporation is not included in authority to manage the ordinary business of the corporation. *Luse v. Isthmus Transit R. Co.*, 6 Ore. 125, 25 Am. Rep. 506.

Power of general manager to mortgage, see § 2121, *infra*.

⁹⁸ *American Trust Co. v. Crescent Ice Co.*, 133 La. 247, 62 So. 664.

⁹⁹ *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95, 108, 78 Am. St. Rep. 560, 55 S. W. 959, distinguishing *Union Nat. Bank v. Shoemaker*, 68 Mo. App. 592, on the ground that the persons who made the sale in that case were the only stockholders and directors, while in the case at bar there were four other directors and,

gage does not include authority to execute a collateral undertaking with a second lien to a stranger.¹

§ 2049. Guaranty or promise to pay debt of another. The president cannot bind the corporation by a contract of guaranty or suretyship, or by a promise to pay another's debt.² Thus, the president of a bank will not be presumed to be authorized by virtue of his office to bind the bank to make good the default of another.³ However, it would seem that a guaranty may be so intimately connected with the everyday business of a corporation that the making of it should be held within the inherent powers of the president in jurisdictions adopting the liberal rule as to powers of presidents.

§ 2050. Modification or rescission of contracts, and waiver. The president has no authority to modify contracts made by the directors or by others under authority from them.⁴ Thus, it is not within the implied power of the corporate president to modify a contract between the corporation and the keeper of a saloon whereby such keeper is prohibited from selling any beer not manufactured by the corporation.⁵ It will not be presumed, in the absence of evidence

although they may have been but nominal stockholders they, together with the president, composed the board of directors, and without the authority of the board he had no right to make the deed of trust.

¹ Bangor & P. Ry. Co. v. American Bangor Slate Co., 203 Pa. 6, 52 Atl. 40.

² Dale v. Donaldson Lumber Co., 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703; Hamilton v. Bates (Cal.), 35 Pac. 304; Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75; Georgetown Water Co. v. Central Thompson-Houston Co., 17 Ky. L. Rep. 1270, 35 S. W. 636, 34 S. W. 435; William Allen & Co. v. Somerset Hotel Co., 88 N. Y. Supp. 944.

Where the president has charge of the management of a corporation, he may execute, in the usual course, a guaranty which is within the powers of the corporation, as, in some states, a guaranty by a brewing company of

payment of rent by the lessee of a saloon. Hall v. Ernest Ochs, 34 N. Y. App. Div. 103, 54 N. Y. Supp. 4.

³ Swenson Bros. Co. v. Commercial State Bank, 98 Neb. 702, 154 N. W. 233.

⁴ Grant v. Duluth, M. & N. Ry. Co., 66 Minn. 349, 69 N. W. 23; Western R. Co. v. Bayne, 75 N. Y. 1, 11 Hun 166.

The president has no power to alter the provisions of a formal agreement under seal entered into by the corporation itself. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 64 Atl. 801, 63 Atl. 610.

When the directors have submitted a matter to arbitration, the president cannot revoke the submission, although he may have general charge of the corporation's business. Madison Ins. Co. v. Griffin, 3 Ind. 277.

⁵ Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 64 Atl. 801, 63 Atl. 610.

to such effect, that corporate by-laws extend authority to the corporate president to surrender a lease by which the corporation has the option of purchasing the property when the lease expires, and to accept in lieu thereof another lease whereby such option is not given;⁶ and power expressly conferred on the president to correct a supposed defect in a lease does not authorize him to surrender the lease and accept a new one which omitted the privilege of buying the property at the expiration of the term.⁷ Where neither express authority nor business custom of the corporation working an estoppel is shown, the president of a corporation is without power to assent to a breach of covenant in a lease.⁸ Power of the president to enter into a contract does not include power to rescind it, especially where his own private interest would be advanced by the rescission at the expense of the corporation.⁹ Power conferred on the president to sell property does not authorize him thereafter to modify an existing executory agreement to sell by extending the time of payment of any instalment.¹⁰ A bank is not bound by an agreement of its president to extend time to a debtor and to take steps to sell the collateral which the bank holds as security to the indebtedness.¹¹ However, it has been held in Utah that it "may be assumed that the principal officer of the corporation, prima facie at least, had the power to waive or to consent to a change or modification of certain provisions in a contract which related to matters coming within the corporate powers and which he had the authority to enter into, and with respect to which he, in all stages of the business, apparently represented and acted for the corporation."¹² A corporation may be deemed bound by waiver by its president of notice of application for the appointment of a receiver.¹³ So he may bind the

⁶ *Lister Agricultural Chemical Works v. Selby*, 68 N. J. Eq. 271, 59 Atl. 247.

⁷ *Lister Agricultural Chemical Works v. Selby*, 68 N. J. Eq. 271, 59 Atl. 247.

⁸ *Granite Bldg. Corporation v. Greene*, 25 R. I. 586, 57 Atl. 649.

⁹ *Wallace v. Oceanic Packing Co.*, 25 Wash. 143, 64 Pac. 938.

Although a corporate president be clothed with authority to enter into contracts in behalf of the corporation without consulting the board of directors, it does not follow that he possesses authority to rescind a con-

tract to the enhancement of his personal interests and the sacrifice of those of the corporation. *Wallace v. Oceanic Packing Co.*, 25 Wash. 143, 64 Pac. 938.

¹⁰ *Lochwitz v. Pine Tree Mining & Milling Co.*, 37 Utah 349, 108 Pac. 1128.

¹¹ *Arbogast v. American Exch. Nat. Bank*, 125 Fed. 518.

¹² *Christensen v. Hamilton Realty Co.*, 42 Utah 70, 129 Pac. 412, relating to a special compromise agreement by the president of a surety company.

¹³ *Davis v. Edwards*, 41 Wash. 480, 84 Pac. 22.

corporation by a letter taking a contract of employment for one year out of the statute of frauds, where the corporation had accepted and paid for the services as rendered.¹⁴

§ 2051. Compromises and settlements. Unless expressly or impliedly authorized,¹⁵ the president has no power to settle or compromise accounts, claims, or suits by or against the corporation.¹⁶ However, it has been held in Texas that the president of a bank may release a debt in consideration of a transfer of property.¹⁷

§ 2052. Payments. The president has no implied authority, by virtue of his office merely, to pay claims against the corporation,¹⁸ nor to collect or receive payment of debts due the corporation.¹⁹ Where

¹⁴ *Truskett v. Rice Bros. Live Stock Commission Co.*, — Mo. App. —, 180 S. W. 1048.

¹⁵ The president may be expressly authorized to compromise claims and suits, and he may have implied authority by reason of his being authorized to manage the business, or to manage the matter in relation to which the compromise is made.

United States. *Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. R.*, 120 U. S. 256, 30 L. Ed. 639.

Illinois. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544.

Mississippi. *Case v. Hawkins*, 53 Miss. 702.

New York. *Farmers' Loan & Trust Co. v. Mann*, 4 Robt. 356.

Pennsylvania. *Dougherty v. Hunter*, 54 Pa. St. 380.

¹⁶ *Wheat v. Bank of Louisville*, 9 Ky. L. Rep. 738, 5 S. W. 305. And see *Beach v. Wakefield*, 107 Iowa 567, 78 N. W. 197, 76 N. W. 688.

An unauthorized compromise may be expressly ratified by the board of directors, or impliedly ratified by acquiescence therein. *Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. R.*, 120 U. S. 256, 30 L. Ed. 639.

Power of agents generally to make settlements, see 1 *Mechem, Agency* (2nd Ed.), § 1012 et seq.

¹⁷ *Farmers' Nat. Bank v. Templeton*, — Tex. Civ. App. —, 40 S. W. 412, following *Panhandle Nat. Bank v. Emery*, 78 Tex. 498, 15 S. W. 23.

¹⁸ *Gibson v. Goldthwaite*, 7 Ala. 281, 42 Am. Dec. 592; *New Orleans Bldg. Co. v. Lawson*, 11 La. 34. And see *Kansas City Hay-Press Co. v. Devol*, 72 Fed. 717; *Sampson v. Fox*, 109 Ala. 662, 55 Am. St. Rep. 950, 19 So. 896.

¹⁹ *Clark v. Minge*, 187 Ala. 97, 65 So. 832; *Browning v. North Missouri Cent. Ry. Co.*, — Mo. —, 188 S. W. 143; *Dougherty v. Hunter*, 54 Pa. St. 380. See also as to authority of agents in general to collect or receive payment, 1 *Mechem, Agency* (2nd Ed.), §§ 932-968.

Payment made to the president of a bank, outside the usual course of business, which the bank does not receive, and from which it derives no benefit, is not a payment that binds the bank. *Tulley v. Citizens' State Bank*, 18 Ind. App. 240, 47 N. E. 850.

A fortiori, "ordinarily payments made to an officer of a corporation in his individual capacity, or services rendered him or material furnished him in such capacity, may not be charged against the corporation, and this is especially true when pleaded as an offset to negotiable paper owned

the statutes give the president no power to make contracts, he cannot bind the corporation by a promise to pay a bill, where not authorized by any by-law or special order or such authority is not implied by acquiescence or ratification.²⁰ But it has been held that he may agree to repay moneys paid out by another for taxes on the corporation land,²¹ and that he may agree to pay advances made by agents to a corporation to whose business the company of which he is president succeeds, the relations with the agents being continued.²² So it has been held that the president of a corporation has authority to receive the payment of subscriptions to its stock—even though the corporation is a trust company which cannot transact business until all its capital stock is paid in—and also has power to issue the stock certificates or substitutes therefor pending the preparation of them.²³

But he may be expressly authorized, or have authority by virtue of being intrusted generally with the management of the business, to pay claims²⁴ or to receive payment.²⁵ However, a president who has authority to make contracts for the sale of the goods of the corporation and to settle its accounts has no implied authority to agree that a

and held by the corporation." *George Fishbaugh, Inc. v. Beeler*, 15 Ariz. 119, 136 Pac. 1057.

²⁰ *Wilson v. Investment Co.*, 80 Ore. 233, 156 Pac. 249.

²¹ *Belleclair Planting Co. v. Hall*, 125 Ark. 203, 188 S. W. 574.

²² *Curtis v. Natalie Anthracite Coal Co.*, 39 N. Y. Misc. 586, 80 N. Y. Supp. 603.

²³ *Higginbotham v. International Trust Co.*, 141 N. Y. App. Div. 535, 126 N. Y. Supp. 366.

²⁴ *New Orleans Bldg. Co. v. Lawson*, 11 La. 34; *Africa v. Duluth News Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019; *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87, 67 N. Y. Supp. 10.

Although the president may be intrusted with the management of the corporation, he has no power, on the insolvency of the corporation, to transfer all the assets of the company by way of preference to a particular creditor. *Hadden v. Linville*, 86 Md. 210, 38 Atl. 37. And see *State Nat. Bank of St. Joseph v. John*

Moran Packing Co., 68 Ill. App. 25, aff'd 168 Ill. 519, 48 N. E. 82.

²⁵ *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 816, 65 Atl. 484; *Dougherty v. Hunter*, 54 Pa. St. 380; *Panhandle Nat. Bank v. Emery*, 78 Tex. 498, 15 S. W. 23 (where the president of a bank was held to have the power to bind it by accepting property in payment of a debt, and agreeing to pay off a claim which was a lien thereon); *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280 (where tender to the president of a corporation of the money due upon a call on stock subscriptions was held good); *East New York & J. R. Co. v. Lighthall*, 36 How. Pr. (N. Y.) 481 (where he was held authorized to receive payment of subscriptions).

Where the president of a bank is held out as having power to attend to all of its business, he may bind the bank by accepting an assignment of a judgment in payment of a claim of the bank. *First Nat. Bank of Indianapolis v. New*, 146 Ind. 411, 45 N. E. 597.

purchaser of goods could pay for them by rendering services to an independent corporation having substantially the same corporators.²⁶

§ 2053. Releases. The president of a corporation has no implied authority, merely by virtue of his office, to surrender rights of the corporation; nor can he do so, even when he has the management and general control of the corporation, except for a consideration and in the usual course of business. Thus, it has been held that he has no authority to release valid claims in favor of the corporation,²⁷ to surrender a note in favor of the corporation, or bind the corporation by an agreement that the maker shall not be held liable thereon,²⁸ to release sureties, or agree that they shall not be held liable,²⁹ to bind the corporation by an agreement that an indorser on a note discounted by it shall not be held liable,³⁰ to release subscribers for stock from liability on their subscriptions,³¹ to discharge a mortgage in favor of the corporation,³² or to renounce a tax levied in its favor by the state or a

²⁶ Bloch Queensware Co. v. Metzger, 70 Ark. 232, 65 S. W. 929.

²⁷ United States. Bank of United States v. Dunn, 6 Pet. 51, 8 L. Ed. 316.

Michigan. Gallery v. National Exch. Bank, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; First Nat. Bank of Sturgis v. Bennett, 33 Mich. 520.

Minnesota. Rhodes v. Webb, 24 Minn. 292.

New York. First Nat. Bank of Whitehall v. Tisdale, 84 N. Y. 655, 18 Hun 151.

Rhode Island. Olney v. Chadsey, 7 R. I. 224.

Virginia. Hodge's Ex'r v. First Nat. Bank of Richmond, 22 Gratt. 51.

²⁸ Rhodes v. Webb, 24 Minn. 292; Stripling v. Maguire, 108 Mo. App. 594, 84 S. W. 164; First Nat. Bank of Whitehall v. Tisdale, 84 N. Y. 655, 18 Hun 151; Brouwer v. Appleby, 1 Sandf. (N. Y.) 158; Mead v. Pettigrew, 11 S. D. 529, 78 N. W. 945.

An agreement by the president of a bank, made in conflict with the interests of the bank, that payment will not be required of the maker of a

note, is not binding on the corporation, the maker having knowledge of conflicting interest in the matter between the president and the bank. Bank of Le Roy v. Purdy, 100 N. Y. App. Div. 64, 91 N. Y. Supp. 310.

²⁹ First Nat. Bank of Sturgis v. Bennett, 33 Mich. 520.

³⁰ Bank of Metropolis v. Jones, 8 Pet. (U. S.) 12, 8 L. Ed. 850; Bank of United States v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316. But see Cake v. Pottsville Bank, 116 Pa. St. 264, 2 Am. St. Rep. 600, 9 Atl. 302.

³¹ Potts v. Wallace, 146 U. S. 689, 36 L. Ed. 1135; United Growers' Co. v. Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906; Mead v. Pettigrew, 11 S. D. 529, 78 N. W. 945; Fuches v. Hamilton Tribune Prtg. & Pub. Co., 10 Ont. (Can.) 497.

³² Smith v. Smith, 117 Mass. 72. And see Mobile & M. Ry. Co. v. Gilmer, 85 Ala. 422, 5 So. 138.

The president may be expressly or impliedly authorized to discharge a mortgage. Smith v. Wells Mfg. Co., 148 Ind. 333, 46 N. E. 1000; Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368, 46 N. E. 426.

municipality,³³ or to bind the corporation by an agreement not to plead the statute of limitations.³⁴ So he cannot release a claim against a stockholder in consideration of the latter releasing his claims to a part of the surplus in the hands of the corporation, since an individual stockholder has no claim to a surplus until a dividend is declared.³⁵

§ 2054. Legal proceedings—In general. According to the more recent and better line of authorities, the president of a corporation has power to institute suits in its behalf,³⁶ to appear in pending actions,³⁷ to conduct and take charge of the litigation of the corporation, and to hire attorneys,³⁸ especially where the attorney is hired to de-

Where the directors of a corporation, a mortgage to which is being attacked as in fraud of creditors, instruct the president to do the best he can in the matter, he is authorized to release the mortgage on the extension of time to the debtor by the other creditors. *Smith v. Wells Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000.

The fact that the president is authorized to discharge a mortgage does not render the corporation bound by his mistake in discharging another mortgagee also. *Smith v. Smith*, 117 Mass. 72.

³³ *Reynolds & Henry Const. Co. v. Police Jury*, 44 La. Ann. 863, 11 So. 236.

³⁴ *Morgan v. Merchants' Nat. Bank of Memphis*, 13 Lea (Tenn.) 234.

³⁵ *C. G. Braxmar Co. v. Olpp*, 135 N. Y. Supp. 1091.

³⁶ *Dent v. People's Bank of Imboden*, 118 Ark. 157, 175 S. W. 1154; *Citizens' Nat. Bank of Kingman v. Berry*, 53 Kan. 696, 24 L. R. A. 719, 37 Pac. 131; *Reno Water Co. v. Leete*, 17 Nev. 203, 30 Pac. 702; *Commercial Nat. Bank v. First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601.

³⁷ He may enter an appearance, by attorney, in a pending action against the corporation. *Savings Bank v. Benton*, 59 Ky. 240; *Fernald*

v. Spokane & B. C. Telephone & Telegraph Co., 31 Wash. 672, 72 Pac. 462.

He is presumed, in the absence of evidence to the contrary, to have power to appear for the corporation in a suit pending against it. *Oakley v. Workingmen's Union Benev. Society*, 2 Hilt. (N. Y.) 487.

³⁸ *Citizens' Nat. Bank of Kingman v. Berry*, 53 Kan. 696, 24 L. R. A. 719, 37 Pac. 131; *Breathitt Coal, Iron & Lumber Co. v. Gregory*, 25 Ky. L. Rep. 1507, 78 S. W. 148; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350, 28 S. W. 227. See also *Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin*, — Tex. Civ. App. —, 179 S. W. 541.

"That the president of a corporation has a general authority to employ counsel to assist in legal proceedings, where the corporation is interested, is well established." *Potter v. New York Infant Asylum*, 44 Hun (N. Y.) 367, 369.

"The authority of the president or other head of a corporation to employ an attorney when the exigencies of his company require it has been repeatedly recognized." *Streeten v. Robinson*, 102 Cal. 542, 545, 36 Pac. 946.

"He has an inherent right to employ counsel for his bank either to institute or defend suits." *Colman*

fend the corporation.³⁹ Thus, in West Virginia, in a well argued case, it is held that the president of a corporation doing a large amount of business has inherent power to institute and carry on legal proceedings to collect debts, to defend suits, to sue out a writ of error, and to voluntarily dismiss a writ of error.⁴⁰ The president may waive notice of an application.⁴¹ However, he cannot agree to pay a large sum in cash or in first mortgage bonds to obtain a discontinuance of suits against the corporation.⁴² In any event, it will be presumed that he had authority to employ an attorney where the directors thereafter meet and confer with the attorney on legal matters.⁴³

On the other hand, there are decisions holding that the president of a corporation has no authority, as such, to institute suits on behalf of the corporation,⁴⁴ or to employ counsel to prosecute an action.⁴⁵ Thus it has been held that the foreclosure of a mortgage does not come within the scope of the merely implied power of the president.⁴⁶ A fortiori, he has no power, long after the corporation has sold all its property and gone out of business, to sue to collect the debts of the corporation for the purpose of liquidating its affairs, especially

v. West Virginia Oil & Oil Land Co., 25 W. Va. 148, 169.

But the president of a bank cannot make a contract of employment retaining the services of an attorney by the year for consultations and advice. *Dent v. People's Bank of Imboden*, 118 Ark. 157, 175 S. W. 1154.

³⁹ *Illinois*. *Boston Tailoring House v. Fisher*, 59 Ill. App. 400.

Kentucky. *Savings Bank v. Benton*, 59 Ky. 240.

Minnesota. *Traxler v. Minneapolis Cedar & Lumber Co.*, 128 Minn. 295, 150 N. W. 914.

New Jersey. *Beebe v. George H. Beebe Co.*, 64 N. J. L. 497, 46 Atl. 168, where the court said that "not even a suggestion to the contrary can be found in the books."

Pennsylvania. *Campbell v. Pittsburgh Bridge Co.*, 23 Pa. Super. Ct. 138.

Washington. *Fernald v. Spokane & B. C. Telephone & Telegraph Co.*, 31 Wash. 672, 72 Pac. 462.

⁴⁰ *Colman v. West Virginia Oil & Oil Land Co.*, 25 W. Va. 148.

⁴¹ "An attorney for the company might have done this, and we know of no reason why the head of the corporation should not have equal authority." *Davis v. Edwards*, 41 Wash. 480, 484, 84 Pac. 22.

⁴² *Thomson v. Central Passenger R. Co.*, 80 N. J. L. 328, 78 Atl. 152.

⁴³ *Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin*, — Tex. Civ. App. —, 179 S. W. 541.

⁴⁴ *Pardee Co. v. H. Alfrey Heading Co.*, 129 La. 749, 56 So. 660; *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. (Mass.) 507.

⁴⁵ *Pacific Bank v. Stone*, 121 Cal. 202, 53 Pac. 634; *Ney v. Eastern Iowa Tel. Co.*, 162 Iowa 525, 144 N. W. 383; *Bright v. Metairie Cemetery Ass'n*, 33 La. Ann. 58.

⁴⁶ *New England Mut. Life Ins. Co. v. Wing*, 191 Mass. 192, 77 N. E. 376. See, in general, *Butcher v. Harvie Drug Co.*, 79 N. Y. App. Div. 631, 80 N. Y. Supp. 1.

where the charter provides for the liquidation of the corporation by commissioners elected by the stockholders.⁴⁷

The president has such authority where it has been either expressly conferred on him or he has been customarily authorized or permitted to attend to such matters or to manage the business of the corporation generally.⁴⁸ Thus, authority given to the president by a by-law to adjust claims, fix credits and in general to supervise the corporate business, includes authority to institute bankruptcy proceedings against one of its debtors.⁴⁹ And express authority to dispose of all the property of the corporation and to pay debts from the proceeds includes power to sue to settle title to land to satisfy prospective purchasers.⁵⁰

⁴⁷ *Jeanerette Rice & Milling Co. v. Durocher*, 123 La. 160, 48 So. 780.

⁴⁸ *California*. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

Massachusetts. *Trustees of Smith Charities v. Connolly*, 157 Mass. 272, 31 N. E. 1058.

Michigan. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

Missouri. *Lewis v. Pulitzer Pub. Co.*, 77 Mo. App. 434.

New York. *Merrill v. Consumers' Coal Co.*, 114 N. Y. 216, 21 N. E. 155; *Recamier Mfg. Co. v. Seymour*, 15 Daly 245, 5 N. Y. Supp. 648; *Mumford v. Hawkins*, 5 Den. 355; *American Ins. Co. v. Oakley*, 9 Paige 496, 38 Am. Dec. 561.

Oregon. *Lucky Queen Min. Co. v. Abraham*, 26 Ore. 282, 38 Pac. 65.

Texas. *Dallas Ice Factory & Cold Storage Co. v. Crawford*, 18 Tex. Civ. App. 176, 44 S. W. 875.

He may have implied authority to execute an appeal bond. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

"There is no need that express authority to commence such an action should be given by the board of directors to a president who is clothed by the charter or by-laws of the corporation with the management of

every department of the company. Such authority may well be implied in the president of a corporation, especially under the circumstances of this case where one who is a director and treasurer of the company must be sued, and that one other of the four directors had himself overdrawn his account and had resigned as such director, as *Ketter* did. It would be an idle formality to insist that the board of directors should be convened to do by formal resolution that which would be and ought to be so evidently within the power of the head of such a corporation." *Green Bay Fish Co. v. Jorgensen*, — Wis. —, 163 N. W. 142.

⁴⁹ Express power conferred upon the president of a mercantile trading company, by the by-laws, "to perform the duties of the executive department of the business," with "authority to fix the time of credits, adjust and settle all claims; * * * and to transact for and control and supervise all the concerns of the business of the corporation" includes power to determine when bankruptcy proceedings should be instituted against its debtor. *In re Winston*, 122 Fed. 187.

⁵⁰ *New York*, *B. & E. R. Co. v. Motil*, 81 Conn. 466, 71 Atl. 563.

§ 2055. — Power to confess judgment. The decisions are conflicting as to the power of a president in regard to confessing judgment. It is generally held that the president is not authorized, merely by virtue of his office, to confess a judgment against the corporation, or execute a warrant or power of attorney to confess judgment,⁵¹ unless the power is expressly conferred upon him or the general powers conferred upon him are broad enough to include such authority.⁵² A fortiori, he has no authority to confess judgment when the effect of the judgment would be to practically divest the corporation of its entire property.⁵³ But, of course, his act in executing a power of attorney to confess judgment binds the company where his act is ratified by it.⁵⁴ In any event, there is no power to execute a power of attorney to confess judgment after the corporation has ceased to do business.⁵⁵

51 Arizona. *Arizona Mining & Trading Co. v. Benton*, 12 Ariz. 373, 100 Pac. 952.

Illinois. *Bailey v. Snyder Bros.*, 61 Ill. App. 472; *Adams v. Cross Wood-Printing Co.*, 27 Ill. App. 313; *Joliet Elec. Light & Power Co. v. Ingalls*, 23 Ill. App. 45. Compare *Snyder Bros. v. Bailey*, 165 Ill. 447, 46 N. E. 452, rev'g 61 Ill. App. 472.

Maryland. *In re Cape Sable Co.*, 3 Bland 606.

Missouri. *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377.

Nebraska. *Fogg v. Ellis*, 61 Neb. 829, 86 N. W. 494; *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627, 49 N. W. 704.

New Jersey. *Raub v. Blairstown Creamery Ass'n*, 56 N. J. L. 262, 28 Atl. 384; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

South Carolina. *Thew v. Porcelain Mfg. Co.*, 5 Rich. 415.

Wisconsin. *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

The fact that the president of a corporation is also its treasurer and superintendent gives him no implied authority to confess judgment against

it. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

52 McDonald v. Chisholm, 131 Ill. 273, 23 N. E. 596, aff'g 30 Ill. App. 176; *Miller v. Oregon City Paper Mfg. Co.*, 3 Ore. 24; *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

Where the code designates the president as the officer competent to confess judgment for a corporation, he may do so without showing special authority from the stockholders or directors. *Miller v. Oregon City Paper Mfg. Co.*, 3 Ore. 24.

Where a corporation, by its president, has executed a contract agreeing to give its judgment note, the president is authorized to execute the warrant of attorney attached to the note. *McDonald v. Chisholm*, 131 Ill. 273, 23 N. E. 596, aff'g 30 Ill. App. 176.

53 Frederick Milling Co. v. Frederick Farmers' Alliance Co., 20 S. D. 335, 106 N. W. 298, where consent was to judgment foreclosing a mortgage on the corporate property.

54 Fred K. Higbie Co. v. Charles Weeghman Co., 126 Ill. App. 97.

55 Lemars Shoe Co. v. Lemars Shoe Mfg. Co., 89 Ill. App. 245.

In some states, however, it has been held that a confession of judgment by an officer, such as the president, upon whom valid service of process might have been made, is binding on the corporation, on the ground that had service been made upon him and he had suffered judgment to be taken by default the corporation would be bound thereby.⁵⁶

§ 2056. Submission to arbitration. Unless he has charge of the corporate business,⁵⁷ it is held that the president cannot submit matters to arbitration.⁵⁸ A fortiori, the president cannot revoke a submission to arbitration made by the board of directors.⁵⁹ In Michigan, however, in case of a company organized for hydraulic purposes, the Supreme Court said: "There is nothing in the objection that no authority is shown in the president and secretary of defendants to agree on arbitration. They are the officers presumably empowered to make ordinary agreements, and such a company cannot exist without power somewhere to agree on rights of flowage. A right to arbitrate any difference on this head is incidental."⁶⁰

§ 2057. Insurance. It is held that the president has no power to insure the corporate property,⁶¹ but it is submitted that this is an ordinary contract which should be deemed to be within the powers of a president, at least in case of a small corporation and where the premiums are not relatively large.

⁵⁶ *Manley v. Mayer*, 68 Kan. 377, 1 Ann. Cas. 825, 75 Pac. 550; *Chamberlin & Churchill v. Mammoth Min. Co.*, 20 Mo. 96; *Miller Bros. v. Bank of British Columbia*, 2 Ore. 291. See also *Boston Tailoring House v. Fisher*, 59 Ill. App. 400.

⁵⁷ See *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284; *Remington Paper Co. v. London Assur. Corporation*, 12 N. Y. App. Div. 218, 43 N. Y. Supp. 431.

Power of general manager to submit to arbitration, see § 2131, *infra*.

⁵⁸ *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503. But see *White Star Min. Co. of Illinois v. Hultberg*, 220 Ill. 578, 600, 77 N. E. 327, writ of error dismissed 205 U. S. 540, 51 L. Ed. 921 (mem. dec.), where agreement was

held binding where under seal and where participated in by the corporation up to the time of the final decision.

⁵⁹ *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

⁶⁰ *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74, 76, 6 N. W. 91.

⁶¹ *Marqusee v. Insurance Co. of North America*, 211 Fed. 903; *Marqusee v. Hartford Fire Ins. Co.*, 198 Fed. 475, 42 L. R. A. (N. S.) 1025.

Especially is this so where the by-laws provide that all contracts shall be made by the board of directors. *Marqusee v. Hartford Fire Ins. Co.*, 198 Fed. 475, 42 L. R. A. (N. S.) 1025; *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. 378.

§ 2058. Partnership contract. The president has no power to make a partnership contract for the corporation,⁶² if for no other reason than that such a contract is *ultra vires*. And a corporation cannot be charged with being a partner in a firm where the alleged contract of partnership, made by the corporate president, is entered into without authority from the board of directors, and is never brought to the attention of the directors or stockholders during the period it is alleged to have been in force.⁶³

§ 2059. Dealing in futures. The power of a president of a cotton manufacturing company does not extend to buying and selling cotton futures on the exchange.⁶⁴ This is simply another illustration of the rule that the president or other officer has no power to do an act or make a contract which is beyond the powers of the corporation itself.

§ 2060. Signing petitions. It has been held that the president of a corporation dealing in real estate has power to sign a subscription to procure a freight yard near its property.⁶⁵ So a president may sign a petition for repaving on behalf of the corporation where it has been customary to sign petitions on behalf of the corporation.⁶⁶ Ordinarily, however, the president cannot bind the corporate property by signing the corporate name to a petition asking for a street improvement, unless expressly authorized.⁶⁷

§ 2061. Affidavits. There is no doubt but that the president of a corporation has power, in a proper case, to make an affidavit on behalf

⁶² *Dixie Cotton Oil Co. v. Morris*, 79 Ark. 113, 94 S. W. 933; *Post & McCord v. New York*, 86 N. Y. Misc. 300, 148 N. Y. Supp. 568.

⁶³ *Dixie Cotton Oil Co. v. Morris*, 79 Ark. 113, 94 S. W. 933.

⁶⁴ "No power is shown in the charter to authorize the corporation to go into such business. It was a corporation to manufacture cotton goods. While the power is given to buy and sell cotton, this could not carry with it the implication that it was authorized to speculate in cotton." As to the claim that an amendment to the charter authorizing the company to also engage in a general mercantile business conferred such power the court said that the purpose of such

amendment "must have been that they might carry on, in connection with their factory, stores for the sale of general merchandise to their employees and others, which they did to a very large extent. They had power, also, to buy and sell cotton, as stated, but that cannot be held certainly to authorize speculation in cotton futures." *In re Trion Mfg. Co.*, 214 Fed. 161, 164.

⁶⁵ *Levy v. West Side Const. Co.*, — N. Y. Misc. —, 162 N. Y. Supp. 661.

⁶⁶ *Eddy v. Omaha*, 72 Neb. 550, 103 N. W. 692, 102 N. W. 70, 101 N. W. 25.

⁶⁷ *Morse v. Omaha*, 67 Neb. 426, 93 N. W. 734.

of the corporation,⁶⁸ although it has been held that he has no power to verify an account to perfect a mechanic's lien, unless so authorized.⁶⁹

§ 2062. Consent to acts of others. The consent by the president of a corporation to an act on the part of another prejudicial to the corporation, not within the scope of the duties of the president and not ratified by the directors, is not binding on the corporation.⁷⁰

XVI. POWERS OF VICE PRESIDENT

§ 2063. In general. A vice president has been defined as an officer next in rank below the president.⁷¹ He is an agent of the corporation,⁷² and has been referred to as a "fifth wheel," i. e., a conditional officer who acts as president in the case of the death, absence or inability of the president to act.⁷³ Prima facie, it would seem that the only function of a vice president is to replace the president in case of the latter's death, incapacity, etc.⁷⁴ In ordinary business organizations, as a general rule, says the Court of Appeals of the District of Columbia, "the vice president has no function or duty whatever to perform other than to take the place of the president in his office."⁷⁵ As a general rule, in the absence or in case of the illness of the president, or if the office of president becomes vacant, the vice president, if one has been elected or appointed by the stockholders or directors, has authority to act in his stead, and with the same authority possessed by the president;⁷⁶ and it can make no difference that the charter of

⁶⁸ *Reed v. Siddall*, 89 Minn. 417, 95 N. W. 303.

"If the creditor is a corporation, the oath must be that of some officer, or some other agent or attorney. The act of the president, in the business of the corporation, and within the scope of his authority, is the act of the corporation." *Lewiston Co-op. Soc. No. 1 v. Thorpe*, 91 Me. 64, 39 Atl. 283.

⁶⁹ *Clement v. Adams Bros.-Paynes Co.*, 113 Va. 547, 75 S. E. 294.

⁷⁰ *Rockefeller v. Lamora*, 96 N. Y. App. Div. 91, 89 N. Y. Supp. 1.

⁷¹ *Webster's Dictionary*; *Pond v. National Mortgage & Debenture Co.*, 6 Kan. App. 718, 50 Pac. 973.

⁷² *Cook v. Imperial Bldg. Co.*, 152

Ill. 638, 38 N. E. 914, rev'g 46 Ill. App. 279.

⁷³ See *Union Inv. Ass'n v. Geer*, 64 Ill. App. 648.

⁷⁴ 2 *Machen, Corporations*, § 1669.

⁷⁵ *Russell v. Washington Sav. Bank*, 23 App. Cas. (D. C.) 308, 408.

⁷⁶ *California. Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

Illinois. Sawyer v. Cox, 63 Ill. 130, 135; *Smith v. Smith*, 62 Ill. 493, 496; *Wagg-Anderson Woolen Co. v. J. H. Leshner & Co.*, 78 Ill. App. 678, 680.

Kansas. Pond v. National Mortgage & Debenture Co., 6 Kan. App. 718, 50 Pac. 973.

New York. Aaronson v. David Meyer Brewing Co., 26 Misc. 655, 56 N. Y. Supp. 387.

the corporation does not mention the office of vice president, where it authorizes the appointment of officers generally, and the by-laws provide for his appointment,⁷⁷ or that the by-laws do not expressly provide for a vice president, where they authorize the directors to appoint officers, and they have created the office.⁷⁸ Thus, if a vacancy occurs by death in the office of the president, the vice president may act in his stead.⁷⁹ So if the president refuses to act as such, it has been held that not only is the vice president authorized to act in his place but it is his duty to do so.⁸⁰ Where a statute provides that corporate deeds may be signed by the "president, presiding member, or trustee of said corporation," they may be signed by the vice president as the "presiding member," in case of the absence of the president or his inability to act.⁸¹ So, in the absence of the president, the vice president may execute notes where the president has power to do so.⁸²

On the other hand, it is generally held that the vice president of a corporation has no authority to bind it, merely by virtue of his office, by contracts, or to dispose of its property;⁸³ but he is often intrusted with the management of the business, or a particular part of

Washington. *Fernald v. Spokane & B. C. Telephone & Telegraph Co.*, 31 Wash. 672, 72 Pac. 462.

"What the president within the scope of his authority may do the vice president acting in his place may do." *Russell v. Washington Sav. Bank*, 23 App. Cas. (D. C.) 308, 408.

"In the absence of the president of a corporation, it is the duty of the vice president to act as president, and at such times he is the chief officer of the corporation." *Pond v. National Mortgage & Debenture Co.*, 6 Kan. App. 718, 50 Pac. 973.

⁷⁷ *Smith v. Smith*, 62 Ill. 493.

⁷⁸ *Colman v. West Virginia Oil & Oil Land Co.*, 25 W. Va. 148.

⁷⁹ *Colman v. West Virginia Oil & Oil Land Co.*, 25 W. Va. 148.

⁸⁰ *Smith v. Smith*, 62 Ill. 493.

⁸¹ *Ballard v. Carmichael*, 83 Tex. 355, 367, 18 S. W. 734, holding that where a deed under seal was signed by the vice president it would be presumed that the contingency had arisen which authorized him to act.

⁸² *Jefferson Bank of St. Louis v.*

Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641.

⁸³ *Morris v. Griffith & Wedge Co.*, 69 Fed. 131; *American Loan & Trust Co. v. St. Louis & C. Ry. Co.*, 42 Fed. 819; *Shavaliar v. Grand Rapids Bark & Lumber Co.*, 128 Mich. 230, 8 Det. L. N. 622, 87 N. W. 212. Compare *Kentucky Land & Immigration Co. v. Wallace*, 21 Ky. L. Rep. 1601, 55 S. W. 885.

As to power to confess judgment, see *Manley v. Mayer*, 68 Kan. 377, 1 Ann. Cas. 825, 75 Pac. 550.

The consent of a railroad corporation to the crossing of its tracks by a street car company cannot be shown by a mere agreement to such effect made with the vice president of the road. *Ballston Terminal R. Co. v. Hudson Valley R. Co.*, 76 N. Y. App. Div. 184, 78 N. Y. Supp. 399.

A fortiori, he has no authority to make a contract by which the individual officers of the company should become personally liable for a loan. *Navarre Realty Co. v. Coale*, 192 Md. 494, 89 Atl. 728.

it, and in such a case he may bind the corporation by any contract within the scope or apparent scope of his authority.⁸⁴ A vice president, although not acting as such, may become an agent of the corporation.⁸⁵ It has been said that "the power of a vice president does not depend upon his title, for his function differs according to the by-laws or according to the use and practice of the particular company. In some railroad companies there are many vice presidents who have great authority. There are other companies in which the vice presidency is a mere ornamental position."⁸⁶ Sometimes the duties of the vice president are limited by the by-laws to presiding over meetings in the absence of the president.⁸⁷

The vice president of a bank, it has been held by the Supreme Court of the United States, has no power to borrow money for the bank, on the theory that a borrowing of money by a bank is "so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money";⁸⁸ but he has such power where there is proof of a general banking custom permitting him to do so,⁸⁹ or, it seems, where he is, for practical purposes, the bank, and recognized as such by the directors.⁹⁰

Of course, his unauthorized contracts on behalf of the corporation may be expressly or impliedly ratified.⁹¹

84 United States. *Cox v. Robinson*, 82 Fed. 277 (assignment of judgment).

California. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946 (employment of attorney).

Illinois. *Springer v. Bigford*, 55 Ill. App. 198, aff'd 160 Ill. 495, 43 N. E. 751 (bill of sale).

Louisiana. *Lacaze v. Creditors*, 46 La. Ann. 237, 14 So. 601 (institution of suit).

Missouri. *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965.

North Carolina. *Rumbough v. Southern Improvement Co.*, 106 N. C. 461, 11 S. E. 528 (acceptance of draft).

Where the vice president is in charge of one of the main departments of the corporate business, he may bind the corporation with respect to the rental of the building to be used for storing goods handled by his department.

Drew v. Billings-Drew Co., 132 Mich. 65, 92 N. W. 774.

Powers as general manager are treated of under subdivision on powers of general manager, since his office of vice president then becomes immaterial.

85 United Inv. Ass'n v. Geer, 64 Ill. App. 648.

86 James Sanatorium v. Yadkin River Power Co., 167 N. C. 326, 83 S. E. 464.

87 Campbell v. Manatawny Bessemer Ore Co., 62 Pa. Super. Ct. 57.

88 Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. Ed. 470.

89 Armstrong v. Chemical Nat. Bank City of New York, 83 Fed. 556.

90 Armstrong v. Chemical Nat. Bank City of New York, 83 Fed. 556.

91 Dallas v. Columbia Iron & Steel Co., 158 Pa. St. 444, 27 Atl. 1055.

§ 2064. **Employment of agents.** Ordinarily the vice president cannot employ help. But where the president of a corporation is deemed to have power to employ counsel to protect the corporate interests, the vice president will be deemed to have such power also, in the absence of the president.⁹² Moreover, he may employ salesmen where it has been his custom so to do, so as to be within his apparent authority.⁹³

§ 2065. **Purchases, sales, assignments and payments.** The vice president has no inherent power to purchase or sell property, at least where the president is capable of acting. Thus, a second vice president has no power to contract for the purchase of the capital stock and bonds of the corporation.⁹⁴ A fortiori, he cannot sell the entire business of the corporation at a certain place.⁹⁵ But "ostensible authority," as that term is defined by statute in California and a few other states, as being such authority "as the principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess," to sell land of a corporation engaged in buying and selling land, is possessed by a vice president who is the only officer or agent of the company in the state where the land was located and the sale made, and who is acting in the town, if not in the building, of the principal place of business of the company, and in the office of the attorney of the company.⁹⁶ He cannot assign a claim held by the corporation⁹⁷ and has no authority to accept payment.⁹⁸ But he may accept accounts instead of cash, where authorized to make a sale.⁹⁹

§ 2066. **Negotiable paper.** Ordinarily the vice president has no power to execute a note,¹ at least unless the president is deemed to

⁹² Fernald v. Spokane & B. C. Telephone & Telegraph Co., 31 Wash. 672, 72 Pac. 462.

⁹³ Carter Grocer Co. v. Day, — Tex. Civ. App. —, 144 S. W. 365.

⁹⁴ Beach v. Palisade Realty & Amusement Co., 86 N. J. L. 238, 90 Atl. 1118.

⁹⁵ Kiefhaber Lumber Co. v. Newport Lumber Co., 15 Cal. App. 37, 113 Pac. 691.

⁹⁶ Merritt v. Adams County Land & Investment Co., 29 N. D. 496, 151 N. W. 11.

⁹⁷ Allen v. Alston, 147 Ala. 609, 41 So. 159.

⁹⁸ Krauss Engineering Co. v. McKinnon, 66 N. Y. Misc. 181, 121 N. Y. Supp. 396.

⁹⁹ Valley Lumber Co. v. McGilvery, 16 Idaho 338, 101 Pac. 94.

¹ Dreeben v. First Nat. Bank of McKinney (Tex.), 99 S. W. 850.

Since authority to sign corporate notes is not an implied power of the vice president, where suit is brought on an alleged corporate note signed by the vice president and the corporation pleads non est factum in defense, the note should not be admitted in evidence until the authority of the officer to append the corporate signa-

have such power and he is merely substituting for the president.² No recovery can be had on a note signed by the vice president and secretary, it is held in New York, unless there is proof of their authority by usage, charter, by-laws or resolution of the directors, or of ratification by receiving and retaining the benefits of the proceeds.³ The authority of the vice president to sign notes cannot be established by his mere assertion of such power.⁴ But if he is intrusted with a note with the name of the corporation on the back, he has implied authority to fill up the blanks and deliver the note after a signature by the maker.⁵ So it has been held that he may guarantee a note on transferring it.⁶

§ 2067. Assignment for benefit of creditors. Ordinarily, the vice president cannot make an assignment for the benefit of creditors.⁷ But power, conferred on a vice president of an insolvent corporation "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interests of this association" includes authority to execute an assignment for the benefit of creditors.⁸

§ 2068. Annual statements. Where a statute provides for liability of the corporate president in case of his failure to make a certain annual statement of the corporate affairs, the law will be deemed sufficiently complied with if the vice president make such statement.⁹

§ 2069. Affidavits. It seems that he may make and sign an affidavit as to the true consideration for a chattel mortgage given to the corporation.¹⁰ Where the vice president is made one of the chief of-

ture is shown. *Dreeben v. First Nat. Bank of McKinney (Tex.)*, 99 S. W. 850.

² Power of president, see § 2038, *supra*.

³ *Emmet v. Northern Bank of New York*, 173 N. Y. App. Div. 840, 160 N. Y. Supp. 183. Compare § 1943, *supra*.

⁴ *Dreeben v. First Nat. Bank of McKinney (Tex.)*, 99 S. W. 850.

⁵ *Hennessy Bros. & Evans Co. v. Memphis Nat. Bank*, 129 Fed. 557.

⁶ "It is to be presumed the vice president had rightfully the power he

assumed to exercise, and the defendant [bank] is estopped to deny it." *People's Bank v. National Bank*, 101 U. S. 181, 183, 25 L. Ed. 907.

⁷ *Friedman v. Leshner*, 198 Ill. 21, 26, 92 Am. St. Rep. 255, 64 N. E. 736, *aff'g* 99 Ill. App. 42.

⁸ *Huse v. Ames*, 104 Mo. 91, 102, 15 S. W. 965.

⁹ *Myar v. Poe*, 79 Ark. 465, 95 S. W. 1005.

¹⁰ *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L. 721, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822, 68 Atl. 1078.

ficers of the company by the by-laws, and he is in charge of the settlement of an estate for the company, he may make an affidavit for a warning order in a suit by the corporation to settle the estate.¹¹

§ 2070. Presumptions. An instrument of conveyance signed by the vice president under due authority from the board of directors is presumptively valid where such instrument may be executed either by the corporate president or vice president when authorized so to do by a corporate by-law.¹² In Illinois it is held that the "vice president acts for the president, and any contract pertaining to the corporate affairs within the general powers of such officer, executed by him on behalf of the corporation, will, in absence of proof to the contrary, be presumed to have been done by the authority of the corporation."¹³ In Wisconsin, it is held that it is to be presumed that the vice president had power to transfer a note by indorsement, and Justice Marshall said: "The president, or in his absence or inability to act the vice president, of a business corporation is a usual officer as managing agent to execute such a paper as the one in question, and it is implied in case of a transfer so signed that the officer had authority to act in the absence of proof to the contrary and notice to the person receiving the paper."¹⁴ In many other states, however, no such presumptions exist, the rule being the same as to presumptions as in case of the president.¹⁵

XVII. POWERS OF SECRETARY

§ 2071. Powers and duties in general—Nature of office. In the absence of provision to the contrary, the secretary is the custodian of the corporate seal.¹⁶ It is generally his duty to make and keep its records, and to make proper entries of the votes, resolutions and proceedings of the stockholders and directors in the management of the corporation and of all other matters required to be entered on the records.¹⁷ He need not enter up the minutes in his own handwriting,

¹¹ *Mandell v. Fidelity Trust Co.*, 32 Ky. L. Rep. 1104, 107 S. W. 775.

¹² *American Exch. Nat. Bank v. Ward*, 111 Fed. 782, 55 L. R. A. 356.

¹³ *Village of Prairie du Rocher v. Schoening-Koenigsmark Milling Co.*, 248 Ill. 57, 93 N. E. 425.

¹⁴ *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083.

¹⁵ See § 2010, *supra*.

¹⁶ *Stovell v. Alert Gold Min. Co.* (Colo.), 87 Pac. 1071; *Evans v. Lee*, 11 Nev. 194.

¹⁷ *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447; *Leary v. Blanchard*, 48 Me. 269.

When a by-law requires the proceedings of each day to be drawn up by the secretary, etc., it is sufficient if, in the absence of the secretary, the proceedings are drawn up on paper

but may direct another to do the writing.¹⁸ The secretary's possession of the books of the corporation is the possession of the corporation. When he ceases to be secretary, he cannot take the books in which he has kept the records of the corporation, even though he may have bought them with his own money.¹⁹ Where the charter does not confine the office of secretary to one person, acts pertaining to the office of secretary, performed by an agent under the direction of the corporation, are binding upon it as the acts of its secretary.²⁰

§ 2072. — Inherent authority. Unless authority is expressly conferred, or he is clothed with apparent authority by being intrusted with the management of the business, or a part of it, the secretary of a corporation has no authority to make any contracts on its behalf and in its name. He has no such authority merely by virtue of his office.²¹

by the secretary pro tem., and subsequently transferred to the record book. *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137.

A mutual benefit society may be bound by the act of the secretary of one of its local councils in fixing his attestation to the signature of a member, and the acceptance of the signature as having been properly verified. *Wandell v. Mystic Tolders*, 130 Iowa 639, 105 N. W. 448.

¹⁸ *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402.

¹⁹ *State v. Goll*, 32 N. J. L. 285.

²⁰ *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575.

²¹ **California.** *Thomasson v. Grace M. E. Church*, 113 Cal. 558, 45 Pac. 838; *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555; *Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435; *Donaldson v. Orchard Crude Oil Co.*, 6 Cal. App. 641, 92 Pac. 1046.

Connecticut. *Fawcett v. New Haven Organ Co.*, 47 Conn. 224.

Illinois. *Chicago v. Stein*, 252 Ill. 409, Ann. Cas. 1912 D 294, 96 N. E. 886; *Sears v. Illinois Wesleyan University*, 28 Ill. 183; *Schmeling v. Rockford Amusement Co.*, 154 Ill. App. 308.

Iowa. *Wolf v. Davenport, I. & D. R. Co.*, 93 Iowa 218, 61 N. W. 847.

Kansas. *Ross Oil & Gas Co. v. Eastham*, 73 Kan. 464, 85 Pac. 531.

Minnesota. *Danvers Farmers' Elevator Co. v. Johnson*, 93 Minn. 323, 101 N. W. 492.

Missouri. *First Nat. Bank of Kansas City v. Hogan*, 47 Mo. 472; *Union Bank Note Co. v. Ajax Portland Cement Co.*, 155 Mo. App. 349, 137 S. W. 18; *Famous Shoe & Clothing Co. v. Eagle Iron Works*, 51 Mo. App. 66; *Simmons Hardware Co. v. Greeley-Burnham Grocer Co.*, 2 Mo. App. 1081.

New York. *Klein v. Louis Barnett Sons*, 158 N. Y. Supp. 627; *Greene v. Iroquois Hotel & Apartment Co.*, 84 N. Y. Supp. 591.

Ohio. *Bradford Belting Co. v. Gibson*, 68 Ohio St. 442, 67 N. E. 888.

Rhode Island. *Roren Drop Forging Co. v. Union Manufacturing & Drop Forging Co.*, 37 R. I. 396, 92 Atl. 1018.

West Virginia. *Cobb v. Glenn Boom & Lumber Co.*, 57 W. Va. 49, 110 Am. St. Rep. 771, 49 S. E. 1005.

England. *Williams v. Chester & Holyhead Ry. Co.*, 15 Jur. 828.

Secretary of mining company has no implied power to bind the company. *Farrell v. Gold Flint Min. Co.*, 32 Mont. 416, 80 Pac. 1027.

"It is well-settled law that the secretary of a trading corporation has no

He has none of the powers of a general or managing agent.²² In Wisconsin, however, in holding that it was not necessary, in an action on a note transferred to plaintiff by an indorsement of the name of the corporation "by O. C. Rosing, Secretary," to prove that the secretary was authorized by the corporation to assign the note, the Supreme Court, by Justice Barnes, said, in referring to a previous decision in that state so holding as to an indorsement by the president,²³ that "what is there said is just as applicable to the secretary of a business corporation as it is to its president. Both are general officers of such corporations who often perform interchangeably a wide range of duties. Indeed, it is a matter of common knowledge that the presidents and secretaries of ordinary private corporations perform much the same functions in the conduct of corporate business enterprises that are performed by general partners in a copartnership business."²⁴

As illustrating, the general rule that a secretary has no authority, merely by virtue of his office, to bind the company by contracts, it is held that he cannot bind the corporation by a promise to pay for clothing delivered by others to employees of the corporation on his orders as secretary.²⁵ So he has no authority, merely by virtue of his office, to bind the corporation by an account stated,²⁶ or by a rep-

power, as such, to sign the name of the corporation to obligations for the payment of money." *Fuller v. Tootle-Campbell Dry Goods Co.*, 189 Mo. App. 514, 176 S. W. 1091.

The secretary of a corporation, who has received from a creditor of the corporation a check drawn by the corporation in favor of the creditor, does not act within the scope of his duty as agent of the corporation in collecting the money thereon and paying it to a creditor of the payee, and therefore the corporation is not liable again to the payee. *East Line & R. River R. Co. v. Terry*, 50 Tex. 129.

In any event, he cannot contract with the vice president to give him half of the commissions on the sales of certain shares of stock, and also half of the commissions on all sales of said stock by whomsoever made. *Waters v. American Finance Co.*, 102 Md. 212, 62 Atl. 357.

²² *Franklin v. Havalena Min. Co.*,

18 Ariz. 201, 157 Pac. 986; *Chicago v. Stein*, 252 Ill. 409, Ann. Cas. 1912 D 294, 96 N. E. 886.

²³ *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1083, where the court said that the president of a business corporation "is a usual officer as managing agent to execute such a paper as the one in question [an assignment of a note and mortgage], and it is implied in case of a transfer so signed that the officer had authority to act in the matter in the absence of proof to the contrary and notice to the person receiving the paper."

²⁴ *Swedish American Nat. Bank of Minneapolis v. Koebernick*, 136 Wis. 473, 128 Am. St. Rep. 1090, 117 N. W. 1020.

²⁵ *Famous Shoe & Clothing Co. v. Eagle Iron Works*, 51 Mo. App. 66.

²⁶ *Harvey v. West-Side El. Ry. Co.*, 13 Hun (N. Y.) 392.

resentation or admission as to the amount due on a mortgage,²⁷ or to agree to pay the debt of another,²⁸ or alter or modify corporate contracts,²⁹ or to ratify an unauthorized contract of a corporate agent,³⁰ or to make an affidavit upon which a writ of attachment is to issue.³¹ He cannot waive a lien on stock in favor of the corporation by any action less than actually transferring the stock.³² He cannot bind the company by statements that the corporation would not perform a contract and that he was authorized by the directors and stockholders to so state.³³ It seems, however, that he may make admissions as to the retainer of an attorney.³⁴

§ 2073. — Express or apparent authority. The secretary of a corporation may be expressly authorized by the charter of the corporation, or by the stockholders or directors, to act for it in making contracts and doing other acts. He may be intrusted with the general management of the business, or with the management of a particular part of it. Or he may be clothed with apparent authority by being permitted to act in particular matters, or generally. In such cases, the corporation will be bound by any contract or act within the scope or apparent scope of his authority.³⁵ Thus, if it has been the custom for

²⁷ *Johnston v. Elizabeth Building & Loan Ass'n*, 104 Pa. St. 394. Compare, however, *Kilpatrick v. Home Building & Loan Ass'n*, 119 Pa. St. 30, 12 Atl. 754.

²⁸ *Guernsey v. Johnson Organ & Piano Mfg. Co.*, 29 Cal. App. 699, 157 Pac. 527.

²⁹ *Illinois Trust & Savings Bank v. Burlington*, 79 Kan. 797, 101 Pac. 649; *Scott v. New York Filling Co.*, 79 N. J. L. 231, 75 Atl. 772.

³⁰ *Reid v. Alaska Packing Co.*, 47 Ore. 215, 83 Pac. 139.

³¹ *North Penn Iron Co. v. Boyce*, 71 N. J. L. 434, 58 Atl. 1094.

³² *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400, 137 N. W. 270.

³³ *Bradford Belting Co. v. Gibson*, 68 Ohio St. 442, 67 N. E. 888.

³⁴ *Union Surety & Guaranty Co. v. Tenney*, 102 Ill. App. 95, aff'd 200 Ill. 349, 65 N. E. 688.

³⁵ *Minnesota. Kraniger v. People's*

Bldg. Society, 60 Minn. 94, 61 N. W. 904.

Missouri. Moore v. H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975.

Nebraska. Commercial Nat. Bank of St. Paul v. Brill, 37 Neb. 626, 56 N. W. 382.

New Jersey. Blake v. Domestic Mfg. Co. (N. J. Eq.), 38 Atl. 241.

New York. Curnan v. Delaware & O. R. Co., 138 N. Y. 480, 34 N. E. 201; *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473, 34 N. E. 289; *Ludington v. Thompson*, 4 App. Div. 117, 38 N. Y. Supp. 768 (waiver of protest).

Sometimes the articles of incorporation expressly provide that the board of directors shall prescribe the duties and powers of the secretary.

A secretary may of course be intrusted with the powers of general manager, and in such case the corporation is bound by his acts in such capacity. *Betts v. Southern California*

the secretary to execute certain contracts, such a contract executed by him is binding on the corporation.³⁶ And, of course, contracts made or acts done by him without authority may be rendered binding upon the corporation by ratification or acquiescence.³⁷ Where the secretary who managed the business made a contract in behalf of the corporation and the treasurer made payments in pursuance thereof, and the secretary and treasurer owned four-fifths of the stock and constituted two of the three directors, the corporation was held bound by the contract.³⁸ If power is conferred on the president and secretary to attend to the business of the company, it has been held that the secretary cannot thereunder make a contract except together with the president.³⁹

Fruit Exchange, 144 Cal. 402, 77 Pac. 993; *Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321. See also *Heas v. W. & J. Sloane*, 66 N. Y. App. Div. 522, 73 N. Y. Supp. 313.

"He was the company's secretary, but he was much more than its recording officer. The evidence makes it plain that he has been intrusted with the general management. In such circumstances the name with which his office was labeled is of small moment. The inference of authority is to be drawn from the things he was allowed to do." *Barkin Const. Co. v. Goodman*, — N. Y. —, 116 N. E. 770.

The executive committee of a mutual fire insurance company was required by its constitution and by-laws to examine all applications. Until approved by it, no insurance was to be in force. The secretary was authorized, however, to consent in writing to the mortgaging of a dwelling which was insured. The court held that on a policy insuring a dwelling it was within the power of the secretary to indorse a provision under which the mortgagee became entitled to payment in case of loss. *Adams v. Farmers' Mut. Fire Ins. Co.*, 115 Mo. App. 21, 90 S. W. 747.

In Illinois it has been held that a signature by a corporation by its secretary is *prima facie* its act and must

be denied under oath, under a statute requiring execution of an instrument to be denied under oath. *Frye v. Tucker*, 24 Ill. 180.

The burden of proving that the secretary had authority to make the contract sued on is on plaintiff. *Abraham Arndt & Bros. v. New York Fruit Water Co.*, 140 N. Y. Supp. 471.

For provision in by-laws of United States Steel Corporation, as to powers and duties of its secretary, see *Fletcher's Corporation Forms*, p. 691.

³⁶ *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262.

³⁷ *California*. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

Connecticut. *Church v. Sterling*, 16 Conn. 388.

Illinois. *Darst v. Gale*, 83 Ill. 136.

Massachusetts. *Williams v. Cheney*, 3 Gray 215; *New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56.

Missouri. *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95.

New York. *Emmet v. Reed*, 8 N. Y. 312.

³⁸ *Meem, Haskins & Mitchell v. Big Ax Pocahontas Coal Co.*, 117 Va. 770, 86 S. E. 118.

³⁹ *Oscar Bonner Oil Co. v. Pennsylvania Oil Co.*, 150 Cal. 658, 89 Pac. 613.

§ 2074. Contracts of employment. The secretary cannot appoint an agent or attorney in fact to manage, control, sell or transfer the property of the corporation.⁴⁰ There is no presumption that the secretary has power "either to appoint agents or to ratify appointments previously made without authority."⁴¹ He has no implied power to bind the corporation for medical services rendered to an injured employee.⁴² Authority expressly or impliedly conferred on an assistant secretary of a taxicab company to employ an insurance broker to insure its cars from time to time as new cars were purchased or existing insurance expired does not include power to contract to give such broker all the insurance business of the company for a period of years.⁴³

§ 2075. Borrowing money. The secretary has no implied authority to borrow money in the name of the corporation,⁴⁴ although he may be expressly authorized or clothed with apparent authority so to do.⁴⁵

§ 2076. Negotiable paper. Except where he is expressly vested with authority or where he has been apparently clothed with authority so to do,⁴⁶ the secretary has no power to execute negotiable paper, such as bills, notes or checks,⁴⁷ nor to indorse such paper even for

⁴⁰ *Johnson v. Sage*, 4 Idaho 758, 44 Pac. 641.

⁴¹ *Carroll v. Manganese Steel Safe Co.*, 111 Md. 252, 73 Atl. 665.

⁴² *Spelman v. Gold Coin Mining & Milling Co.*, 26 Mont. 76, 55 L. R. A. 640, 91 Am. St. Rep. 402, 66 Pac. 597.

⁴³ *Pennsylvania Taximeter Cab Co. v. Cressey*, 191 Fed. 337.

⁴⁴ *Sears v. Illinois Wesleyan University*, 28 Ill. 183.

⁴⁵ *Kraniger v. People's Bldg. Society*, 60 Minn. 94, 61 N. W. 904; *Beers v. Phoenix Glass Co.*, 14 Barb. (N. Y.) 358.

⁴⁶ *Talladega Ins. Co. v. Peacock*, 67 Ala. 253; *Williams v. Cheney*, 3 Gray (Mass.) 215; *Kraniger v. People's Building Society*, 60 Minn. 94, 61 N. W. 904; *Blake v. Domestic Mfg. Co.* (N. J. Ch.), 38 Atl. 241.

Presumptions in general, see § 1943, *supra*.

⁴⁷ *Arkansas. City Elec. St. Ry. Co.*

v. First Nat. Exch. Bank, 62 Ark. 33, 31 L. R. A. 535, 54 Am. St. Rep. 282, 34 S. W. 89.

California. *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

Illinois. *Sears v. Illinois Wesleyan University*, 28 Ill. 183.

Maryland. *Black v. First Nat. Bank of Westminster*, 96 Md. 399, 54 Atl. 88.

Michigan. *Northville State Bank v. Detroit Silver Refining Co.*, 181 Mich. 515, 148 N. W. 175; *Gould v. W. J. Gould & Co.*, 134 Mich. 515, 104 Am. St. Rep. 624, 2 Ann. Cas. 519, 96 N. W. 576.

Missouri. *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95; *First Nat. Bank of Kansas City v. Hogan*, 47 Mo. 472.

New York. *Karsch v. Pottier & Styms Manufacturing & Improvement Co.*, 82 App. Div. 230, 81 N. Y. Supp. 782.

transfer.⁴⁸ A fortiori, he cannot issue accommodation paper,⁴⁹ nor bind the corporation by an accommodation indorsement on his own promissory note.⁵⁰ He cannot execute notes although appointed to make a settlement with certain creditors, where the articles of incorporation provide that the president or vice president shall execute all notes for the corporation.⁵¹ However, if the secretary and the president are the only trustees, and the president consents thereto, a note signed by the secretary for the company is binding on the company.⁵² And it has been held that a corporation is bound where its secretary, in ignorance of the facts, certifies and seals a note negotiable in form as the act of the corporation, although it be forged in fact. It is a choice in such cases between the corporation and an innocent holder, and the superior equities are with the innocent holder.⁵³ Power conferred on the secretary to indorse paper made payable to the company gives no power to execute a note for money borrowed by the corporation.⁵⁴

Oregon. *Crawford v. Albany Ice Co.*, 36 Ore. 535, 60 Pac. 14.

Texas. *First Nat. Bank of Tombstone v. Abilene Hotel Co.*, 46 Tex. Civ. App. 595, 103 S. W. 1120.

England. *Neale v. Turton*, 4 Bing. 149.

⁴⁸ See *People's Sav. Bank of West Bay City v. Hine*, 131 Mich. 181, 9 Det. L. N. 283, 91 N. W. 130. But see *Stubbs v. Fourth Nat. Bank of Macon*, 12 Ga. App. 539, 77 S. E. 893.

But where the secretary and treasurer have customarily indorsed notes and other negotiable instruments, under the sanction of the corporation, the corporation cannot later repudiate one of such indorsements. *Black v. First Nat. Bank of Westminster*, 96 Md. 399, 54 Atl. 88.

In Wisconsin it is held that the secretary will be presumed to have had authority to indorse a corporate note for transfer. *Swedish American Nat. Bank of Minneapolis v. Koebornick*, 136 Wis. 473, 128 Am. St. Rep. 1090, 117 N. W. 1020, quoted from at length on this point in § 2072, *supra*.

⁴⁹ *El Dorado Improvement Co. v. Citizens' Bank*, 85 Ark. 185, 107 S. W. 676.

⁵⁰ *Karsch v. Pottiere & Stymus Manufacturing & Improvement Co.*, 82 N. Y. App. Div. 230, 81 N. Y. Supp. 782; *Wheeling Ice & Storage Co. v. Conner*, 61 W. Va. 111, 55 S. E. 982.

⁵¹ Under articles providing that the president, and in his absence the vice president, shall execute notes, the secretary is without authority to execute a note even though appointed together with the vice president to make a settlement with certain creditors where in certain notes of the corporation were to be executed. *Thompson v. Des Moines Driving Park*, 112 Iowa 628, 84 N. W. 678.

⁵² *National Bank of Commerce of Seattle v. Puget Sound Biscuit Co.*, 61 Wash. 192, 112 Pac. 265.

⁵³ *Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank*, 34 Tex. Civ. App. 551, 79 S. W. 651.

⁵⁴ *Northville State Bank v. Detroit Silver Refining Co.*, 181 Mich. 515, 148 N. W. 175.

§ 2077. Purchases and sales. The secretary has no power to purchase property for the corporation,⁵⁵ although if he is one of the managers of a real estate corporation, it seems that he may purchase an automobile for use in the business.⁵⁶ So he has no implied authority to sell or convey the corporate property, all or any of it,⁵⁷ especially the real estate.⁵⁸ But while a sale of corporate property is beyond the implied power of the secretary, such sale by him when intrusted with the powers of general manager, with the consent of the large majority of the stockholders, is binding on the corporation.⁵⁹

§ 2078. Assignments. The secretary has no inherent power to assign its notes or mortgages, or other choses in action.⁶⁰ Thus, he has no authority to assign corporate securities as collateral security for a past indebtedness.⁶¹ Of course, the secretary may assign a claim for collection where directly authorized so to do by the general manager;⁶² and it will be presumed, it is held in Wisconsin, that the secretary was authorized to assign corporate notes.⁶³

§ 2079. Pledge or mortgage. The secretary cannot pledge or mortgage the property of the corporation,⁶⁴ although, of course, a pledge,

⁵⁵ *Alexander v. Cauldwell*, 83 N. Y. 480; *Kingsbridge Flour Mill Co. v. Plymouth, S. & D. Grinding & Baking Co.*, 2 Exch. 718; *Williams v. Chester & H. Ry. Co.*, 15 Jur. 828.

⁵⁶ *A. Meister & Sons Co. v. Wood & Tatum Co.*, 26 Cal. App. 584, 147 Pac. 981.

⁵⁷ *California Winemakers' Corporation v. Sciaroni*, 139 Cal. 277, 280, 72 Pac. 990; *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565, 38 Atl. 310.

⁵⁸ *Vacarezza v. Realty Inv. Co.*, — Tex. Civ. App. —, 165 S. W. 516; *Cobb v. Glenn Boom & Lumber Co.*, 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005.

⁵⁹ *Magowan v. Groneweg*, 14 S. D. 543, 86 N. W. 626.

⁶⁰ *Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435.

Where the secretary merely has charge of orders for goods, an assignment by him of an account for goods

sold by the corporation is invalid, unless it is shown to have been in fact authorized. *Read v. Buffum*, 79 Cal. 77, 12 Am. St. Rep. 131, 21 Pac. 555.

But he may be expressly authorized to assign notes, mortgages and other contracts, or impliedly authorized by being allowed to do so, or authorized to manage the business. See *Moore v. H. Gaus & Sons Mfg. Co.*, 113 Mo. 98, 20 S. W. 975; *Commercial Nat. Bank of St. Paul v. Brill*, 37 Neb. 626, 56 N. W. 382; *Blake v. Domestic Mfg. Co. (N. J. Eq.)*, 38 Atl. 241.

⁶¹ *In re W. W. Mills Co.*, 162 Fed. 42.

⁶² *Leitch v. Marx*, 21 Cal. App. 208, 131 Pac. 328.

⁶³ *Swedish American Nat. Bank of Minneapolis v. Koebornick*, 136 Wis. 473, 128 Am. St. Rep. 1090, 117 N. W. 1020.

⁶⁴ *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373.

with the knowledge and acquiescence of the directors, is valid and binding.⁶⁵

§ 2080. Leases. The secretary has no inherent power to execute and deliver a lease,⁶⁶ nor to rent premises for the corporation.⁶⁷ So he cannot accept a surrender of a lease given by the corporation to its tenant, and bind the corporation to pay the wages of the employees of the lessee.⁶⁸

§ 2081. Releases. The secretary, merely by virtue of his office, cannot release a party to a contract.⁶⁹ Thus, he cannot release makers of notes or other debtors of the corporation,⁷⁰ or subscribers for stock.⁷¹ But he may release a mortgage when the debt has been paid, where he is authorized to release satisfied mortgages.⁷²

§ 2082. Guaranty or indemnity. Of course the secretary cannot ordinarily guarantee the contracts of a third person so as to bind the company.⁷³ Thus, the secretary of a brewing company has no power to guarantee the payment of rent for several years by the tenant of a saloon.⁷⁴ However, if the secretary conducts all the negotiations relating to a sale, with authority to fix the terms and conditions, and executes all the contracts relating thereto, he has power to agree to save harmless a person who, in reliance upon said agreement, indorses a note, made by the purchasers, for their accommodation.⁷⁵

§ 2083. Compositions with creditors. The secretary is without implied power to sign a composition with creditors.⁷⁶ So power to

⁶⁵ Darst v. Gale, 83 Ill. 136.

⁶⁶ Fischer v. Motor Boat Club of America, 61 N. Y. Misc. 66, 113 N. Y. Supp. 56.

⁶⁷ Ridley v. Plymouth, S. & D. Grinding & Baking Co., 2 Exch. 711.

⁶⁸ Harris v. Congress Hall Hotel Co., 76 N. J. L. 367, 70 Atl. 330, aff'd 77 N. J. L. 800, 73 Atl. 1118.

⁶⁹ Blair v. Brownstone Oil & Refining Co., 17 Cal. App. 471, 120 Pac. 41.

⁷⁰ Moshannon Land & Lumber Co. v. Sloan, 109 Pa. St. 532.

When authority is not given to the secretary of a corporation by the charter, or by the action of the corporation, and cannot be implied from the course of business, he has no authority

to release the maker of a note, although he is given authority to renew it. Moshannon Land & Lumber Co. v. Sloan, 109 Pa. St. 532.

⁷¹ Minnehaha Driving Park Ass'n v. Legg, 50 Minn. 333, 52 N. W. 898.

⁷² Kimball v. Goodburn, 32 Mich. 10.

⁷³ See Robert Gair Co. v. Columbia Rice Packing Co., 124 La. 193, 50 So. 8.

⁷⁴ McBroom v. Cheboygan Brewing & Malting Co., 162 Mich. 323, 127 N. W. 361, 17 Det. L. N. 571.

⁷⁵ Heas v. W. & J. Sloane, 66 N. Y. App. Div. 522, 73 N. Y. Supp. 313.

⁷⁶ Oscar Bonner Oil Co. v. Pennsyl-

“attend to the business of the company” and “audit and pay the current bills of the company, all under the general direction of the board of directors” does not, it seems, confer power to make a composition with creditors.⁷⁷

§ 2084. Confession of judgment. The secretary cannot confess a judgment against the corporation or execute a warrant or power of attorney to confess judgment.⁷⁸

§ 2085. Payments. It may be within the express or apparent authority of the secretary to receive payments,⁷⁹ but the secretary has no authority to agree to accept anything but money in satisfaction of a judgment held by the corporation.⁸⁰ The secretary of the local chapter of an incorporated mutual benefit association may not waive provisions of the by-laws relative to the payment of assessments unless expressly authorized so to do.⁸¹

§ 2086. Certificates. While the secretary has power to certify that a copy of a resolution of the board of directors is a true copy,⁸² the secretary of a newspaper company has no implied power to make a certificate of publication for the company, to show publication of legal notices, etc.⁸³ Where an affidavit in attachment is required to be made by “the plaintiff, his agent or attorney,” it has been held insufficient to sign an affidavit with one’s name with “secretary and

vania Oil Co., 150 Cal. 658, 89 Pac. 613.

⁷⁷ Oscar Bonner Oil Co. v. Pennsylvania Oil Co., 150 Cal. 658, 89 Pac. 613.

⁷⁸ Joel J. Bailey & Co. v. Snyder Bros., 61 Ill. App. 472, rev’d 165 Ill. 447, 46 N. E. 452; Hardiman v. Philadelphia Ass’n, 2 Wkly. Notes Cas. (Pa.) 440.

⁷⁹ So far as pertains to payment of premiums and the delivery of forms upon which to make proof of death, the secretary of a section of the Knights of Pythias is the representative of the society. Winter v. Supreme Lodge, K. P., 96 Mo. App. 1, 69 S. W. 662.

Where it is within the apparent scope of the duty of the secretary of

a real estate investment corporation, who has charge of all its affairs, to receive moneys for investment in real estate, and he does so with the acquiescence of the president, the corporation will not be permitted thereafter to deny that it has received the money. Ring v. Long Island Real Estate Exch. & Inv. Co., 93 N. Y. App. Div. 442, 87 N. Y. Supp. 682.

⁸⁰ Good Hope Bldg. Ass’n v. Amweg, 22 Pa. Super. Ct. 143, 145.

⁸¹ Field v. National Council of Knights & Ladies of Security, 64 Neb. 226, 89 N. W. 773.

⁸² Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45, 43 S. E. 295.

⁸³ Chicago v. Stein, 252 Ill. 409, Ann. Cas. 1912 D 294, 96 N. E. 886.

treasurer" added, since not showing on its face that it was made by an "agent" of the corporation.⁸⁴

XVIII. POWERS OF TREASURER

§ 2087. In general. The treasurer of a corporation is the proper officer, and the only proper officer, in the absence of express provision to the contrary, to receive and keep the moneys of the corporation, and to disburse them as he may be authorized.⁸⁵ He has authority to receive and receipt for moneys due the corporation;⁸⁶ and he may ex-

⁸⁴ Taylor v. Sutherlin-Meade Tobacco Co., 107 Va. 787, 14 L. R. A. (N. S.) 1135, 60 S. E. 132.

⁸⁵ Albro Mining & Milling Co. v. Chinn, 20 Colo. App. 238, 77 Pac. 1097; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Pearson v. Tower, 55 N. H. 215 (holding that the directors could not cause the funds to be deposited with others for safe-keeping, and might be restrained from doing so at the suit of a stockholder); Portage County Mutual Ins. Co. v. Wetmore, 17 Ohio 330 (as to the liability of sureties on the bond of a treasurer).

For provision in by-laws of United States Steel Corporation, as to powers and duties of its treasurer, see Fletcher's Corporation Forms, p. 690.

"Ordinarily, the treasurer is simply the custodian of the funds of the corporation, and its disbursing officer." Albro Mining & Milling Co. v. Chinn, 20 Colo. App. 238, 244, 77 Pac. 1097.

He is a mere depositary of the money of the corporation in his hands, and is not a trustee thereof, so as to confer jurisdiction on a court of equity. Taylor v. Taylor, 74 Me. 582. Compare, however, New York, P. & B. R. Co. v. Dixon, 114 N. Y. 80, 21 N. E. 110.

It is the treasurer's duty to keep the moneys of the corporation distinct from his own, unless there is some special agreement to the contrary, and to be able and ready at all times to pay them over on demand. Second

Ave. R. Co. v. Coleman, 24 Barb. (N. Y.) 300.

The treasurer, having charge of the corporate finances, will be presumed to have knowledge of matters pertaining thereto. Buffalo Loan, Trust & Safe Deposit Co. v. Carstensen, 107 N. Y. App. Div. 128, 94 N. Y. Supp. 907.

If the treasurer of a corporation deposits its funds with another corporation of which he is an officer, the presumption is that the act was authorized. In re Smith Thorndike & Brown Co., 170 Fed. 900.

Where employees of a corporation were accustomed to leave part of their wages on deposit with the treasurer, the amount being indorsed on the pay roll, supposing it was deposited with the company, and the treasurer appropriated the funds, it was held that the corporation was liable, on the ground that retention of the money was within the treasurer's apparent authority, although the practice was not known to the other officers. Carroll v. People's Ry. Co., 14 Mo. App. 490. And see Leary v. People's Ry. Co., 16 Mo. App. 561. Compare, however, Gardner v. Omnibus R. Co., 63 Cal. 326.

Sometimes the articles of incorporation expressly provide that the board of directors shall prescribe the duties and powers of the treasurer.

⁸⁶ Brown v. Winnisimmet Co., 11 Allen (Mass.) 326; People v. Carter, 122 Mich. 668, 81 N. W. 924.

He may receive a deposit for the

tend the time for payment of notes where he is in charge of all the financial matters of the corporation.⁸⁷ On the other hand, as a general rule, the treasurer of a corporation has no implied authority, merely by virtue of his office, to bind the corporation by contracts or others acts made or done in its name, or to dispose of its assets except as he may be authorized by the directors or other managing officers.⁸⁸ He has no power, merely by virtue of his office, to purchase goods;⁸⁹ to settle or compromise claims;⁹⁰ to release the makers of notes or

purchase of stock of the corporation. *People v. Carter*, 122 Mich. 668, 81 N. W. 924, 6 Det. L. N. 941.

He has implied power to collect debts due the company. *Clark v. Minge*, 187 Ala. 97, 65 So. 832.

⁸⁷ *Franklin Sav. Bank v. Cochrane*, 182 Mass. 586, 61 L. R. A. 760, 66 N. E. 200.

⁸⁸ *Connecticut. Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565, 38 Atl. 310.

Kentucky. *Chemical Nat. Bank of New York v. Wagner*, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535; *Louisville Water Co. v. Tullenlove*, 12 Ky. L. Rep. 556 (abstract).

Maine. *Brown v. Weymouth*, 36 Me. 414.

Massachusetts. *Jewett v. West Somerville Co-operative Bank*, 173 Mass. 54, 73 Am. St. Rep. 259, 52 N. E. 1085; *Craft v. South Boston R. Co.*, 150 Mass. 207, 5 L. R. A. 641, 22 N. E. 920.

New York. *Alexander v. Cauldwell*, 83 N. Y. 480; *Adams v. Mills*, 60 N. Y. 533; *Coney Island Automobile Race Co. v. Boyton*, 87 App. Div. 251, 84 N. Y. Supp. 347; *Parmelee v. Associated Physicians & Surgeons*, 9 Misc. 458, 30 N. Y. Supp. 250; *Greene v. Iroquois Hotel & Apartment Co.*, 84 N. Y. Supp. 591.

Pennsylvania. *Pollock v. Standard Steel Car Co.*, 230 Pa. 136, 79 Atl. 400; *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. St. 157, 28 Atl. 1072.

It is beyond the implied power of the treasurer to bind the corporation

to pay for certain goods sold to another corporation. *In re Prospect Worsted Mills*, 126 Fed. 1011.

It has been held that a corporate treasurer has no implied authority to make an agreement that in case the corporation collects certain claims a third party shall have a certain portion of the proceeds. That an agreement of this character is in writing and bears the corporate seal does not render it admissible in evidence in an action to collect such commission, where no specific authority of the treasurer is shown. *Backer v. United States Gas Fixture Co.*, 84 N. Y. Supp. 149.

⁸⁹ *Alexander v. Cauldwell*, 83 N. Y. 480.

But he may be expressly or impliedly authorized to purchase property. *Woodbury Granite Co. v. Muliken*, 66 Vt. 465, 30 Atl. 28.

⁹⁰ *Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray (Mass.) 214.

In the absence of special authority therefor, the general powers and duties of a treasurer of a corporation do not extend so far as to allow him to settle and audit disputed claims for salaries brought by other agents of similar grade and to issue written admissions of his determination binding upon the corporation. *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327.

But in the absence of provision to the contrary, the secretary and treasurer of a corporation having power to make loans and purchase real and

other debtors of the corporation, or surrender securities;⁹¹ or to confess judgment, or execute a warranty or power of attorney to confess judgment.⁹² So he has no inherent power to assume the debt of another,⁹³ or to bind the corporation by an account stated,⁹⁴ or to accept an order by a creditor of the corporation to pay part of the sum due to another, and to issue a certificate reciting that he holds such order.⁹⁵

Of course, unauthorized contracts made by the treasurer of a corporation may be rendered binding by ratification, and ratification may be implied if the corporation accepts the benefits of the contract with knowledge, or if it acquiesces and fails to repudiate it.⁹⁶

§ 2088. As general manager. The treasurer may also be intrusted with the general management of its business, or a particular part of it; and in such a case, of course, he has the same authority, in the

personal property and mortgages, who has authority to accept satisfaction of debts due the company and pay debts, has authority to agree to a transfer of real estate from a debtor of the company to one of its creditors as payment of the company's claim against the debtor, and as satisfaction of the company's debt to the creditor. *First Nat. Bank of Latrobe v. Garretson*, 107 Iowa 196, 77 N. W. 856.

⁹¹ *Dedham Inst. for Savings v. Slack*, 6 Cush. (Mass.) 408; *Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray (Mass.) 214; *Moshannon Land & Lumber Co. v. Sloan*, 109 Pa. St. 532.

⁹² *Joel J. Bailey & Co. v. Snyder Bros.*, 61 Ill. App. 472, rev'd 165 Ill. 447, 46 N. E. 452; *Adams v. Cross Wood-Printing Co.*, 27 Ill. App. 313; *Stevens v. Carp River Iron Co.*, 57 Mich. 427, 24 N. W. 160; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

But the fact that the treasurer of a corporation had no power under its by-laws to execute a judgment note for the corporation does not render such a note invalid, where it was given, for a valid debt, to one who had no notice of the by-law and when the treasurer was the corporation's financial and business manager and

the directors knew of the transaction soon afterwards and did not repudiate it. *Atwater v. American Exch. Nat. Bank of Chicago*, 152 Ill. 605, 38 N. E. 1017, rev'g 40 Ill. App. 501.

Where a corporation, by its course of dealing, holds out its treasurer as clothed with the full powers of a financial agent, he has implied authority to execute on its behalf a judgment note, with power of attorney to confess judgment. *Chicago Tip & Tire Co. v. Chicago Nat. Bank*, 176 Ill. 224, 52 N. E. 52, aff'g 74 Ill. App. 439.

⁹³ *Stark Bank v. United States Pottery Co.*, 34 Vt. 144.

⁹⁴ *Harvey v. West Side El. Ry. Co.*, 13 Hun (N. Y.) 392. Compare, however, *Davis v. Georgetown Bridge Co.*, 1 Cranch C. C. (U. S.) 147, Fed. Cas. No. 3,637.

⁹⁵ *Louisville Water Co. v. Fullenlove*, 12 Ky. L. Rep. 556 (abstract). See also *Jewett v. West Somerville Co-operative Bank*, 173 Mass. 54, 73 Am. St. Rep. 259, 52 N. E. 1085.

⁹⁶ *St. James Parish v. Newburyport & A. Horse R. R.*, 141 Mass. 500, 6 N. E. 749; *Ellis v. Howe Mach. Co.*, 9 Daly (N. Y.) 78; *Taylor v. Albemarle Steam Nav. Co.*, 105 N. C. 484, 10 S. E. 897.

absence of restrictions, as any other manager. His being treasurer does not limit his authority as manager;⁹⁷ but he has general authority to make all contracts and do all other acts which are incidental to the management of the ordinary business of the corporation, or the particular part of the business with which he is intrusted,⁹⁸ as more fully shown in a succeeding subdivision.⁹⁹ But the corporation will not be bound by contracts or acts which are not incidental to the ordinary business with which he is intrusted, and are not within either the actual or the apparent scope of his authority.¹ Generally, the authority of the treasurer, who has general charge of the business, to borrow money and execute notes therefor, is one of fact.²

§ 2089. Negotiable paper. The treasurer has no inherent power to execute notes or other negotiable paper,³ nor can he indorse such

⁹⁷ *Ceeder v. H. M. Loud & Sons Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575.

The treasurer may be intrusted with the powers ordinarily enjoyed by the general manager, and in such case the corporation will be deemed bound by his acts as general manager the same as if he were not treasurer. *Magowan v. Groneweg*, 14 S. D. 543, 86 N. W. 626; *Saunders v. United States Marble Co.*, 25 Wash. 475, 65 Pac. 782.

⁹⁸ *United States. Page v. Fall River, W. & P. R. Co.*, 31 Fed. 257.

Iowa. Gafford v. American Mortg. & Inv. Co., 77 Iowa 736, 42 N. W. 550.

Michigan. Odd Fellows v. First Nat. Bank of Sturgis, 42 Mich. 461, 4 N. W. 158.

Missouri. Moore v. H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975.

New Jersey. Cope v. C. B. Walton Co., 77 N. J. Eq. 512, 76 Atl. 1044; *Blake v. Domestic Mfg. Co. (N. J. Eq.)*, 38 Atl. 241.

New York. Phillips v. Campbell, 43 N. Y. 271.

A treasurer having general power of management may submit to arbitration the question of loss under a policy of insurance. *Remington Paper Co. v. London Assur. Corporation*,

12 N. Y. App. Div. 218, 43 N. Y. Supp. 431.

The treasurer of a corporation to whom a mortgage has been assigned in his official capacity has prima facie authority to foreclose the same by advertisement under the statute. *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

⁹⁹ See §§ 2096-2136, *supra*, as to powers of general managers. If a treasurer is made a general manager, either expressly or by permitting him to act as such, then his powers do not depend upon his position as treasurer and the fact that he is treasurer would seem to be immaterial, unless perhaps in exceptional cases where the treasurer would have inherent power as such. Therefore the power of treasurers as general managers is stated in the subdivision relating to general managers without noticing the fact that the general manager was also treasurer.

¹ *First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co.*, 116 N. C. 827, 21 S. E. 948.

² *First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n of America*, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, *aff'd without opinion* 185 N. Y. 575, 78 N. E. 1103.

³ *Iowa. Van Buren County Sav.*

paper,⁴ except that in Massachusetts a different rule prevails as to manufacturing and trading corporations,⁵ a distinction not recognized

Bank v. Stirling Woolen Mills Co., 94 N. W. 945.

Kentucky. *Chemical Nat. Bank of New York v. Wagner*, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535.

Maine. *Atkinson v. St. Croix Mfg. Co.*, 24 Me. 171.

Massachusetts. *Jewett v. West Somerville Co-operative Bank*, 173 Mass. 54, 73 Am. St. Rep. 259, 52 N. E. 1085; *Craft v. South Boston R. Co.*, 150 Mass. 207, 5 L. R. A. 641, 22 N. E. 920; *Bradlee v. Warren Five Cents Sav. Bank*, 127 Mass. 107, 34 Am. Rep. 351.

New Jersey. *Blake v. Domestic Mfg. Co. (N. J. Eq.)*, 38 Atl. 241.

New Mexico. *Oak Grove & S. V. Cattle Co. v. Foster*, 7 N. M. 650, 41 Pac. 522.

New York. *First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun 412, 9 N. Y. Supp. 859; *M. H. Marcus & Bro. v. National Film Distributing Co.*, 76 Misc. 429, 135 N. Y. Supp. 37; *Columbia Bank v. Gospel Tabernacle Church*, 57 N. Y. Super. Ct. 149.

North Dakota. *Security Bank of Minnesota v. Kingsland*, 5 N. D. 263, 65 N. W. 697.

Pennsylvania. *Monongahela Nat. Bank v. Harmony Land Co.*, 226 Pa. 440, 18 Ann. Cas. 727, 75 Atl. 687; *In re Millward-Cliff Cracker Co.*, 161 Pa. St. 157, 28 Atl. 1072.

Texas. *Dreeben v. First Nat. Bank of McKinney*, 99 S. W. 850.

Wisconsin. *Pelton v. Spider Lake Sawmill & Lumber Co.*, 132 Wis. 219, 122 Am. St. Rep. 963, 112 N. W. 29.

The burden to show the authority of the treasurer to execute a note is on the person suing on the note. *First Nat. Bank v. Colonial Hotel Co.*, 226 Pa. 292, 75 Atl. 412.

⁴*Black v. First Nat. Bank of West-*

minster, 96 Md. 399, 54 Atl. 88; *Pelton v. Spider Lake Sawmill & Lumber Co.*, 132 Wis. 219, 122 Am. St. Rep. 963, 112 N. W. 29.

He may be expressly authorized to indorse corporate paper. *Van Norden Trust Co. v. L. Rosenberg*, 62 N. Y. Misc. 285, 114 N. Y. Supp. 1025.

⁵It is held in Massachusetts that treasurers of manufacturing and trading corporations have implied authority, by virtue of their office, to act for the corporation in making, accepting, indorsing, issuing and negotiating promissory notes and bills of exchange, and that such an instrument, therefore, is binding on the corporation in the hands of a bona fide purchaser for value, although, with reference to the corporation, it may be mere accommodation paper, or otherwise in excess of the treasurer's actual authority. *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; *Coreoran v. Snow Cattle Co.*, 151 Mass. 74, 23 N. E. 727; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322; *Bird v. Daggett*, 97 Mass. 494; *Lowell Five Cents Sav. Bank v. Inhabitants of Winchester*, 8 Allen (Mass.) 109; *Lester v. Webb*, 1 Allen (Mass.) 34; *Fay v. Noble*, 12 Cush. (Mass.) 1; *Bates v. Keith Iron Co.*, 7 Mete. (Mass.) 224; *Narragansett Bank v. Atlantic Silk Co.*, 3 Mete. (Mass.) 282.

Gas companies were held to be within the rule. *Merchants' Nat. Bank of Gardiner v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083.

Even in Massachusetts there is no implied authority in the case of other corporations, such as railroad companies, *Jewett v. West Somerville Co-operative Bank*, 173 Mass. 54, 73 Am.

in other jurisdictions.⁶ Of course, he may be expressly authorized to execute, indorse and accept negotiable paper, or such authority may be implied from the course of business or custom or from clothing the treasurer with apparent authority.⁷ Thus, if the treasurer has been

St. Rep. 259, 52 N. E. 1085; *Craft v. South Boston R. Co.*, 150 Mass. 207, 5 L. R. A. 641, 22 N. E. 920; *Bradlee v. Warren Five Cents Sav. Bank*, 127 Mass. 107, 34 Am. St. Rep. 351; a monument association, *Torrey v. Dustin Monument Ass'n*, 5 Allen (Mass.) 327; a college, *Webber v. Williams College*, 23 Pick. (Mass.) 302; or savings banks and the like.

⁶ Other courts, however, have held that, even in the case of manufacturing and trading companies, the treasurer has no implied authority, merely by virtue of his office, to make, accept, or indorse notes or bills on behalf of the corporation, and that his act is not binding on the corporation unless he had express authority or was clothed with apparent authority. *Chemical Nat. Bank of New York v. Wagner*, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535; *Atkinson v. St. Croix Mfg. Co.*, 24 Me. 171; *Oak Grove & Sierra Verde Cattle Co. v. Foster*, 7 N. M. 650, 41 Pac. 522; *First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun (N. Y.) 412, 9 N. Y. Supp. 859; *In re Millward-Cliff Cracker Co.'s Estate*, 161 Pa. St. 157, 28 Atl. 1072.

"A treasurer of a manufacturing corporation has no power to make promissory notes in its name unless such power is expressly given to such officer by the by-laws of the corporation or by resolution of its board of directors." *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154, 161, 105 N. E. 210, aff'g 149 N. Y. App. Div. 356, 134 N. Y. Supp. 418.

⁷ *United States. Page v. Fall River, W. & P. R. Co.*, 31 Fed. 257; *Foster v. Ohio-Colorado Reduction &*

Mining Co., 17 Fed. 130; *In re Great Western Telegraph Co.*, 5 Biss. 363, Fed. Cas. No. 5,740.

Connecticut. *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472.

Illinois. *Chicago Tip & Tire Co. v. Chicago Nat. Bank*, 176 Ill. 224, 52 N. E. 52, aff'g 74 Ill. App. 439.

Kentucky. *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485, 41 S. W. 577.

Massachusetts. *Lester v. Webb*, 1 Allen 34.

Michigan. *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338, 11 N. W. 187.

New Jersey. *Blake v. Domestic Mfg. Co.* (N. J. Eq.), 38 Atl. 241.

New York. *Bank of Attica v. Potter & Stymus Mfg. Co.*, 49 Hun 606, 1 N. Y. Supp. 483; *Van Norden Trust Co. v. L. Rosenberg*, 62 Misc. 285, 114 N. Y. Supp. 1025; *Partridge v. Badger*, 25 Barb. 146.

Pennsylvania. *First Nat. Bank v. Colonial Hotel Co.*, 226 Pa. 292, 75 Atl. 412; *Graham v. Railroad Co.*, 1 Wkly. Notes Cas. 40; *Hanson v. Railroad Co.*, 1 Wkly. Notes Cas. 7.

The treasurer of a corporation may negotiate a note to the corporation taken in his name or office, and intrusted to his care and control, and his indorsement of such a note will bind the company. *Perkins v. Bradley*, 24 Vt. 66.

When the treasurer is authorized by resolution to borrow money on the best terms possible to meet certain obligations, he is authorized to bind the corporation by the indorsement of drafts drawn by him to accomplish that object. *Belknap v. Davis*, 19 Me. 455.

signing the corporate name to notes for years, and the financial management of the corporation is left wholly with him, it will be inferred that he was authorized to execute notes.⁸ If he is in general charge of the business of the corporation, it has been held a question of fact whether he has power to execute a note, where there was some evidence of like acts by the treasurer in the past to the knowledge of the board of directors.⁹ Where by-laws authorize the treasurer to sign negotiable paper, and provide that the office of secretary and treasurer shall be held by the same person, a note signed for the corporation by the secretary and treasurer binds it, although instead of describing himself as "treasurer" he added the word "secretary."¹⁰

§ 2090. Contracts of employment. The treasurer of a corporation has no implied power, merely by virtue of his office, to bind the corporation by contracts of employment,¹¹ or to employ an attorney.¹² He has no implied authority to agree to pay a certain per cent. for collecting specified claims held by the corporation,¹³ nor power to agree to issue treasury stock as a commission for selling treasury stock.¹⁴

§ 2091. Sales, assignments, pledges and mortgages. The treasurer has no inherent power to sell the goods or other property of the cor-

A by-law authorizing the treasurer to incur debts for supplies and merchandise to a certain amount does not authorize him to execute notes. *Bangs v. National Macaroni Co.*, 15 N. Y. App. Div. 522, 44 N. Y. Supp. 546. However, it is said in a later case that "the trend of modern decisions with respect to the authority of the officers of business corporations when the interests of third parties dealing with the corporation come in question, has been to extend, rather than to restrict, their powers, and the strict rule announced in *Bangs v. Macaroni Co.*, 15 App. Div. 522, 44 N. Y. Supp. 546, and cases cited, has not been adhered to." *Bacon v. Montauk Brewing Co.*, 130 N. Y. App. Div. 737, 115 N. Y. Supp. 617.

⁸ *Johnson v. Johnson Bros.*, 108 Me. 272, Ann. Cas. 1913 A 1303, 80 Atl. 741.

⁹ *First Nat. Bank of Binghamton v. Commercial Travellers' Home Ass'n*

of America, 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, aff'd without opinion 185 N. Y. 575, 78 N. E. 1103.

¹⁰ *National Bank of Commerce in St. Louis v. Sancho Packing Co.*, 186 Fed. 257.

¹¹ *Connell v. Ernst-Marx-Nathan Co.*, 35 N. Y. Misc. 133, 71 N. Y. Supp. 313; *Parmelee v. Associated Physicians & Surgeons*, 9 N. Y. Misc. 458, 30 N. Y. Supp. 250. And see *Henry Wood's Sons Co. v. Schaefer*, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881.

¹² But if he is authorized to collect bills due the corporation, he may employ an attorney for such purpose. *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298.

¹³ *Backer v. United States Gas Fixture Co.*, 84 N. Y. Supp. 149.

¹⁴ *Hill v. Troegerlith Tile Co.*, 168 N. Y. App. Div. 639, 154 N. Y. Supp. 535.

poration;¹⁵ or to sell, assign, or pledge its notes, mortgages or other securities;¹⁶ or to mortgage its property.¹⁷ He cannot sell and assign accounts due the corporation,¹⁸ nor contract for the sale of land¹⁹ even where the corporation is engaged in the real estate business.²⁰ Moreover, the fact that the treasurer has charge of the corporate bonds does not show authority on his part to change their registration and sell them.²¹

However, of course, there may be express authority to sell or implied authority from permitting the treasurer to act as manager or to make sales,²² and the same is true as to express or apparent authority in regard to the notes or other choses in action.²³ Power conferred to sell

¹⁵ *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565, 38 Atl. 310; *Brown v. Bass*, 132 Ga. 41, 63 S. E. 788.

The secretary and treasurer of a manufacturing company has no apparent authority to sell machinery constituting part of the plant. *Winsted Hosiery Co. v. New Britain Knitting Co.*, 69 Conn. 565, 38 Atl. 310.

¹⁶ *Holden v. Phelps*, 135 Mass. 61; *Holden v. Upton*, 134 Mass. 177; *Bradlee v. Warren Five Cents Sav. Bank*, 127 Mass. 107, 34 Am. Rep. 351; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318; *Jackson v. Campbell*, 5 Wend. (N. Y.) 572; *Wahlig v. Standard Pump Mfg. Co.*, 9 N. Y. Supp. 739.

¹⁷ *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837; *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

A fortiori, he has no authority to make a chattel mortgage of all the corporate property, disabling the corporation from doing business. *Danglade & Robinson Min. Co. v. Mexico-Joplin Land Co.*, — Mo. App. —, 190 S. W. 35.

¹⁸ *Maroney v. Cole*, 52 N. Y. Misc. 451, 103 N. Y. Supp. 560.

¹⁹ *Daniele v. Burlington Real Estate & Manufacturing Co.*, 84 N. J. Eq. 53, 92 Atl. 587.

²⁰ *Daniele v. Burlington Real Es-*

tate & Manufacturing Co., 84 N. J. Eq. 53, 92 Atl. 587.

²¹ *Jennie Clarkson Home for Children v. Missouri, K. & T. R. Co.*, 182 N. Y. 47, 70 L. R. A. 787, 74 N. E. 571, aff'g 92 N. Y. App. Div. 617, 87 N. Y. Supp. 1138, 41 N. Y. Misc. 214, 83 N. Y. Supp. 913.

²² *Nashua Iron & Brass Foundry Co. v. Chandler Adjustable Chair & Desk Co.*, 166 Mass. 419, 44 N. E. 348; *Phillips v. Campbell*, 43 N. Y. 271.

The fact that the treasurer has general charge of the business, with power to sell goods, purchase material, borrow money, and pay debts, does not give him power to transfer all the property of the corporation in payment of debts, particularly when some of the debts are not yet due. *First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co.*, 116 N. C. 827, 21 S. E. 948.

²³ *Massachusetts. Lester v. Webb*, 1 Allen 34.

Michigan. Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187.

Missouri. Moore v. H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975.

New Jersey. Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; *Blake v. Domestic Mfg. Co.* (N. J. Eq.), 38 Atl. 241.

Vermont. Perkins v. Bradley, 24 Vt. 66.

corporate property includes power to make a deed to the property sold.²⁴

§ 2092. Borrowing money. Ordinarily, the treasurer has no implied authority to borrow money in the name of the corporation,²⁵ although of course he may be expressly or apparently authorized to borrow for the corporation.²⁶

§ 2093. Making payments. The treasurer has no inherent power to pay debts or set off debts.²⁷ However, the payment of a note of a third person is not apparently beyond the authority of a treasurer conducting the business of the corporation.²⁸

§ 2094. Affidavits. He may make an affidavit to a mortgage claim where he was the agent of the corporation throughout the whole transaction in reference to the mortgage.²⁹

When the treasurer is authorized or directed to assign certain mortgages of the corporation as security for loans, an assignment of other mortgages is not binding. *Holden v. Phelps*, 135 Mass. 61.

Authority from the directors to the treasurer to assign, to secure certain creditors, any notes, bills, drafts, etc., "in his hands," authorizes him to assign such assets, although he has not personal custody of them, where it appears that the phrase "in his hands" was used as a mere euphuism. *Juillard v. Walker*, 54 Ill. App. 517, aff'd 158 Ill. 417, 41 N. E. 1076.

²⁴*Bishop v. Burke*, 207 Mass. 133, 93 N. E. 254.

²⁵*Alton Mfg. Co. v. Garrett Biblical Institute*, 243 Ill. 298, 90 N. E. 704; *Craft v. South Boston R. Co.*, 150 Mass. 207, 5 L. R. A. 641, 22 N. E. 920; *Adams v. Mills*, 60 N. Y. 533; *First Nat. Bank v. Council Bluffs City Water-Works Co.*, 56 Hun (N. Y.) 412, 9 N. Y. Supp. 859.

²⁶*Belknap v. Davis*, 19 Me. 455; *Fay v. Noble*, 12 Cush. (Mass.) 1; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318.

²⁷*Brown v. Weymouth*, 36 Me. 414. But see *Mount Olivet Cemetery Co. v. Shubert*, 2 Head (Tenn.) 116, where it was held that a promise by the treasurer of a corporation to pay an account of the corporation transferred to a third person was prima facie within his authority as treasurer.

Of course, the treasurer may be, and often is, expressly authorized to pay or settle debts, and he may be impliedly authorized by being customarily allowed to do so.

Where the treasurer of a corporation is authorized by the directors to borrow money and by the by-laws to pay corporate debts, he has authority to bind the corporation by an agreement with its selling agents that the latter shall pay and adjust a balance due to the selling agents whom they succeeded, and credit the amount thereof to their own account with the corporation. *Bradley v. Richardson*, 23 Vt. 720.

²⁸*Manhattan Web Co. v. Aquidneck Nat. Bank*, 133 Fed. 76.

²⁹*McCauseland v. Baltimore Humane Impartial Society*, 95 Md. 741, 52 Atl. 918.

§ 2095. Treasurer of savings bank. The powers of the treasurer of a savings bank are similar to the powers of treasurers of other corporations. He is an officer of much more limited powers than the cashier of a commercial bank, and it has been said that his duties "more nearly resemble those of the paying and receiving tellers of" commercial banks.³⁰ He has no authority to release a debt due, upon payment of a dividend thereon,³¹ nor to indorse notes,³² nor to transfer to a purchaser a note belonging to the bank,³³ nor to assign a mortgage belonging to the bank.³⁴ So he has no inherent power to borrow money,³⁵ nor to execute notes³⁶ nor to pledge securities as collateral for money borrowed.³⁷ So the treasurer of a co-operative bank, which in Massachusetts is very similar to a savings bank, has no power to accept an order directed to the bank to pay a sum of money to a third person.³⁸ On the other hand, it has been held that he has power to take possession of land upon which the bank holds a mortgage, for the purpose of gathering the growing crops, pursuant to the procedure in Maine.³⁹ So he has power to cause suit to be brought to collect an overdue debt.⁴⁰ Of course, usage may extend the powers of the treasurer.⁴¹

XIX. POWERS OF GENERAL MANAGER, SUPERINTENDENTS, BRANCH MANAGERS AND THE LIKE

§ 2096. Definitions and general considerations. The general management and control of the business of a corporation is ordinarily vested by the charter, general law or by-laws in the board of directors

³⁰ *Com. v. Reading Sav. Bank*, 133 Mass. 16, 22, 43 Am. Rep. 495.

The treasurer of a savings bank, on making a building loan and taking a mortgage on the premises, has no authority to bind the bank by an agreement to pay for materials to be furnished the mortgagor for completion of the building, retaining the proceeds of the loan for such purpose. *Slattery v. North End Sav. Bank*, 175 Mass. 380, 56 N. E. 606.

³¹ *Dedham Inst. for Savings v. Slack*, 6 Cush. (Mass.) 408.

³² *Bradlee v. Warren Five Cents Sav. Bank*, 127 Mass. 107, 34 Am. Rep. 351.

³³ *Holden v. Upton*, 134 Mass. 177.

³⁴ *Holden v. Phelps*, 135 Mass. 61.

³⁵ *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 526, 7 Atl. 318.

³⁶ *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 526, 7 Atl. 318.

³⁷ *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 526, 7 Atl. 318.

³⁸ *Jewett v. West Somerville Co-operative Bank*, 173 Mass. 54, 73 Am. St. Rep. 259, 52 N. E. 1085.

³⁹ *Bangor Sav. Bank v. Wallace*, 87 Me. 28, 32 Atl. 716.

⁴⁰ *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298.

⁴¹ See *New Hampshire Sav. Bank v. Ela*, 11 N. H. 335.

or trustees, but the board does not always attend to the details of the business, or act from day to day. On the contrary, the general management is frequently intrusted to subordinate officers and agents, or the management of particular branches of the business is thus delegated.⁴² A general manager, where his duties are not fixed by by-laws or otherwise, has been defined as "the person who really has the most general control over the affairs of a corporation, and who has knowledge of all its business and property, and who can act in emergencies on his own responsibility; who may be considered the principal officer."⁴³ The very term is said to imply "a general supervision of the affairs of a corporation in all departments."⁴⁴ The term, when used in connection with a gas company, has been said by Justice Peckham of the Supreme Court of the United States, to be presumed to mean, in the absence of any evidence on the subject, nothing more "than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated."⁴⁵ The office of general manager is said to be "of broader import than that of president, and implies authority in one invested with it to do such acts as are necessary in the usual and ordinary course of the business carried on by the corporation."⁴⁶ In Indiana it is held that the term "general manager," according to its ordinary meaning, "indicates one who has the general direction and control of the affairs of the corporation, as contradistinguished from one who may have the management of some particular branch of the business."⁴⁷ So in Kansas it is stated that it has frequently been held that the term "general manager" or "general superintendent" is "a broad and comprehensive title, and that as to the public and those who deal with such an officer without actual knowledge of his author-

⁴² As to the power of the directors to delegate their authority, see §§ 1952-1958, *supra*.

⁴³ Anderson's Law Dictionary, quoted in Robert E. Lee Silver Min. Co. v. Omaha & Grant Smelting & Refining Co., 16 Colo. 118, 122, 26 Pac. 326; Kansas City v. Cullinan, 65 Kan. 68, 77, 68 Pac. 1099; Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N. M. 300, 330, 93 Pac. 706. See also Manross v. Uncle Sam Oil Co., 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385; Robinson v. Moark-Nemo Consol. Min. Co., 178 Mo. App. 531, 163 S. W. 885; Ritchie v.

Illinois Cent. R. Co., 87 Neb. 631, 635, 128 N. W. 35; Booker-Jones Oil Co. v. National Refining Co., — Tex. Civ. App. —, 132 S. W. 815.

⁴⁴ Wheeler & Wilson Mfg. Co. v. Lawson, 57 Wis. 400, 404, 15 N. W. 398.

⁴⁵ Washington Gas Light Co. v. Lansden, 172 U. S. 534, 548, 43 L. Ed. 543.

⁴⁶ Wainwright v. P. H. & F. M. Roots Co., 176 Ind. 682, 687, 97 N. E. 8.

⁴⁷ Louisville, E. & St. Louis R. Co. v. McVay, 98 Ind. 391, 398, 49 Am. Rep. 770.

ity, he is the corporation itself."⁴⁸ "General manager" and "general agent" are said to be synonymous terms.⁴⁹

In this subdivision, however, the law is stated not only as to the powers of officers or agents who are strictly general managers in the sense that they have control of all the business of the corporation, but also as to the powers of managers of a part of the business or of a branch office.

§ 2097. Kinds of and classification. When it is stated that a manager or general manager of a corporation has or has not power to do a certain thing, it is often important to determine just what kind of a manager he was. The officer or agent to whom the management of the business is intrusted may be called the "manager," "general manager," "general agent," "superintendent," etc., or he may be the "president," "treasurer," "secretary," etc. But his title, while it may raise a presumption as to the extent of his authority, does not necessarily determine his authority. The extent of his implied authority depends upon the duties with which he is intrusted. He may be intrusted with the entire management and control of the business, and in such a case his authority to act for the corporation is very broad. Or he may be intrusted with the management of a particular branch of the business only. In any case, the extent of his authority depends upon the scope of his employment. The fact that a person who is appointed general manager of a corporation is also its president, or secretary, or treasurer, etc., does not operate at all as a limitation on his powers as general manager.⁵⁰

Stated in another way, in order to determine the powers of one who is by title or in effect a general manager of the whole business or a specified part of it, it is necessary to include herein the following

⁴⁸ *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385, which statement, however, seems to be too broad.

⁴⁹ *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458, 460.

⁵⁰ *Ceeder v. H. M. Loud & Sons Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575.

Of course if an officer is also a general manager, his authority is broader than as if merely an executive officer, such as president, secretary, treasurer, cashier or the like. *Metz-*

ger v. Southern Bank, 98 Miss. 108, 54 So. 241.

The office of general manager is of broader import than that of president. *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8.

"That the general manager was also president of the company is immaterial here. *Lyndon Mill Co. v. Lyndon, etc., Institution*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783." *Roben v. Ryegate Light & Power Co.*, — Vt. —, 100 Atl. 768.

classes of persons, the law varying to some extent as to their powers according to which class the person belongs.

1. A person bearing the title of general manager, and appointed to such position, not necessarily a director or other officer of the corporation. He may or may not be a corporate officer as distinguished from an agent.⁵¹

2. A person bearing the title of superintendent, as is often the case in mining corporations and the like, whose powers oftentimes are not as broad as those of one bearing the title of general manager. The superintendent of a corporation, so called, may be in fact general manager or general agent, or he may be superintendent of a particular part of the business only, or he may be merely superintendent of the plant, under a general manager; and the authority of a superintendent, therefore, will depend upon the scope of his employment, and the duties with which he is intrusted. The mere fact that one is called "superintendent" does not determine the extent of his authority. The only rule that can be stated is that, like any other agent, he has implied authority to bind the corporation by any contract or act which is within the scope of his employment, and incidental to the business with which he is intrusted by the directors, whether special authority to make the particular contract or do the particular act has been conferred or not.⁵² But he has no authority to bind the corporation by contracts or acts beyond the scope of his employment.⁵³

3. An officer of the corporation, who may be its president, vice president, secretary or treasurer, who is appointed to take charge of the business of the corporation or of a particular branch of the business, without regard to whether he is expressly designated as manager or whether his managerial work is recognized as a separate office or employment. In such a case his powers are not measured by the

⁵¹ See § 1746, *supra*.

⁵² *Union Pacific, D. & G. Ry. Co. v. McCarty*, 3 Colo. App. 530, 34 Pac. 767; *Georgia Military Academy v. Estill*, 77 Ga. 409; *Whitaker v. Kilroy*, 70 Mich. 635, 38 N. W. 606; *Hardy v. Tittabawassee Boom Co.*, 52 Mich. 45, 17 N. W. 235; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Raven Red Ash Coal Co. v. Herron*, 114 Va. 103, 75 S. E. 752.

Thus it has been held that the superintendent of a company engaged in manufacturing lumber "has power to contract in behalf of the corpora-

tion with reference to matters proper and usual in the ordinary conduct of the corporate business. He may employ labor, contract for the hauling of logs, and do any act relating to the actual operation of the mill." *Minnesota Lumber Co. v. Hobbs & Livingston*, 122 Ga. 20, 49 S. E. 783.

⁵³ *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 So. 425; *Breed v. First Nat. Bank of Central City*, 4 Colo. 481; *Boynton v. Lynn Gaslight Co.*, 124 Mass. 197; *Lonkey v. Succor Mill & Mining Co.*, 10 Nev. 17.

powers of a president, vice president, secretary or treasurer, but by the powers of a general manager of all or a part of the business.⁵⁴ It is not necessary, in order that one may have the powers of a general manager, that he be denominated as such, or that such an office or position exist, but it is sufficient that the corporation permits him to conduct and manage the business, without objection.⁵⁵ So it is not necessary that any resolution should be passed appointing a general manager, in order to bind the corporation by the acts of an officer who is in fact permitted or authorized to manage the business.⁵⁶

4. A person who is at the head of some department or branch office or the like. The only difference, it would seem, between the power of a general manager of all the business and the superintendent or manager of a department is that the one has broader power than the other; that the former has power to act as a general agent as to all the business while the latter has the same power to act in regard to his branch of the business subject of course to the control of the general manager.⁵⁷

5. Another class of persons who may properly be called general managers are those who own all or a large majority of the stock of the corporation, and who, in effect, carry on the business in the same manner and way as if no corporation had been formed. In such a case, the manager has more extensive powers than those possessed by persons who are general managers but who are not controlling stockholders and who are in fact, at least to some extent, controlled by an active board of directors. Justice Hawley, in a federal decision illustrating this set of facts, said that "in endeavoring to sustain and uphold a law made for the protection of innocent stockholders (referring to a

⁵⁴ See *supra*, this paragraph.

⁵⁵ See, for instance, *Commercial Hotel Co. v. Brill*, 123 Wis. 638, 101 N. W. 1101.

⁵⁶ *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 386, 89 Pac. 86.

⁵⁷ See *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 81 Neb. 517, 18 L. R. A. (N. S.) 680, 129 Am. St. Rep. 703, 116 N. W. 157; *American Car & Foundry Co. v. Alexandria Water Co.*, 218 Pa. 542, 67 Atl. 861, and see note in 38 L. R. A. (N. S.) 1135 on "Implied or presumed authority of a superintendent of a department to contract as to matters relating to his department."

"The fact that a corporation has a general manager, whose supervision extends to all of its business, does not exclude its right to vest in another agent the powers of a general manager representing the corporation in the conduct of some department of its business. The superintendent or manager of such department stands in the same relation to the matters pertaining to his department as does the general superintendent or general manager to the general affairs of the company." *Francis v. Independent Electrical Supply Co.*, — Cal. App. —, 165 Pac. 716.

statute requiring stockholders' consent to a corporate mortgage), we should be careful not to announce a doctrine that would permit the leading stockholders, under the guise of a corporate name, to commit frauds by taking advantage of their own wrong," and referred to the so-called directors and officers as "simply the dumb machinery, entirely directed by these parties, and through whom they operated when it was necessary to invoke the legal status of the corporation to strengthen their hands or advance their objects."⁵⁸

6. Still another class of managers consists of one or more, either the president, vice president, secretary, treasurer or a large stockholder, who in fact act for and in behalf of the corporation in all its dealings without interference from the board of directors or stockholders who are wholly inactive, except possibly that the board of directors holds a formal meeting at long intervals. Such a state of facts of course vests the manager or managers with more extensive powers than ordinary general managers. The board of directors becomes practically a nullity and the manager or managers, whatever his or their title may be, become practically the board of directors. Here enters the rule of apparent powers in addition to inherent powers, so that it is difficult to place any limitation whatever on the powers of such a manager or managers other than that they cannot bind the corporation by contracts which the corporation itself has no power to make, i. e., *ultra vires* contracts, except in so far as *ultra vires* contracts are enforceable. Thus, where the directors and stockholders abandon their functions and duties as such, and permit the executive officers to assume and direct the entire control and management of the business of the corporation, there is an estoppel not only of the corporation, but also of the directors and stockholders to question the validity of acts of such officers, performed in the usual and ordinary course of business and without fraud, to the detriment of third persons who have acted in good faith and without notice of actual want of authority of such executive officers.⁵⁹ If the stockholders and directors turn over the management of the business to one or more officers or persons, and virtually abandon their functions and duties as directors and stockholders, such person or persons have apparent power to do any act in the ordinary course of the business, in-

⁵⁸ *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. 23, 29. N. W. 396. See also *Garmany v. Lawton*, 124 Ga. 876, 110 Am. St. Rep.

⁵⁹ *American Nat. Bank v. Wheeler-Adams Auto Co.*, 31 S. D. 524, 141 207, 53 S. E. 669.

cluding the giving of a mortgage,⁶⁰ execution of notes,⁶¹ etc. So where a company has only a few stockholders, and they waive the election of directors, they themselves acting as de facto directors, an apparent agency of its president may be created in favor of third persons by the conduct of the stockholders.⁶²

§ 2098. Powers in general—Statement of rule. The powers and duties of a general manager are sometimes, but not usually, defined by the charter or by-laws. If not so defined, then his powers are at least as broad and comprehensive as those of a general agent;⁶³ and the general rule is that, in the absence of express restrictions on his powers, with actual or constructive notice thereof to persons dealing with him, an officer or agent of a corporation, intrusted with the general management and control of its business, has implied authority to make any contract or do any other act which is necessary or appropriate in the ordinary business of the corporation.⁶⁴

⁶⁰ *Cunningham v. German Ins. Bank*, 101 Fed. 977; *American Nat. Bank v. Wheeler-Adams Auto Co.*, 31 S. D. 524, 141 N. W. 396.

⁶¹ *Osmer v. LeMay-Wegmann Brokerage Co.*, 155 Mo. App. 211, 134 S. W. 65.

⁶² *Murphy v. W. H. & F. W. Cane, Inc.*, 82 N. J. L. 557, Ann. Cas. 1913 D 643, 82 Atl. 854.

⁶³ *Hodges v. Bankers Surety Co.*, 152 Ill. App. 372.

⁶⁴ *United States*. *Scotfield v. Parlin & Orendorff Co.*, 61 Fed. 804; *Prentice v. United States & C. A. Steam Ship Co.*, 58 Fed. 702.

California. *Betts v. Southern California Fruit Exchange*, 144 Cal. 402, 77 Pac. 993; *Wiley B. Allen Co. v. Wood*, — Cal. App. —, 162 Pac. 121; *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212.

Georgia. *Georgia Military Academy v. Estill*, 77 Ga. 409; *Nunez Gin & Warehouse Co. v. Moore*, 10 Ga. App. 350, 73 S. E. 432.

Illinois. *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419, aff'g 41 Ill. App. 72; *Cozzens & Beaton Typesetting Co. v. Western Ranch & Irrigation Co.*, 112

Ill. App. 309; *B. S. Green Co. v. Blodgett*, 55 Ill. App. 556, aff'd 159 Ill. 169, 50 Am. St. Rep. 146, 42 N. E. 176.

Indiana. *Monon Lumber Co. v. American Case & Register Co.*, 184 Ind. 11, 110 N. E. 196; *Louisville, E. & St. L. Ry. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

Kansas. *Topeka Primary Ass'n University of Builders v. Martin*, 39 Kan. 750, 18 Pac. 941; *Kansas Lumber Co. v. Central Bank*, 34 Kan. 635, 9 Pac. 751.

Kentucky. *Albany Mill Co. v. Huff Bros.*, 24 Ky. L. Rep. 2037, 72 S. W. 820.

Louisiana. *Crusel v. Houssiere-Latreille Oil Co.*, 122 La. 913, 48 So. 322; *Merchants' & Farmers' Bank v. Hervey Plow Co.*, 45 La. Ann. 1214, 14 So. 139.

Maine. *Ulmer v. Lime Rock B. Co.*, 98 Me. 579, 66 L. R. A. 387, 57 Atl. 1001.

Massachusetts. *Metropolitan Coal Co. v. Bontell Transportation & Towing Co.*, 196 Mass. 72, 81 N. E. 645; *Henderson v. Raymond Syndicate*, 183 Mass. 443, 67 N. E. 427; *Frost v. Do-*

In attempting to determine the implied powers of the general manager of a corporation from his title, the court in a Georgia case said: "The terms 'general manager' are words of large meaning. In and of themselves they imply duties and responsibilities which would devolve upon a person having the management and control of the corporate affairs. By giving such a title to this officer the corporation holds him out to the world as its managing agent, its alter ego, as the person having general and supreme authority as the immediate representative of the directors in the conduct of the corporate affairs and in its dealings with the public. To allow a corporation to confer such a title upon one of its officers and thus hold him out to the world as possessing the large responsibilities and powers which are to be implied from his title, and then permit it to repudiate engagements into which he has entered within the scope of such

mestic Sew. Mach. Co., 133 Mass. 563; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Odiorne v. Maxcy, 13 Mass. 178; Bates v. Keith Iron Co., 7 Metc. 224.

Michigan. Sarmiento v. Davis Boat & Oar Co., 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205; Ceeder v. H. M. Loud & Sons Lumber Co., 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; Whitaker v. Kilroy, 70 Mich. 635, 38 N. W. 606; Mulderone v. American Lumber Co., 55 Mich. 622, 22 N. W. 67; Adams Min. Co. v. Senter, 26 Mich. 73.

Missouri. Ward v. Davidson, 89 Mo. 445, 1 S. W. 846.

Nebraska. Trephagen v. South Omaha, 69 Neb. 577, 111 Am. St. Rep. 570, 96 N. W. 248.

New Hampshire. Goodwin v. Union Screw Co., 34 N. H. 378.

New Mexico. Bank of Commerce v. Baird Min. Co., 13 N. M. 424, 85 Pac. 970.

New York. Round Lake Ass'n v. Kellogg, 141 N. Y. 348, 36 N. E. 326; Rathbun v. Snow, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379; McDuffie v. Financier Co., 135 App. Div. 307, 119 N. Y. Supp. 949; Leonardi v. Times Square Automobile Co., 127

App. Div. 192, 111 N. Y. Supp. 523; Alexander v. Brown, 9 Hun 641; Whitman v. Koted Silk Underwear Co., 38 Misc. 796; 78 N. Y. Supp. 880.

Pennsylvania. Weschler v. Buffalo & L. E. Traction Co., 51 Pa. Super. Ct. 92.

Tennessee. Allison v. Tennessee Coal, Iron & Railroad Co. (Tenn. Ch. App.), 46 S. W. 348.

Virginia. Raven Red Ash Coal Co. v. Herron, 114 Va. 103, 75 S. E. 752.

Wisconsin. Lowe v. Ring, 115 Wis. 575, 92 N. W. 238; Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84.

England. Biggerstaff v. Rowatt's Wharf, [1896] 2 Ch. 93.

It has been held that the position and title of general manager of the corporation may be deemed the index of his power to bind the corporation with respect to routine contracts. Buffalo Coal Creek Min. Co. v. Troendle, 30 Ky. L. Rep. 740, 99 S. W. 622.

An officer or agent to whom is intrusted the general corporate management, or the management of a department, will be deemed to have implied authority to manage the business, or his department, in the customary manner. Rowland v. P. P. Carroll Loan

implied powers, would be to sanction the perpetration of a fraud; and this the courts will never do except under the stress of the most mandatory requirement of the law."⁶⁵ A "general manager," without any limitations or restrictions as to his express authority, has implied authority, it has been said, "to do anything that the corporation could lawfully do in the general scope of its business."⁶⁶ The extent of the authority of a general manager, says Professor Mechem, must "be dependent largely upon the nature of the business and the degree to which it is placed under the agent's control."⁶⁷

The test seems to be whether the act is within the "ordinary business" of the corporation. If it is, then, as already stated, the manager has power. On the other hand, his authority does not extend to any matters or transactions which are not properly incident to the management of the ordinary business.⁶⁸ However, it is

& Investment Co. (Wash.), 87 Pac. 482.

The supervising manager of plaintiff corporation was placed in charge of its gas well. This manager was also president of a competing corporation. He endeavored to turn over property within his possession as such manager to the corporation of which he was president, without notice and without authority, and then maintain the position that title to such property adverse to the corporation of which he was superintendent was held by the corporation of which he was president. The court held his contention untenable. *McCullough v. Ford Natural Gas Co.*, 213 Pa. 110, 62 Atl. 521.

The rule that a corporation is bound by the contracts of one whom it has permitted to exercise general authority in respect to the business of the corporation does not apply to the contracts of a treasurer in possession of and operating a mine, "in the absence of proof that the treasurer was authorized by appropriate action of the corporation to take possession of and operate the property of the corporation." *Albro Mining & Milling Co. v. Chinn*, 20 Colo. App. 238, 77

Pac. 1097. It is submitted, however, that this decision is wrong. It impliedly holds that, if the president, instead of the treasurer, had been in possession of and operating the mine the rule would have been different. But why should the rule as to apparent authority be connected at all with the office in such a case as this? It is the permitting any officer or agent to assume powers of general control that binds the corporation to third persons relying thereon.

"It was within the power of the general manager to assure the plaintiff that no more motors would be taken on than could be carried, and to make such assurance a part of the claimed contract, for that assurance related to the management of the existing business." *Roben v. Ryegate Light & Power Co.*, — Vt. —, 100 Atl. 768.

⁶⁵ *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008.

⁶⁶ *Kitzmiller v. Pacific Coast & N. Packing Co.*, 90 Wash. 357, 362, 156 Pac. 17.

⁶⁷ 1 Mechem, Agency (2nd Ed.), § 980.

⁶⁸ *United States. Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135.

his apparent authority rather than his real authority which controls.⁶⁹ Directors may of course authorize him to enter into a specific contract in the corporate behalf,⁷⁰ and his contracts are valid where expressly authorized by the board of directors.⁷¹

§ 2099. — As dependent on whether corporation is a trading or nontrading corporation. The courts sometimes distinguish between the powers of managers of trading corporations and of nontrading corporations. Thus it has been said that "in banking and mercantile pursuits the necessities of business frequently demand quick action in the borrowing of money, and, to meet such emergencies, it is customary for the chief executive officer to be clothed with the power to borrow money on behalf of the corporation. * * * But with nontrading corporations * * * there are no such necessities, and

Arkansas. Dale v. Donaldson Lumber Co., 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703.

California. Centerville & K. Irrigation Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 73 Pac. 1079; Neuhart v. George K. Porter Co., 23 Cal. App. 526, 138 Pac. 951.

Colorado. Orphan Belle Mining & Milling Co. v. Pinto Min. Co., 35 Colo. 564, 85 Pac. 323; Consolidated Gregory Co. v. Raber, 1 Colo. 511; Victoria Gold Min. Co. v. Fraser, 2 Colo. App. 14, 29 Pac. 667.

Massachusetts. Boynton v. Lynn Gaslight Co., 124 Mass. 197; New Haven & N. Co. v. Hayden, 107 Mass. 525.

Nevada. Lonkey v. Succor Mill & Mining Co., 10 Nev. 17.

North Carolina. First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co., 116 N. C. 827, 21 S. E. 948.

Oregon. Reid v. Alaska Packing Co., 47 Ore. 215, 83 Pac. 139.

An agent of an express company, having general management of its business in a particular district, with authority to appoint and discharge employees, has no authority to license one of its employees to engage in a

business in competition with the company's business. Adams' Exp. Co. v. Trego, 35 Md. 47.

A "change in the character of the plant was not within the powers of the general manager as expressed in the by-laws nor within his apparent power, and the plaintiff had no right to understand that it was, and the statements of the manager in that regard, the plaintiff was bound to understand as no more than a free expression of the views of the manager as to what the company would find it necessary to do and would do." Roben v. Ryegate Light & Power Co., — Vt. —, 100 Atl. 768.

⁶⁹ Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507.

"In the absence of notice to third persons dealing with him for his company, his actual authority was not limited to a lesser scope than his position and title reasonably and naturally implied." Buffalo Coal Creek Min. Co. v. Troendle, 30 Ky. L. Rep. 740, 99 S. W. 622.

⁷⁰ Aliunde Consol. Min. Co. v. Arnold, 16 Colo. App. 542, 67 Pac. 28.

⁷¹ Stuart v. Staten Island Clay Co., 65 N. J. L. 546, 47 Atl. 805.

there is no reason for bestowing on the chief executive officer implied authority to plunge the corporation into debt. The income and outlay may be forecast with reasonable accuracy, and the pecuniary wants of the corporation supplied without recourse to emergent action."⁷²

§ 2100. — Effect of general provision placing control in board of directors. A provision in the charter that "the affairs of this corporation shall be managed and conducted by a board of directors," is common to all charters, and in no manner restricts or limits the implied power of the general manager to bind the corporation by any contract entered into by him for the company in the usual scope of his authority.⁷³ This proposition has already been stated as applicable to officers in general.⁷⁴

§ 2101. — Manager of branch or department. If one is intrusted with the management of a particular branch of the business only, his authority does not extend beyond such contracts and acts as are incident to the management of that particular branch.⁷⁵ However, the apparent authority of the manager of a branch bank may extend to the running of a separate business to protect an existing debt.⁷⁶ And the powers of one given the title of manager of a branch of a trust company doing a banking business are not to be presumed to be limited to those of an ordinary cashier, where he had a cashier under his immediate control.⁷⁷

§ 2102. Contracts in general—Statement of rule. The general manager may make contracts which are in the ordinary course of the business,⁷⁸ especially where he had executed similar contracts before

⁷² *Sedalia Nat. Bank v. Economy Steam Heating & Electric Co.*, 145 Mo. App. 319, 130 S. W. 377.

⁷³ *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385.

⁷⁴ See § 1906, *supra*.

⁷⁵ See cases hereafter cited, and see § 2102, *supra*.

⁷⁶ *Union Savings & Trust Co. of Seattle v. Krumm*, 88 Wash. 20, 152 Pac. 681.

⁷⁷ *Union Savings & Trust Co. of*

Seattle v. Krumm, 88 Wash. 20, 152 Pac. 681.

⁷⁸ *Saunders v. United States Marble Co.*, 25 Wash. 475, 65 Pac. 782. See also *Cleburne St. Ry. Co. v. Barber*, — Tex. Civ. App. —, 180 S. W. 1176.

It cannot be contended that an officer is without authority to make a particular contract on behalf of the corporation where a by-law gives him general supervision of the corporate business and the contract is in pursuance of the general corporate pur-

without objection,⁷⁹ but, of course, he is not authorized to make an ultra vires contract.⁸⁰ So he is presumed to have power to bind the corporation for supplies to be furnished to enable a person to carry out his contract with the corporation.⁸¹ And a sales manager may make contracts in regard to the usual running business of selling the products of the corporation.⁸² He may make contracts for advertisement of the business;⁸³ and one who is the general passenger agent of a railroad company has apparent authority to contract for the publication of a guide book to popularize the hunting and fishing places along the railroad.⁸⁴ The general manager of a land company, engaged in selling land on commission, may make a contract with the owner of land to procure a purchaser therefor.⁸⁵ A superintendent of a brick company is presumed to have authority to contract for timber for the plant or to modify a contract therefor.⁸⁶

poses. *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

It is within the apparent scope of authority of the superintendent of a lumber corporation to enter into a contract for the hauling of logs to be sawed into lumber by the corporation. *Minnesota Lumber Co. v. Hobbs*, 122 Ga. 20, 49 S. E. 783.

An agent in charge of the business of a corporation in a particular city has power to make ordinary contracts. *Empire Implement Mfg. Co. v. Hench*, 219 Pa. 135, 67 Atl. 995.

Where corporate property has been levied on under executions on judgments for services rendered by persons employed by the general manager, the latter may authorize a representative of the judgment creditors to float logs levied on down to a city, sell them, and distribute the surplus among the judgment creditors. *Lewiston Lumber & Box Co. v. Garvey*, 13 Idaho 257, 89 Pac. 940.

He may promise to pay money owing for property bought, to a third person. *Tevis v. Savage*, 130 Cal. 411, 62 Pac. 611.

He cannot, it seems, make a contract to fill in corporate land with soil

excavated by a contracting company, since outside the ordinary course of business. *Durbrow v. Hackensack Meadows Co.*, 77 N. J. L. 89, 71 Atl. 59.

⁷⁹ *W. O. Johnson & Sons v. Des Moines, I. F. & N. Ry. Co.*, 129 Iowa 281, 105 N. W. 509.

⁸⁰ *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 149 Iowa 141, 126 N. W. 190. See generally § 1910, *supra*.

⁸¹ *McGowan Commercial Co. v. Midland Coal & Lumber Co.*, 41 Mont. 211, 108 Pac. 655.

⁸² *Monarch Portland Cement Co. v. P. J. Creedon & Sons*, 94 Neb. 185, 142 N. W. 906.

⁸³ *B. S. Green Co. v. Blodgett*, 55 Ill. App. 556, *aff'd* 159 Ill. 169, 50 Am. St. Rep. 146, 42 N. E. 176.

He may make contracts for printing advertisements, catalogues, etc. *Georgia Military Academy v. Estill*, 77 Ga. 409.

⁸⁴ *Parrot v. Mexican Cent. R. Co.*, 207 Mass. 184, 34 L. R. A. (N. S.) 261, 93 N. E. 590.

⁸⁵ *Forrester-Duncan Land Co. v. Evatt*, 90 Ark. 301, 119 S. W. 282.

⁸⁶ *Olive Hill Fire Brick Co. v. Mullins*, 153 Ky. 293, 155 S. W. 372.

The manager of a mine with authority to contract for draining the mine has authority to agree to pay for past drainage as a part of the consideration for continuing such drainage in the future, in the absence of notice to the parties with whom he contracted that he had not such authority.⁸⁷ Authority to secure patents for mining ground includes power to make contracts necessary and proper for expediting the obtaining of patents and securing the claims for the company, as against adverse claims that might be made in contesting such applications for patents.⁸⁸ It is within the apparent authority of the superintendent of the dining car department of a railroad company to contract for menu cards for exclusive use in dining cars.⁸⁹ A general manager of a railroad company may contract to repair a sleeping car used on the road.⁹⁰ If the general manager enters into a contract, it will be presumed that he has authority to attend to and accept the manner of its performance in behalf of the corporation;⁹¹ and a general manager has power, it is to be presumed, to act for the company in determining whether it will live up to the terms of a contract relating to its ordinary business, or repudiate the same in whole or in part.⁹²

Where no lien is thereby fastened on the property of the corporation, the general manager may make a purely executory contract, operative alone on the business to be transacted under it, whereby the corporation holds in trust and separate, for settlement of the account of petitioner, all goods unsold and all accounts, notes or other values received by the corporation for the goods sold.⁹³

The superintendent of a water company has no power to make a contract with an individual for a supply of water not only for general purposes but also at a certain pressure for fire purposes, to be paid for on the basis of "what was used and as used," at the same rate as water supplied for other purposes, although he has authority to make contracts for water for general purposes;⁹⁴ but it has been held that the superintendent of a water company has ap-

⁸⁷ *Fisk Mining & Milling Co. v. Reed*, 32 Colo. 506, 520, 77 Pac. 240.

⁸⁸ *Wood v. Saginaw Gold Mining & Milling Co.*, 20 S. D. 161, 105 N. W. 101.

⁸⁹ *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 38 L. R. A. (N. S.) 1135, 115 Pac. 841.

⁹⁰ *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008.

⁹¹ *Redwine v. Continental Realty Co., Inc.*, 184 Fed. 851.

⁹² *Minnesota Lumber Co. v. Hobbs & Livingston*, 122 Ga. 20, 49 S. E. 783.

⁹³ *Cumberland Trust Co. v. B. S. Ayars & Sons Co.*, 83 N. J. Eq. 479, 91 Atl. 813.

⁹⁴ *Hall v. Passaic Water Co.*, 83 N. J. L. 771, 43 L. R. A. (N. S.) 750, 85 Atl. 349.

parent authority to make a special contract for water at a lower rate than granted the general public.⁹⁵

Authority of a general manager of a corporation to make certain contracts includes power to bind the company by admissions or representations as to the authority of another to make such contracts.⁹⁶

Furthermore, the mere fact that a contract is unusual in its terms and without precedent, so far as the particular corporation is concerned, does not necessarily preclude the authority of the manager to enter into it.⁹⁷

Of course if the powers of a general manager have been limited to the supervision of the construction work of the company, with no right to make contracts of any kind, he cannot agree to surrender to the seller certain pumps purchased by the company, for which it was unable to pay.⁹⁸ So the head of the business office of a newspaper, but whose duties consisted in ascertaining and carrying out the directions of the directors, except in routine matters concerning which there could be no reasonable doubt, has no power to enter into a large and unusual contract pertaining to advertising.⁹⁹ Nor has a manager any power to bind the corporation by an agreement fixing the boundaries to its real estate.¹

The managing editor of a newspaper, who has been in the habit of exercising an unlimited discretionary authority in the collection of news for the paper, making all pecuniary and other arrangements in respect thereto, will be presumed to have been given authority so to do, either directly or indirectly, by the trustees of the association in whom was lodged the power to manage the concerns of the company.²

§ 2103. — Length of contracts. It seems that there is no doubt that the general manager may make a contract which will not terminate until after his term of office or period for which he is employed

⁹⁵ *Milledgeville Water Co. v. Edwards*, 121 Ga. 555, 49 S. E. 621.

⁹⁶ *Wales-Riggs Plantations v. Caston*, 105 Ark. 641, 152 S. W. 282. See also § 2172, *infra*.

⁹⁷ *Kitzmiller v. Pacific Coast & N. Packing Co.*, 90 Wash. 357, 156 Pac. 17.

⁹⁸ *Worthington v. Mack Mfg. Co.*, 175 Fed. 763.

⁹⁹ *Adams v. Herald Pub. Co.*, 82 Conn. 448, 74 Atl. 755.

¹ *Wolrath v. Champion Min. Co.*, 171

U. S. 293, 43 L. Ed. 170, *aff'g* 72 Fed. 978; *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491, 45 N. W. 351.

² *Sun Ptg. & Pub. Ass'n v. Moore*, 183 U. S. 642, 46 L. Ed. 366, *aff'g* 101 Fed. 591, holding that he had power to charter a yacht to collect news, and incidentally to incur absolute liability to return it or become responsible for its value, and to stipulate as to such value.

has terminated. This question as to length of contract usually arises in regard to contracts of employment.³

§ 2104. Contracts of employment—In general. The general manager or agent of a corporation, unless restricted, has implied authority to employ necessary clerks, servants, laborers, etc., and appoint necessary agents, and agree upon their compensation;⁴ and he may

³ See § 2108, *infra*.

⁴ **Alabama.** Tennessee River Transp. Co. v. Kavanaugh, 101 Ala. 1, 13 So. 283; Alabama Great Southern R. Co. v. Hill, 76 Ala. 303.

California. Smith v. Sinbad Development Co., 15 Cal. App. 166, 113 Pac. 701; Smith v. Sinbad Development Co., 11 Cal. App. 253, 104 Pac. 706.

Colorado. Oro Mining & Milling Co. v. Kaiser, 4 Colo. App. 219, 35 Pac. 677. See also Golden Age No. 2 Mining & Milling Co. v. Langridge, 39 Colo. 157, 88 Pac. 1070.

Illinois. Howard v. Wabash Truss Hoop Co., 147 Ill. App. 216.

Kentucky. Forked Deer Pants Co. v. Shipley, 25 Ky. L. Rep. 2299, 80 S. W. 476.

Massachusetts. Bates v. Keith Iron Co., 7 Metc. 224. But see Dunton v. Derby Desk Co., 186 Mass. 35, 71 N. E. 91.

Michigan. Sax v. Detroit, G. H. & M. Ry. Co., 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314, 7 Det. L. N. 486; Ceeder v. H. M. Loud & Sons Lumber Co., 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575; Hardy v. Tittabawassee Boom Co., 52 Mich. 45, 17 N. W. 235.

Missouri. Hasler v. Ozark Land & Lumber Co., 101 Mo. App. 136, 74 S. W. 465.

New York. Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379; Wilson v. Kings County El. R. Co., 114 N. Y. 487, 21 N. E. 1015; Hooker v. Eagle Bank of Rochester, 30 N. Y. 83, 86

Am. Dec. 351; Stahlberger v. New Hartford Leather Co., 92 Hun 245, 36 N. Y. Supp. 708; Thomas v. International Silver Co., 48 Misc. 509, 96 N. Y. Supp. 218; Smith v. Co-operative Dress Ass'n, 12 Daly 304.

North Carolina. Lewis v. Albemarle & R. R. Co., 95 N. C. 179.

Oregon. Calvert v. Idaho Stage Co., 25 Ore. 412, 36 Pac. 24.

"The president and secretary in the active control and management of the business of the company may employ the necessary help to carry it on." Little Butte Consol. Mines Co. v. Girand, 14 Ariz. 9, 123 Pac. 309.

The manager in charge of a branch of the corporate business may have implied power to renew a contract with a traveling salesman where he has been accustomed to make original contracts in respect thereto. Thomas v. International Silver Co., 48 N. Y. Misc. 509, 96 N. Y. Supp. 218.

The managing officers of a railroad company may employ a civil engineer. Lewis v. Albemarle & R. R. Co., 95 N. C. 179.

A director-general of a circus may have apparent power to hire performers. Eddy v. American Amusement Co., 21 Cal. App. 487, 132 Pac. 83.

He has apparent power to fix wages of persons hired. Kelly v. Jersey City Water Supply Co., 74 N. J. L. 734, 67 Atl. 108.

The manager of a dry goods business may increase the salary of a clerk, especially where he has exer-

employ attorneys to attend to the current legal business of the corporation.⁵ But where a general manager is given power to hire and

cised such power for a long time without objection. *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

He may agree with superintendent of mine as to his compensation. *Sandberg v. Victor Gold & Silver Min. Co.*, 24 Utah 1, 21, 66 Pac. 360.

While proceedings were pending in the federal courts for the punishment of officers of defendant corporation for sending fraudulent statements with reference to the property of the corporation through the United States mails, it was not beyond the scope of authority of the managing officers of the corporation to employ certain parties to make an examination of the said property and give testimony as experts at the trial for the purpose of showing the truth of the statements made. *Lincoln Mountain Gold Min. Co. v. Williams*, 37 Colo. 193, 85 Pac. 844.

But an advertising manager of a newspaper has no authority to employ an advertising solicitor for a year. *Sloman v. Star Co.*, 149 N. Y. App. Div. 500, 133 N. Y. Supp. 946.

⁵ *California*. *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946.

Kansas. *St. Louis & S. F. Ry. Co. v. Kirkpatrick*, 52 Kan. 104, 34 Pac. 400; *St. Louis, Ft. S. & W. R. Co. v. Grove*, 39 Kan. 731, 18 Pac. 958.

Kentucky. *Pittsburgh, C. & St. L. R. Co. v. Woolley*, 12 Bush 451.

Massachusetts. *Frost v. Domestic Sew. Mach. Co.*, 133 Mass. 563.

Michigan. *Ceeder v. H. M. Loud & Sons Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575.

Missouri. *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89; *Western Bank of Missouri v. Gilstrop*, 45 Mo. 419; *Lewis v. Pulitzer Pub. Co.*, 77 Mo. App. 434.

Nebraska. *Fidelity & Casualty Co.*

v. Field & Brown, 2 Neb. (Unoff.) 442, 89 N. W. 249.

Texas. *Gulf, C. & S. F. Ry. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744.

But the resident manager of an insurance company in this country has no implied authority to hire an attorney to go to Europe with him to discuss with the home office the affairs of the agency in America, and to aid him in making his report. "I do not think that the resident manager of an insurance company in New York has any implied authority to engage an attorney to go to Europe with him to discuss with the home office the affairs of the agency in America. The power of attorney given to the agent is very broad, and I agree that under that power the resident manager has authority to employ an attorney, even to go abroad, if the business of the agency requires it. By that, however, I mean the business of the agency with third parties. I do not think that an agent employed to transact a definite line of business has authority to engage counsel for the purpose of adjusting the relationship of the local office with the home office. The question of whether he has such power should be considered in the light of the general rules governing the law of agency. An agent who is deputed with power to transact the business of his principal within a local territory is certainly without authority to bind his principal in the transaction of business with himself, yet the evidence in this case shows that the resident manager employed the plaintiff, not to transact any business in behalf of his principal, but to aid him in arranging with the home office details in regard to the administration of work here." *Allen v. General Ac-*

appoint agents " 'subject to the approval of the board of directors.' " it has been held that he cannot employ an attorney without the approval or knowledge of the board of trustees.⁶ He has power to hire a cashier and accountant,⁷ a bookkeeper,⁸ a foreman,⁹ architects to prepare plans for an addition to the corporation's buildings,¹⁰ or a person to assist in the management of a branch store.¹¹ If the corporation is engaged in selling land, the general manager may employ a selling agent¹² or a surveyor to plat the lands.¹³

§ 2105. — Employment of superintendent or other general agent.

A general manager has been held, in most jurisdictions, to have power to hire a superintendent¹⁴ or other general agent. In Missouri, however, it has been held that the employment "of a general agent of a corporation is not an incident to the power of the superintendent, but it is the peculiar office and duty of the board of directors as a body, or by a committee raised out of it, to select and employ all general officers and agents of the corporation."¹⁵ In any event, the manager cannot, it seems, contract with a third person for the exclusive management by him of a specified part of the business for a fixed compensation and a percentage of the profits.¹⁶

§ 2106. — Employment of brokers or agents to buy or sell.

Authority to sell corporate property includes power to employ a broker to effect such sale, where that is the ordinary means of accom-

cident, *Fire & Life Assur. Corporation*, 98 N. Y. Misc. 206, 162 N. Y. Supp. 934.

⁶ *Red Cross Protective Society v. Wayte*, 171 Fed. 643.

⁷ *Pink v. Metropolitan Milk Co.*, 129 Minn. 353, 152 N. W. 725.

⁸ The general manager of a store corporation has power to employ a bookkeeper. *Pounds v. Farmers' Union Mercantile Co.*, — Mo. App. —, 189 S. W. 583.

⁹ *Peck v. Dexter Sulphite Pulp & Paper Co.*, 164 N. Y. 127, 58 N. E. 6, rev'g 19 N. Y. App. Div. 628, 46 N. Y. Supp. 1098.

¹⁰ *Fernekes v. Nugent Sanitarium*, 158 Wis. 671, 149 N. W. 393.

¹¹ *Baker v. Jewel Tea Co.*, 152 Iowa 72, 131 N. W. 674.

¹² *Hoffman v. Guy M. Rush Co.*, 27 Cal. App. 167, 149 Pac. 177.

¹³ *Heinze v. South Green Bay Land & Dock Co.*, 109 Wis. 99, 85 N. W. 145.

¹⁴ *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385; *Sandberg v. Victor Gold & Silver Min. Co.*, 24 Utah 1, 66 Pac. 360. See also *Doolittle v. Pacific Coast Safe & Vault Works*, 79 Ore. 498, 154 Pac. 753.

¹⁵ *Skene v. Union Casualty & Surety Co.*, 91 Mo. App. 120, 132, applying rule to hiring of manager of a department of an insurance business.

¹⁶ *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8.

plishing a sale.¹⁷ So he may agree to pay a broker commissions to do an act within the authority of the general manager.¹⁸ He may employ a real estate broker, at the prevailing rate of commissions, to sell land unnecessary for the use of the corporation and which it was compelled to buy in at a foreclosure sale.¹⁹ The general manager of a fish company may employ brokers to sell fish, in advance of the opening market price for the season, where at about the then current price.²⁰ The general manager of a land company may employ a person to sell lands on a salary and commission,²¹ or may agree to pay a certain sum per acre for all lands purchased by the corporation through negotiations initiated by the other party to the contract.²² Of course, if the general manager cannot sell the property of the corporation, he cannot agree to compensate a person for negotiating the sale;²³ and on this ground he cannot employ a broker to

¹⁷ *Hartford & N. Y. Transp. Co. v. Plymmer*, 120 Fed. 624, aff'g 103 Fed. 674; *Norton v. Genesee Nat. Savings & Loan Ass'n*, 57 N. Y. App. Div. 520, 68 N. Y. Supp. 32, holding that the general manager of a loan association could employ a real estate broker to sell property acquired under foreclosure.

"No vote of the directors to authorize the employment of a broker was necessary." *Henderson v. Raymond Syndicate*, 183 Mass. 443, 67 N. E. 427.

The manager of a corporation may bind the company by an agreement to pay commissions on sales of goods. *Northern Cent. Ry. Co. v. Bastian*, 15 Md. 494; *American Button-Hole, Overseaming & Sewing-Machine Co. v. Maurer* (Pa.), 10 Atl. 762.

A manager of sales of a manufacturing company has power to contract in regard to the usual running business of selling its wares, as by agreeing to pay commissions on orders for goods. *Barber v. Stromberg-Carlson Tel. Mfg. Co.*, 81 Neb. 517, 18 L. R. A. (N. S.) 680, 129 Am. St. Rep. 703, 116 N. W. 157.

¹⁸ *Chileott v. Washington State*

Colonization Co., 45 Wash. 148, 88 Pac. 113.

The authorization of a collecting agent of the company to secure exchange of corporate property at certain rates of commission was held to be within the power of the general manager of a savings and loan association. *Norton v. Genesee Nat. Savings & Loan Ass'n*, 57 N. Y. App. Div. 520, 68 N. Y. Supp. 32.

But a traveling salesman may not bind the corporation by promise to pay commissions to a third person for assistance rendered in effecting a sale. *Jones v. Keeler*, 40 N. Y. Misc. 221, 81 N. Y. Supp. 648.

¹⁹ *Norton v. Genesee Nat. Savings & Loan Ass'n*, 57 N. Y. App. Div. 520, 68 N. Y. Supp. 32.

²⁰ *Kitzmiller v. Pacific Coast & N. Packing Co.*, 90 Wash. 357, 156 Pac. 17.

²¹ *Pettibone v. Lake View Town Co.*, 134 Cal. 227, 66 Pac. 218.

²² *Chileott v. Washington State Colonization Co.*, 45 Wash. 148, 88 Pac. 113.

²³ *Elk Valley Coal Co. v. Thompson*, 150 Ky. 614, 150 S. W. 817.

procure a purchaser for the business property of the corporation.²⁴ The general manager cannot bind the company to pay a commission for the sale of what is his own property.²⁵

§ 2107. — **Contracts for medical services.** The general manager or superintendent of a railroad company has implied authority to employ a physician, surgeon or nurse to attend employees injured in the course of their business, and otherwise contract for their care,²⁶ and, it seems, to also attend passengers injured on the road.²⁷ But there is no such authority in a mere roadmaster, station agent or other subordinate and special agent, not intrusted with the general management of the business.²⁸

In case of corporations other than railroad companies, although there is some authority to the contrary,²⁹ it is also generally held

²⁴ *Elk Valley Coal Co. v. Thompson*, 150 Ky. 614, 150 S. W. 817.

²⁵ *Demarest v. Spiral Riveted Tube Co.*, 71 N. J. L. 14, 58 Atl. 161.

²⁶ *Alabama*. *Sevier v. Birmingham, S. & T. River R. Co.*, 92 Ala. 258, 9 So. 405.

Illinois. *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484.

Indiana. *Louisville, E. & St. L. Ry. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496.

Kansas. *Atchison & N. R. Co. v. Reeher*, 24 Kan. 228; *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458.

Michigan. See *Marquette & O. R. Co. v. Taft*, 28 Mich. 289, where court was divided.

New York. See *Noll v. Archer-Pan-coast Co.*, 60 App. Div. 414, 69 N. Y. Supp. 1007, contract for burial of deceased employee.

England. *Walker v. Great Western Ry. Co.*, L. R. 2 Exch. 228.

²⁷ *Cincinnati, I., St. L. & C. Ry. Co. v. Davis*, 126 Ind. 99, 9 L. R. A. 503, 25 N. E. 878.

²⁸ See § 1937, *supra*.

²⁹ *Swazey v. Union Mfg. Co.*, 42 Conn. 556; *Atlantic Refining Co. v. Leffingwell & Berry*, 61 Fla. 101, 34 L. R. A. (N. S.) 351 with note, 54 So. 266; *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759; *New Pittsburgh Coal & Coke Co. v. Shaley*, 25 Ind. App. 282, 58 N. E. 87; *Chaplin v. Freeland*, 7 Ind. App. 676, 34 N. E. 1007; *King v. Forbes Lithograph Mfg. Co.*, 183 Mass. 301, 67 N. E. 330.

Authority of a superintendent of a department of a manufacturing company to hire and discharge employees does not empower him to bind the corporation by a contract to pay for medical or surgical treatment of one of its employees. *King v. Forbes Lithograph Mfg. Co.*, 183 Mass. 301, 67 N. E. 330.

A superintendent of a mercantile company has no implied authority to engage a physician to attend an injured employee. *Ward v. J. Samuels & Bro.*, 37 R. I. 438, 93 Atl. 649.

In Indiana, a general manager cannot employ a physician for an employee injured while in course of duty, where the corporation is not a railroad company. *New Pittsburgh Coal &*

that a general manager may contract for medical service for injured employees,³⁰ where they are hurt in the course of the work through the negligence of the corporation.³¹

In any event, even a general manager or superintendent has no authority to employ a physician or surgeon or a nurse, or contract for hospital care, for an employee of the company who has been injured in a private brawl, or otherwise not in the course of his employment.³² And this is the rule, it has been held, where the injury is not due to any negligence of the corporation,³³ although as to this there is considerable conflict in the opinions.³⁴

Coke Co. v. Shaley, 25 Ind. App. 282, 58 N. E. 87. A later case, however, holds that a contract for medical services by a superintendent of a manufacturing company is valid only where the "facts leading up to it were so unusual and extreme as to impose upon the employer a duty analogous to that imposed upon railroad companies." *Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782, following *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759.

In Tennessee, it is held that "the rule is that even the general manager of a commercial corporation has no authority or power implied from his official position to commit his company to the payment of ordinary attendance (as contradistinguished from emergency attendance, with which we are not dealing) by a physician or surgeon on an employee of the corporation, injured while in the line of duty." *Journal & Tribune Co. v. Lones*, 130 Tenn. 209, 169 S. W. 760.

³⁰ *Scott v. Monte Cristo Oil & Development Co.*, 15 Cal. App. 453, 115 Pac. 64; *Mt. Wilson Gold & Silver Min. Co. v. Burbridge*, 11 Colo. App. 487, 53 Pac. 826; *Lithgow Mfg. Co. v. Samuel*, 24 Ky. L. Rep. 1590, 71 S. W. 906; *Greensfelder v. Witte Hardware Co.*, 189 Mo. App. 576, 175 S. W.

275; *Ghio v. Schaper Bros. Mercantile Co.*, 180 Mo. App. 686, 163 S. W. 551; *Freeman v. Junge Baking Co.*, 126 Mo. App. 124, 103 S. W. 565; *Hasler v. Ozark Land & Lumber Co.*, 101 Mo. App. 136, 74 S. W. 465; *Evans v. Marion Min. Co.*, 100 Mo. App. 670, 75 S. W. 178. See also *Newberry v. Missouri Granite & Construction Co.*, 180 Mo. App. 672, 163 S. W. 570, holding that president has power even if general manager has not. But see *Meisenbach v. Southern Cooperage Co.*, 45 Mo. App. 232.

³¹ *Evans v. Marion Min. Co.*, 100 Mo. App. 670, 75 S. W. 178.

He may hire a surgeon to treat an injured employee, for whose injuries the company would be liable in damages. *Lithgow Mfg. Co. v. Samuel*, 24 Ky. L. Rep. 1590, 71 S. W. 906.

³² *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703; *Chase v. Swift & Co.*, 60 Neb. 696, 83 Am. St. Rep. 552, 84 N. W. 86. ³³ *Spelman v. Gold Coin Mining & Milling Co.*, 26 Mont. 76, 55 L. R. A. 640, 91 Am. St. Rep. 402, 66 Pac. 597.

³⁴ Compare *Bonnette v. St. Louis, I. M. & S. R. Co.*, 87 Ark. 197, 16 L. R. A. (N. S.) 1081 with note, 128 Am. St. Rep. 30, 112 S. W. 220; *Fraser v. San Francisco Bridge Co.*, 103 Cal. 79, 36 Pac. 1037; *Swazey v. Union Mfg. Co.*, 42 Conn. 556.

§ 2108. — **For what length of time contracts of employment may be made.** A general manager has no authority to bind the corporation by a special contract of employment for a long term of years or for life.³⁵ Thus, he cannot make a three-year contract of employment.³⁶ So a five-year contract made by a general manager with a third person for the latter to manage a part of the business for a specified compensation and a percentage of the profits in such part of the business has been held unauthorized.³⁷ By the weight of authority, however, a general manager may make a contract of employment for a period of one year or less, so as to bind the company, upon the theory that a contract for such a time is not unusual or extraordinary.³⁸ This is so at least if contracts for that length of

³⁵ *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385; *Carney v. New York Life Ins. Co.*, 19 N. Y. App. Div. 160, 45 N. Y. Supp. 1103, aff'd 162 N. Y. 453, 49 L. R. A. 471, 76 Am. St. Rep. 347, 57 N. E. 78; *Camacho v. Hamilton Bank Note & Engraving Co.*, 2 N. Y. App. Div. 369, 37 N. Y. Supp. 725; *Smith v. Co-operative Dress Ass'n*, 12 Daly (N. Y.) 304.

He cannot hire employees for a long future period without express authority. *Reupke v. D. H. Stuhr & Son Grain Co.*, 126 Iowa 632, 102 N. W. 509.

A contract of employment for five years, it seems, is beyond the power of a general manager to make. *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8.

³⁶ *Camacho v. Hamilton Bank Note & Engraving Co.*, 2 N. Y. App. Div. 369, 37 N. Y. Supp. 725.

"It would seem clear that, in the absence of any evidence of custom or any holding out as possessed of authority other than the bare fact that he was secretary-treasurer and manager, the authority to continue employment not only beyond his term of office, but beyond the period, during which the entire management of the affairs of the company might be

changed by the election of a new board of directors, would not be implied." *Laird v. Michigan Lubricator Co.*, 153 Mich. 52, 116 N. W. 534, 15 Det. L. N. 344.

³⁷ *Wainwright v. P. H. & F. M. Roots Co.*, 176 Ind. 682, 97 N. E. 8.

³⁸ *Luce v. San Diego Land & Town Co. (Cal.)*, 37 Pac. 390, employment of attorney for a year; *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385; *Peck v. Dexter Sulphite Pulp & Paper Co.*, 164 N. Y. 127, 58 N. E. 6, employment of foreman for a year; *Stahlberger v. New Hartford Leather Co.*, 92 Hun (N. Y.) 245, 36 N. Y. Supp. 708; *Moyer v. East Shore Terminal Co.*, 41 S. C. 300, 25 L. R. A. 48, 44 Am. St. Rep. 709, 19 S. E. 651.

The general manager of an oil company has implied authority to employ a superintendent of refineries for one year, and to fix the compensation of such employee. *Manross v. Uncle Sam Oil Co.*, 88 Kan. 237, Ann. Cas. 1914 B 827, 128 Pac. 385.

"Authority to employ is authority to employ for what is, under the circumstances, a reasonable length of time," and it may "fairly be inferred from the facts in this case that an employment for a year was for a reasonable period of time." *Pink v.*

time are customary.³⁹ Thus the superintendent of a taxicab company who has power to hire help may bind the company by a contract of hire for one year, and this is so although he was authorized only to hire from day to day, where this restriction was not known to the other contracting party, since the contract "was made in the course of his apparent authority as well as his expressed authority to hire and discharge men."⁴⁰ Likewise, the president of a lumber company, who is also its general manager, may employ sawyers for the season.⁴¹ So it has been held in the federal courts that the employment of a master of a ship for two seasons was within the authority of a general manager of a steamship company where he was in effect the company.⁴² It has been held a question of fact whether a division engineer of a railroad company who is intrusted with the control of the maintenance of the tracks and bridges within his territory and who alone employs and discharges workmen and directs their operations, has power to make a contract of employment for nine months.⁴³ By-laws limiting the power of the general manager to employ to contracts for less than a year are not binding on the other party to the contract who had no knowledge of them.⁴⁴

Whether a general manager, on settling a claim of an injured employee, has power to agree to employ him for life at a specified wage, does not seem to have been decided.⁴⁵ In any event, a claim agent

Metropolitan Milk Co., 129 Minn. 353, 152 N. W. 725.

In Missouri, however, it is held that "in the absence of evidence, it will not be presumed that a business manager of a theatrical company has the power to engage performers for a year." *Vogel v. St. Louis Museum, Opera & Fine-Art Gallery*, 8 Mo. App. 587 (mem. dec.).

³⁹ *Reupke v. D. H. Stuhr & Son Grain Co.*, 126 Iowa 632, 102 N. W. 509.

⁴⁰ *Slocum v. Seattle Taxicab Co.*, 67 Wash. 220, 39 L. R. A. (N. S.) 435, 121 Pac. 67.

⁴¹ *Ceeder v. H. M. Loud & Sons Lumber Co.*, 86 Mich. 541, 24 Am. St. Rep. 134, 49 N. W. 575.

⁴² *Jenkins S. S. Co. v. Preston*, 186 Fed. 609.

⁴³ "Whether a reasonably prudent

man, familiar with the business, was justified in supposing that he had authority to make a contract of employment for nine months, was a fair question for the determination of the jury. Such a contract was not necessarily unusual or extraordinary." *Townsend v. Missouri Pac. R. Co.*, 88 Kan. 260, 128 Pac. 389.

⁴⁴ *Moyer v. East Shore Terminal Co.*, 41 S. C. 300, 25 L. R. A. 48, 44 Am. St. Rep. 709, 19 S. E. 651. See §§ 502, 1931, *supra*.

⁴⁵ Compare *Pierson v. Kingman Milling Co.*, 91 Kan. 775, 139 Pac. 394, 92 Kan. 468, 140 Pac. 1033, where contract for life employment was held to be ratified.

Power of president to make contract of employment for life, see § 2036, *supra*.

of a railroad company, as distinguished from a general manager, has no implied authority, in settling a claim against the company, to bind it by a contract to give the complainant employment for life.⁴⁶ So a mere division superintendent of a railroad, subject to the supervision of the general superintendent and the president and directors, has no implied power to bind the company by agreeing to give an injured employee a job for life.⁴⁷ So the general attorney of a railroad company whose sole duty was to furnish legal advice and settle suits cannot bind the company by an agreement to employ for life one who was injured while in the service of the company.⁴⁸ On the other hand, where a railroad company sent its general yard-master to make a settlement with an injured employee, the company was held bound by a settlement in which it was agreed that the employee was to have permanent employment.⁴⁹ So a contract by a division superintendent employing for life a person who had been injured in the service of the company has been upheld, where it was the custom of the company to make such contracts.⁵⁰ Moreover, it has been held in New York that where an injured employee was contemplating suit against a railroad company, but executed a general release in consideration of a certain payment and a promise to employ him for life at certain wages, such agreement made by a division superintendent of the company was binding on the company as an executed contract.⁵¹

§ 2109. — Contract to pay injured employee certain sums for life.

A contract to pay an injured employee a certain sum at stipulated intervals during his life is not within the power of a general manager.⁵²

⁴⁶ *Hornick v. Union Pac. R. Co.*, 85 Kan. 568, 38 L. R. A. (N. S.) 826, Ann. Cas. 1913 A 208, 118 Pac. 60; *Bohanan v. Boston & M. R. R.*, 70 N. H. 526, 49 Atl. 103.

⁴⁷ *Maxson v. Michigan Cent. R. Co.*, 117 Mich. 218, 75 N. W. 459, explaining *Brighton v. Lake Shore & M. S. Ry. Co.*, 103 Mich. 420, 61 N. W. 550, as a case of ratification.

⁴⁸ *Nephew v. Michigan Cent. R. Co.*, 128 Mich. 599, 87 N. W. 753.

⁴⁹ *Louisville & N. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389.

⁵⁰ *Jackson v. Illinois Cent. R. Co.*, 76 Miss. 607, 24 So. 874.

⁵¹ *Usher v. New York Cent. & H.*

River R. Co., 76 N. Y. App. Div. 422, 78 N. Y. Supp. 508, aff'd without opinion 179 N. Y. 544, 71 N. E. 1141.

⁵² *Smith v. Crum Lynne Iron & Steel Co.*, 208 Pa. 462, 57 Atl. 953.

It is beyond the scope of the authority of a general superintendent of a corporation to bind the corporation by a promise which amounts in effect to pension a third party for life. The court indicated that such authority might have been delegated by the corporation, but it would not be presumed from the nature of the superintendent's ordinary duties. *Smith v. Crum Lynne Iron & Steel Co.*, 208 Pa. 462, 57 Atl. 953.

Thus, the superintendent of an express company has been held to have no authority to agree to pay an injured express messenger a monthly stipend during his natural life.⁵³

§ 2110. Borrowing money. It is usually held that a general manager of a corporation, intrusted with the entire management and control of its business, has implied power to borrow money for the legitimate purposes of the corporation in its current and usual business,⁵⁴ and that he need not have express authority to borrow money.⁵⁵ A fortiori, if the general manager owns all the stock of the corporation, he may bind the company by a contract to pay a certain sum to an agent to procure a loan for the corporation.⁵⁶ However, it has been held that a general manager of a lumber company⁵⁷ or of a charitable institution⁵⁸ or other nontrading corporation⁵⁹ has no power to borrow money; and it seems that the implied powers of the general manager of a nontrading corporation are more restricted than in case of a manager of a trading corporation, at least as to borrowing money.⁶⁰ Furthermore, there is no such authority in the case of

⁵³ *Chenoweth v. Pacific Exp. Co.*, 93 Mo. App. 185.

⁵⁴ *United States. Cherry v. City Nat. Bank of Kansas City*, 144 Fed. 587; *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. 23.

Illinois. Matson v. Alley, 141 Ill. 284, 31 N. E. 419, aff'g 41 Ill. App. 72.

Iowa. Leonard v. Burlington Mut. Loan Ass'n, 55 Iowa 594, 8 N. W. 463.

Kansas. Topeka Primary Ass'n University of Builders v. Martin, 39 Kan. 750, 18 Pac. 941.

Massachusetts. Fay v. Noble, 12 Cush. 1.

Minnesota. Africa v. Duluth News Tribune Co., 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019; *Rosemond v. Northwestern Autographic Register Co.*, 62 Minn. 374, 64 N. W. 925.

New York. Rathbun v. Snow, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544.

He may borrow money, where he has been accustomed to manage the corporation, without interference from the stockholders, for a long time.

Cook v. American Tubing & Webbing Co., 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

⁵⁵ *St. James Co. v. Security Trust & Life Ins. Co.*, 82 N. Y. App. Div. 242, 81 N. Y. Supp. 739, aff'd 178 N. Y. 560, 70 N. E. 1108.

⁵⁶ *Clark v. Freeport Clays, Products & Minerals Co.*, 52 Pa. Super. Ct. 1.

⁵⁷ *Rizzuto v. R. W. English Lumber Co.*, 44 Colo. 413, 98 Pac. 728.

Thus, the general manager of a corporation engaged in selling lumber at retail is held to have no authority to borrow money or execute a note therefor. *Rizzuto v. R. W. English Lumber Co.*, 44 Colo. 413, 98 Pac. 728.

⁵⁸ *Alton Mfg. Co. v. Garrett Biblical Institute*, 243 Ill. 298, 90 N. E. 704.

⁵⁹ *Sedalia Nat. Bank v. Economy Steam Heating & Electric Co.*, 145 Mo. App. 319, 130 S. W. 377, where corporation was a steam heating and electric company.

⁶⁰ *Sedalia Nat. Bank v. Economy Steam Heating & Electric Co.*, 145 Mo. App. 319, 130 S. W. 377.

a mere superintendent, or in the case of a manager who has not the entire charge of the business, but is intrusted with its management under the direct control of the directors or other superior officers or agents.⁶¹ Thus, a state or local agency to sell the products of a corporation in a particular state or locality, and to collect therefor, has no authority to borrow money.⁶² "The fact that the defendant carried on the sale of its products through the medium of agencies distributed over the country would be no ground for a conclusion that the various agents for making sales of machinery and collecting the proceeds were clothed with authority to borrow money."⁶³ And the governing rule in all cases is, as stated by Professor Mechem, that the authority to borrow "is one reluctantly to be implied."⁶⁴

§ 2111. Negotiable paper—In general. Ordinarily, a general manager or superintendent has no authority to bind the corporation by the execution of a promissory note, drawing or acceptance of bills or drafts, or the indorsement of notes or bills.⁶⁵ The reason for this is

⁶¹ *Alabama Nat. Bank v. O'Neil*, 128 Ala. 192, 29 So. 688; *Breed v. First Nat. Bank of Central City*, 4 Colo. 481; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Adriance v. Roome*, 52 Barb. (N. Y.) 399.

A superintendent, who is authorized to draw on the funds of the corporation, has not for that reason any authority to bind it by an overdraft. *Breed v. First Nat. Bank of Central City*, 4 Colo. 481.

⁶² *Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co.*, 223 Ill. 41, 7 L. R. A. (N. S.) 752, 79 N. E. 38, aff'g 123 Ill. App. 430.

⁶³ *Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co.*, 223 Ill. 41, 7 L. R. A. (N. S.) 752, 79 N. E. 38, aff'g 123 Ill. App. 430.

⁶⁴ 1 Mechem, *Agency* (2nd Ed.), § 1001.

⁶⁵ *Colorado. Breed v. First Nat. Bank of Central City*, 4 Colo. 481; *Sanford Cattle Co. v. Williams*, 18 Colo. App. 378, 71 Pac. 889.

Louisiana. Culver v. Leovy, 19 La. Ann. 202.

Massachusetts. Gould v. Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50.

Michigan. Merchants' Nat. Bank of Chicago v. Detroit Knitting & Corset Works, 68 Mich. 620, 36 N. W. 696; *New York Iron Mine v. First Nat. Bank of Negaunee*, 39 Mich. 644.

Montana. Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.

New York. Railway Equipment & Publication Co. v. Lincoln Nat. Bank, 82 Hun 8, 31 N. Y. Supp. 44; *Lawrence v. Gebhard*, 41 Barb. 575.

Oregon. Baines v. Coos Bay Nav. Co., 45 Ore. 307, 77 Pac. 400.

Virginia. Davis v. Rockingham Inv. Co., 89 Va. 290, 15 S. E. 547.

Washington. Elwell v. Puget Sound & C. R. Co., 7 Wash. 487, 35 Pac. 376.

The fact that a superintendent has authority to draw the funds of the company does not authorize him to bind it by a note. *Breed v. First Nat. Bank of Central City*, 4 Colo. 481.

said to be "because such paper, in the hands of an innocent holder, is subject practically to no defense, and to protect corporations from the fraud of their agents, for through them alone can they act; the law requires that such an agent must possess express authority before he can bind his principal by putting in circulation negotiable instruments." ⁶⁶

But the nature of the business and the scope of his employment may be such as to give him such authority,⁶⁷ as where the act is in

"The rule is general that no managing agent of a corporation, except the cashier of a bank, possesses implied power to bind it by issuing, accepting, or indorsing on its behalf negotiable instruments." Where, therefore, the general manager of a railroad corporation executed and delivered to a director thereof, at the instigation of such director, certain promissory notes of the corporation made payable to such director, the act of the manager being without express authority, the director could not make claim to the validity of the notes on the ground that the execution thereof was within the apparent scope of the powers of the general manager, the director being presumed to know of any express powers which had been delegated to the general manager. *Baines v. Coos Bay Nav. Co.*, 45 Ore. 307, 77 Pac. 400.

He has no implied power to draw sight drafts and have them immediately cashed by a bank before being presented for payment. *Bank of Commerce v. Baird Min. Co.*, 13 N. M. 424, 85 Pac. 970.

He has no authority to draw checks in excess of corporate funds where limited in his expenditures to profits or receipts from the business. *Smith v. Courant Co.*, 23 N. D. 297. 136 N. W. 781.

⁶⁶ *Baines v. Coos Bay Nav. Co.*, 45 Ore. 307, 310, 77 Pac. 400.

⁶⁷ *United States. Glidden & Joy Varnish Co. of Ohio v. Interstate Nat. Bank of Kansas City*, 69 Fed. 912.

District of Columbia. See *La Normandie Hotel Co. v. Security Trust Co.*, 38 App. Cas. 187.

Georgia. *Merchants' Bank of Macon v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Illinois. *Matson v. Alley*, 141 Ill. 284, 31 N. E. 419, aff'g 41 Ill. App. 72; *Gane Bros. & Co. v. Loemo Printing Co.*, 46 Ill. App. 456.

Massachusetts. *Bates v. Keith Iron Co.*, 7 Metc. 224.

Nevada. *Judell Co. v. Goldfield Realty Co.*, 32 Nev. 351, 108 Pac. 455.

New York. *Rathbun v. Snow*, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Hascall v. Life Ass'n of America*, 66 N. Y. 616, 5 Hun 151; *Craig Medicine Co. v. Merchants' Bank*, 59 Hun 561, 14 N. Y. Supp. 16; *Fensterer v. Pressure Lighting Co.*, 85 Misc. 621, 149 N. Y. Supp. 49; *Munn v. Commission Co.*, 15 Johns. 44, 8 Am. Dec. 219; *Negley v. Counting Room Co.*, 1 N. Y. St. Rep. 298.

Ohio. *Andres v. Morgan*, 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

Texas. See *Knox City Milling Co. v. Warren*, — Tex. Civ. App. —, 141 S. W. 1007.

Washington. *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495; *Citizens' Nat. Bank of Tacoma v. Wintler*, 14 Wash. 558, 53 Am. St. Rep. 890, 45 Pac. 38.

At least he may execute a note to pay an account where there is no cash on hand. *Francis v. Western Screen Co.*, 22 Cal. App. 32, 133 Pac. 327.

the usual course of the business,⁶⁸ at least where he is the sole stockholder,⁶⁹ or where that has been the custom for several years.⁷⁰ Of course, a general manager has power to execute notes, where it is shown that on other occasions, before and after the execution of the note in question, he had executed similar papers in the name of and in behalf of the company, to the knowledge of the company.⁷¹ In some states, however, the power to execute notes seems to be limited to cases of urgent necessity;⁷² and the general manager of a non-trading corporation, such as a public service corporation, ordinarily has no power to execute notes for borrowed money.⁷³

A branch manager in a foreign state who opens a bank account in the name of the corporation has implied power, where the account is overdrawn, to execute demand notes in the name of the corporation therefor. *Hennessy Bros. & Evans Co. v. Memphis Nat. Bank*, 129 Fed. 557.

Express power "generally to conduct the affairs of the corporation, subject to the direction of the president and this board" confers authority to execute notes for the corporation where the exigencies of its business require such transactions. *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212.

⁶⁸ *Gane Bros. & Co. v. Loemo Printing Co.*, 46 Ill. App. 456.

The agent of a manufacturing company empowered by its by-laws to manage its affairs according to his best ability and discretion, to properly collect all sums that may become due to the corporation, and to disburse them according to the order of the board of directors, has authority, unless controlled by the board of directors, to give the note of the corporation to pay workmen, when there are no funds on hand with which to pay them. *Bates v. Keith Iron Co.*, 7 Metc. (Mass.) 224.

An officer of a corporation, being intrusted with a note, with blanks to be filled up, and the name of the corporation on the back, has implied au-

thority to fill up the blanks, and to bind the corporation as an indorser by delivering the note after a signature by the maker. *Johnson v. Weed & Gumaer Mfg. Co.*, 103 Wis. 291, 79 N. W. 236.

⁶⁹ *Africa v. Duluth News Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019.

⁷⁰ *Cadillac State Bank v. Cadillac Stave & Heading Co.*, 129 Mich. 15, 88 N. W. 67, 8 Det. L. N. 851.

⁷¹ *Livermore v. Ayres*, 86 Kan. 50, 119 Pac. 549.

⁷² *Baines v. Coos Bay Nav. Co.*, 45 Ore. 307, 312, 77 Pac. 400, where a general manager held to have power to execute a note to secure a discharge of a lien which was a pressing demand, and the court said: "As a speedy settlement of the claim became necessary to maintain the credit of the defendant, that it might continue the building of the railroad, we think the court could not say, as a matter of law, in view of the necessity adverted to, that Graham was without implied power to make the notes in question."

Whether the general manager of a corporation possesses implied power to execute a note in the name of the corporation to relieve it from a pressing demand may be submitted to the jury. *Baines v. Coos Bay Nav. Co.*, 45 Ore. 307, 77 Pac. 400.

⁷³ *Sedalia Nat. Bank v. Economy*

The governing rule has been clearly and well stated in regard to managers in general—and what is said is equally applicable to general managers of corporations—as follows: “The authority to bind the principal as a party to negotiable paper is one which the law does not readily imply. Such a power may, however, be conferred expressly, it may result from an established course of dealing, or may arise by necessary implication. As many businesses may be, and constantly are, conducted without the exercise of this extraordinary power, the mere fact that one is authorized to manage a business does not of itself alone imply that he may bind his principal by making, accepting, or indorsing negotiable paper. Where, however, the business is of a sort ordinarily conducted largely upon credit, and to which the making of negotiable paper may fairly be regarded as incident, an agent given a general authority of management may be found to have the authority to execute such paper.”⁷⁴

§ 2112. — Accommodation paper. In any event, a general manager has no implied authority to make, draw, accept or indorse notes or bills for the mere accommodation of another.⁷⁵ This subject has already been noticed in considering the powers of officers and agents generally in regard to ultra vires acts.⁷⁶

§ 2113. — Indorsement for transfer. A general manager may indorse commercial paper for transfer, it is usually held,⁷⁷ although

Steam Heating & Electric Co., 145 Mo. App. 319, 130 S. W. 377.

See also *supra*, next preceding section.

⁷⁴ 1 Mechem, Agency (2nd Ed.), § 998.

⁷⁵ American Bonding Co. of Baltimore v. Laigle Stave & Lumber Co., 111 Ark. 151, 163 S. W. 167; Federal Nat. Bank v. Cross Creek & P. Coal Co., 220 Pa. 39, 68 Atl. 1018; Haupt v. Vint, 68 W. Va. 657, 34 L. R. A. (N. S.) 518, 70 S. E. 702.

⁷⁶ See §§ 1910, 1934, 1935, *supra*.

⁷⁷ Ramboz v. Stansbury, 13 Cal. App. 649, 110 Pac. 472; La Normandie Hotel Co. v. Security Trust Co., 38 App. Cas. (D. C.) 187; Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111, 81 N. W. 1034.

When an officer is given general

control and management of the affairs of a corporation, with authority to sign all contracts and conveyances, he has authority to indorse commercial paper in the regular course of the business. *Hiawatha Iron Co. v. John Strange Paper Co.*, 106 Wis. 111, 81 N. W. 1034.

Where a corporation puts an agent in charge of its business, and clothes him with power to sell, collect for goods sold and purchase goods which the corporation has ordered but which are not in stock, the corporation may be barred from asserting that such agent exceeded his apparent authority in paying for the goods so purchased by indorsement of checks of the corporation. *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879.

there is authority to the contrary⁷⁸ on the theory that it is a rule of agency, applicable to all agents, that authority to indorse commercial paper can only be implied where the agent is unable to perform the duties of his agency without the exercise of such authority.⁷⁹ Thus it is held in Illinois that the superintendent of a paper mill who manages the running of the mill has no inherent power to indorse a corporate check for transfer.⁸⁰ However, in any event, a manager may, by the custom and usage of the corporation, be authorized to indorse and transfer commercial paper.⁸¹

§ 2114. Purchases—In general. The general manager or general agent of a corporation has implied authority to purchase supplies and materials, necessary office furniture, etc., for the use of the corporation in its business, unless there are restrictions on his powers in its management.⁸² However, in so far as the right of the general manager to make purchases for the corporation is concerned, the size

⁷⁸ *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L. R. A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, rev'g 99 Ill. App. 108.

⁷⁹ *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L. R. A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, rev'g 99 Ill. App. 108.

A general superintendent of a manufacturing company is not apparently authorized to indorse checks merely because he has them in his possession, they having been given to him for goods purchased of the company. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L. R. A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, rev'g 99 Ill. App. 108.

⁸⁰ *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 59 L. R. A. 657, 93 Am. St. Rep. 113, 65 N. E. 136, rev'g 99 Ill. App. 108.

⁸¹ *Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

⁸² *California. Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399.

Colorado. Union Pac., D. & G. Ry. Co. v. McCarty, 3 Colo. App. 530, 34 Pac. 767.

Illinois. Matson v. Alley, 141 Ill. 284, 31 N. E. 419, aff'g 41 Ill. App. 72.

Kentucky. Crystal Ice Co. v. Martin, 11 Ky. L. Rep. 581.

Maine. Castle v. Belfast Foundry Co., 72 Me. 167.

Missouri. Kaes v. Lime Co. of St. Louis, 71 Mo. App. 101.

Nebraska. Powder River Live Stock Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019.

New York. Rathbun v. Snow, 123 N. Y. 343, 10 L. R. A. 355, 25 N. E. 379.

Wisconsin. Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84.

The purchasing agent of a railroad corporation, authorized generally to "buy all materials and supplies in general use in every department of the service," and named in the by-laws as one of the officers authorized to conduct the company's business, may make yearly contracts for supplies. *Levey v. New York Cent. R. Co.*, 4 N. Y. Misc. 415, 24 N. Y. Supp. 124.

of the business and the amount of the purchase are material matters.⁸³ Generally, it is held that he may purchase machinery for the plant,⁸⁴ although in some cases such power has been denied.⁸⁵ So a manager in charge of the business of a fruit concern at a certain place has apparent authority to buy fruit.⁸⁶ And a manager of a retail store has apparent power to replenish stock.⁸⁷ He may buy an account register to use in the business.⁸⁸ On the other hand, he has no authority to purchase property for sale, where dealing in such property is not within the business authorized by the charter of the corporation.⁸⁹ For instance, the manager of a wholesale grocery company cannot purchase a stock of groceries and store fixtures from a retail grocer, where the company had never carried on any business other than a wholesale business and was then considering whether to enter the retail field.⁹⁰ However, the manager of a wholesale grocery company has power to purchase all the goods of a retail grocery company, in part to secure a debt due from the latter;⁹¹ and the power to make a purchase in order thereby to collect a debt is not affected by the fact that another reason prompting the purchase was beyond his powers as a general manager.⁹² So it has been held that the general manager of a wholesale and retail grocery company has apparent authority to purchase fertilizers for resale, regardless of private instructions of the president not to handle fertilizers, which were not known to the seller and although the company had never

⁸³ *Grand Rapids Elec. Co. v. Walsh Mfg. Co.*, 142 Mich. 4, 105 N. W. 1, 12 Det. L. N. 639, where power of local manager to purchase a dynamo costing over \$600, necessary for the lighting plant of the company, was held a question for the jury.

⁸⁴ *Benford Lumber Mfg. Co. v. Knox*,—Tex. Civ. App.—, 168 S. W. 32, purchase of steam log loader for lumber manufacturing company. See also *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.*,—Tex. Civ. App.—, 167 S. W. 256.

⁸⁵ It has been held that the general manager of a milling company has no authority, merely by virtue of his office, to bind the company by contracts for the purchase of machinery. *Victoria Gold Min. Co. v. Fraser*, 2 Colo. App. 14, 29 Pac. 667. But see *Crystal*

Ice Co. v. Martin, 11 Ky. 'L. Rep. 581.

⁸⁶ *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399, purchase of oranges by manager of packing house.

⁸⁷ *Spokane Merchants' Ass'n v. Clere Clothing Co.*, 84 Wash. 616, 147 Pac. 414.

⁸⁸ *Monon Lumber Co. v. American Case & Register Co.*, 184 Ind. 11, 110 N. E. 196.

⁸⁹ *Getty v. C. R. Barnes Milling Co.*, 40 Kan. 281, 19 Pac. 617.

⁹⁰ *Gulf Grocery Co. v. Crews*,—Tex. Civ. App.—, 146 S. W. 654.

⁹¹ *Crews v. Gulf Grocery Co.*,—Tex.—, 182 S. W. 1096, rev'g—Tex. Civ. App.—, 146 S. W. 654.

⁹² *Crews v. Gulf Grocery Co.*,—Tex.—, 182 S. W. 1096, rev'g—Tex. Civ. App.—, 146 S. W. 654.

before handled fertilizers.⁹³ Whether a general manager has power to purchase an automobile would seem to depend somewhat on whether it was bought for his private use or for use in the business of the company, together with his apparent power.⁹⁴ He cannot buy an automobile, it seems, where merely the state agent of a foreign corporation engaged in manufacturing and selling liquor.⁹⁵ He may accept a sample of goods to be manufactured and bind the corporation thereby.⁹⁶ "It is doubtless true," said the court in a Texas case, "that a general manager of a corporation may do every necessary, proper or customary thing in furtherance of the company's established business, but the power to buy and establish another distinct business would clearly have to be expressly conferred."⁹⁷ If the corporation is one organized to buy and sell land, he may purchase real estate, at least where expressly authorized.⁹⁸

§ 2115. — Purchase of or subscriptions to stock of corporation.

He has no power to subscribe for the stock of another corporation⁹⁹ nor to purchase the capital stock of his own corporation¹ or of another corporation.² But he may purchase stock of another corporation where the board of directors has authorized such purchase without designating any person to make the purchase; and where the resolution fixed the price per share at which the stock was to be bought the manager may buy for less and obtain longer terms of payment.³

⁹³ "The buying and selling of commercial fertilizers, though not necessarily implied, was not so extraneous to the business, nor so inadapated to its general character and conduct, as to suggest to plaintiff any want of authority in a general manager and purchaser of stocks to buy them for resale as other commodities were handled." *Dadeville Union Warehouse & Wholesale Grocery Co. v. Jefferson Fertilizer Co.*, 194 Ala. 683, 69 So. 918.

⁹⁴ *Western Investment & Land Co. v. First National Bank of Denver*, 23 Colo. App. 143, 128 Pac. 476.

⁹⁵ *Studebaker Bros. Co. of New York v. R. M. Rose Co.*, 65 N. Y. Misc. 322, 119 N. Y. Supp. 970.

⁹⁶ *Roren Drop Forging Co. v. Union*

Manufacturing & Drop Forging Co., 37 R. I. 396, 92 Atl. 1018.

⁹⁷ *Manhattan Liquor Co. v. Joseph A. Magnus & Co.*, 43 Tex. Civ. App. 463, 94 S. W. 1117.

⁹⁸ *California & Arizona Land Co. v. Cuddeback*, 27 Cal. App. 450, 150 Pac. 379.

⁹⁹ *W. L. Wells Co. v. Gastonia Cotton Mfg. Co.*, 118 Fed. 190, aff'd 128 Fed. 369.

¹ *Nunez Gin & Warehouse Co. v. Moore*, 10 Ga. App. 350, 73 S. E. 432.

² Cannot purchase stock of another corporation, where the business of the corporation was to buy and sell grain, etc., and conduct a line of elevators. *Porter v. Lien*, 36 S. D. 18, 153 N. W. 905.

³ *Adam v. New England Inv. Co.*, 33 R. I. 193, 80 Atl. 426.

So it has been held that he may purchase shares of stock in another corporation, where not ultra vires, especially where the general manager was put in by the owner of nearly all the stock of the corporation, who gave the manager very broad authority and allowed him to do practically as he pleased.⁴

§ 2116. Sales—General rules. The extent of the power of the general manager to dispose of corporate property, out of the usual course of its business, has been said to depend “largely upon the character of the business, the charter, by-laws, etc.”⁵ The general manager cannot sell all the property of the corporation.⁶ He cannot dispose of property required for the performance of its corporate functions and thus terminate its business.⁷ So a general manager of a corporation cannot, on behalf of the corporation, agree to credit on a purchase from the corporation by a third person, a debt owed by him individually.⁸ Authority to buy and pledge the credit of the company for the price does not include power to sell or pledge the property so purchased.⁹

§ 2117. — Personal property. The general manager or superintendent of a corporation has authority to sell and transfer its goods and other personal property, and its choses in action, in the usual course of its business,¹⁰ his power being limited to sales of this char-

⁴ *Parker v. Hill*, 68 Wash. 134, 122 Pac. 618.

⁵ *Asheville Supply & Foundry Co. v. Machin*, 150 N. C. 738, 64 S. E. 887, where the court added: “We could not say, as a matter of law, in the absence of any evidence on these points, that he had such power.”

⁶ *Trent v. Sherlock*, 24 Mont. 255, 61 Pac. 650, aff’d 26 Mont. 85, 66 Pac. 700.

⁷ *Lord v. United States Transp. Co.*, 143 N. Y. App. Div. 437, 128 N. Y. Supp. 451, holding that general manager of water transportation company had no power to sublease a pier used by the company.

⁸ “When any transaction in which he attempts to act as the agent of such corporation is one in which he is also acting in his own behalf—

which fact, as in the case at bar, is known to the party with whom he is dealing—the presumption in favor of the power of such agent or officer ceases.” *Clow-Schaaf Lumber Co. v. Kass*, 30 S. D. 497, 138 N. W. 1120.

⁹ *Trent v. Sherlock*, 24 Mont. 255, 265, 61 Pac. 650, aff’d 26 Mont. 85, 66 Pac. 700.

¹⁰ *California*. *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Seeley v. San Jose Independent Mill & Lumber Co.*, 59 Cal. 22; *McKiernan v. Lenzen*, 56 Cal. 61.

Colorado. *Robert E. Lee Silver Min. Co. v. Omaha & Grant Smelting & Refining Co.*, 16 Colo. 118, 26 Pac. 326.

Indiana. *Blake v. Holley*, 14 Ind. 383.

Michigan. *Walker v. Detroit Tran-*

acter.¹¹ Thus his power to sell includes the sale of goods manufactured or produced by the company.¹² If the buying and selling of saloons is a part of the ordinary business of a brewing company, he may sell the furniture and fixtures of a saloon with its goodwill and license.¹³ If in charge of the construction of a standard gauge track in place of a narrow gauge one, he may sell narrow gauge ties taken out while he was broadening the road.¹⁴ But apparent power, from acquiescence, to loan machinery or equipment for use elsewhere does not show authority to alienate the property, by custom or usage.¹⁵ So the securing of fresh capital by the sale of additional stock, or contracting to pay commissions therefor, is not within the implied powers of the president acting as general manager, since not an ordinary business transaction of the corporation.¹⁶ And a

sit Ry. Co., 47 Mich. 338, 11 N. W. 187.

Minnesota. Peterson v. Mille Lacs Lumber Co., 51 Minn. 90, 52 N. W. 1082.

Mississippi. Carey-Halliday Lumber Co. v. Cain, 70 Miss. 628, 13 So. 239.

Missouri. Emmons v. Excelsior Distilling Co., 9 Mo. App. 578.

Texas. Hamm v. Drew, 83 Tex. 77, 18 S. W. 434; National Bank of Jefferson v. Goolsby, 12 Tex. Civ. App. 362, 35 S. W. 713.

Where the general manager of a mining company is authorized to "take charge of the business of selling of ores mined," he has authority to enter into a contract with a smelting company for a sale to it of all the ore mined within a given period. Robert E. Lee Silver Min. Co. v. Omaha & G. Smelting & Refining Co., 16 Colo. 118, 26 Pac. 326.

¹¹ Alabama Nat. Bank v. O'Neil, 128 Ala. 192, 29 So. 688; Hadden v. Linville, 86 Md. 210, 38 Atl. 37; Hyde v. Larkin, 35 Mo. App. 365; First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co., 116 N. C. 827, 21 S. E. 948.

The superintendent of a mining company has no authority to make a

bill of sale of ore mills. Trent v. Sherlock, 24 Mont. 255, 61 Pac. 650, aff'd 26 Mont. 85, 66 Pac. 700.

¹² Valley Lumber Co. v. McGilvery, 16 Idaho 338, 101 Pac. 94; Kitzmiller v. Pacific Coast & N. Packing Co., 90 Wash. 357, 156 Pac. 17.

A manager of sales of a manufacturing corporation has power to "direct and contract in regard to the usual running business of selling its wares." Barber v. Stromberg-Carlson Tel. Mfg. Co., 81 Neb. 517, 520, 18 L. R. A. (N. S.) 680, 129 Am. St. Rep. 703, 116 N. W. 157.

Agreement to pay for furniture in performing dental work for the general manager, where not known to the corporation or its directors, is not binding on the company. Bowditch Furniture Co. v. Jones, 74 Conn. 149, 50 Atl. 41.

¹³ Freyberg v. Los Angeles Brewing Co., 4 Cal. App. 403, 88 Pac. 378.

¹⁴ Henningsen v. Tonopah & G. R. Co., 33 Nev. 208, Ann. Cas. 1913D 1008, 119 Pac. 774, 111 Pac. 36.

¹⁵ Danglede & Robinson Min. Co. v. Mexico-Joplin Land Co.,—Mo. App.—, 190 S. W. 35.

¹⁶ In re Continental Engine Co., 234 Fed. 58.

manager cannot, of his own motion, undertake the sale of the company's bonds.¹⁷ But it has been held that he may sell stock of the company under an agreement to repurchase it at the buyer's option.¹⁸ Where the manager of a company engaged in catching, canning and selling salmon, agreed to sell ten thousand cases of salmon at a fixed price, in advance of the season's catch and of the opening market price as fixed by an association to which the corporation belonged, but at about the then current price, the contract was held binding on the company, the price having gone up in the meantime.¹⁹

§ 2118. — Real property. The general manager has no authority to sell and convey the real estate of the corporation, unless specially empowered to do so,²⁰ although he may be expressly given such power by the charter, or by the stockholders or directors.²¹ However, the managing agent of a real estate corporation has authority to contract for the sale of certain of the corporate property, and to make a representation that the corporation will rent the property for the purchaser for an amount sufficient to take care of the instalments of the purchase price specified by the contract of sale.²²

§ 2119. Assignment of choses in action. The general manager may assign accounts due the corporation,²³ and may assign claims, espe-

¹⁷ East Cleveland R. Co. v. Everett, 19 Ohio Cir. Ct. 205, 10 Ohio Cir. Dec. 493.

¹⁸ Sweeney v. United Underwriters Co., 29 S. D. 576, 137 N. W. 379.

¹⁹ Kitzmiller v. Pacific Coast & N. Packing Co., 90 Wash. 357, 156 Pac. 17, where the court said: "Merchandise may be, and often is, sold in advance of its manufacture or production, and sometimes at a firm or fixed price and sometimes at a variable, future price. * * * Whether it is better to sell at a fixed or firm price or at a variable future price depends chiefly upon the judgment and the condition of the seller. Kildall, as general manager, had apparent authority to exercise his judgment in the matter."

²⁰ Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Hartford Iron Min. Co. v. Cambria Min. Co., 80 Mich. 491, 45 N. W. 351; Gillis v. Bailey, 17 N. H.

18; Schetter v. Southern Oregon Co., 19 Ore. 192, 24 Pac. 25.

He cannot sell the lands of a land and cattle company. Hurlbut v. Gai-nor, 45 Tex. Civ. App. 588, 103 S. W. 409.

He cannot sell land, nor make agreements in connection therewith. American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co., — Tex. Civ. App. —, 155 S. W. 286.

²¹ Authority "to make contracts of sale of the lands" of the corporation does not authorize a conveyance as attorney in fact of the corporation. Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79.

"Whether or not he had authority is a matter of proof aliunde the conveyances." Dothan Lumber Co. v. Bell Lumber Co., 193 Ala. 399, 69 So. 419.

²² Harvey v. Sparks Bros., 45 Wash. 578, 88 Pac. 1108.

²³ Preston v. Central California

cially where it has been the custom for him to do so.²⁴ He may transfer the interest of the company in an executory contract which the company was unable to carry out.²⁵ And it is within the apparent scope of the manager of an electric company to assign a part of the sum due the corporation on a contract to one to whom the corporation is indebted.²⁶ The right to transfer commercial paper by indorsing it has already been noticed.²⁷

§ 2120. Gifts and dedications. In the absence of special authority or custom, a corporate officer is without implied power to sell the corporate assets, and, of course, it does not lie within his power to make a gift thereof to a stranger.²⁸ So it does not lie within the implied power of the general manager to dedicate land of the corporation to a public use.²⁹ But a director of a gas company may be general manager with apparent power to agree to furnish gas free for a certain period to induce a brick company to locate its plant in the town.³⁰

§ 2121. Mortgage, pledge or lien. Although there is some authority to the contrary,³¹ it is generally held that neither a mere superintendent nor a general manager has implied authority to mortgage or pledge the real or personal property or the choses in action of the corporation.³² As said in a recent federal decision, "the mortgaging

Water & Irrigation Co., 11 Cal. App. 190, 104 Pac. 462.

He may, at least under the direction of the president, assign an ordinary open account to a creditor of the corporation. *Kentucky Consumers' Oil Co. v. Continental Fuel Co.*, 171 Ky. 748, 188 S. W. 855.

²⁴ *Reid v. Clay*, 134 Cal. 207; 66 Pac. 262.

He may assign moneys to become due under a contract for a public improvement to be constructed by the corporation. *Cope v. C. B. Walton Co.*, 77 N. J. Eq. 512, 76 Atl. 1044.

²⁵ *Tevis v. Hammersmith* (Ind. App.), 81 N. E. 614.

²⁶ *Howland Bros. & Cave v. Barre Sav. Bank & Trust Co.*, 89 Vt. 290, 95 Atl. 679.

²⁷ See § 2113, *supra*.

²⁸ *Cassville Roller Milling Co. v. Aetna Ins. Co.*, 105 Mo. App. 146, 79 S. W. 720.

²⁹ *Town of West Point v. Bland*, 106 Va. 792, 56 S. E. 802; *Hast v. Piedmont & C. R. Co.*, 52 W. Va. 396, 44 S. E. 155.

But a principal agent of a corporation authorized to lay out its grounds, in order to dispose of them, may lay out and dedicate appropriate parts of the land for streets, etc. *State v. Atherton*, 16 N. H. 203.

³⁰ *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.*, 27 Okla. 180, 111 Pac. 326.

³¹ See *infra*, this section. See also *Sherman v. Fitch*, 98 Mass. 59, mortgage of personal property.

³² *United States. In re Plymouth Elevator Co.*, 191 Fed. 633. Compare

of property to secure a past-due indebtedness is certainly not an act done in the usual course of current business. It is a first step to what generally terminates in bankruptcy and destruction of the business. We cannot give our assent to the exercise of such potentially destructive power by a chief executive officer of a business corporation without authority of the board of directors or stockholders themselves."³³ Express authority to buy and sell does not authorize a pledge or mortgage.³⁴ So he has no authority to place liens on corporate real estate,³⁵ and there is a like decision as to a lien upon personal property.³⁶ A fortiori, he has no authority to mortgage corporate property to secure his own debt or the debt of another.³⁷

On the other hand, where a general manager is given practically the powers of the board of directors³⁸ or where the board becomes inactive and acquiesces in all the acts of one acting as general manager,³⁹ a mortgage executed by him is binding upon the company.

Poole v. West Point Butter & Cheese Ass'n, 30 Fed. 513.

Maryland. See *Buchwald Transfer Co. v. Hurst*, 111 Md. 572, 19 Ann. Cas. 619, 75 Atl. 111.

New Hampshire. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

Oregon. *Luse v. Isthmus Transit R. Co.*, 6 Ore. 125, 25 Am. Dec. 506.

Vermont. *Whitwell v. Warner*, 20 Vt. 425.

He cannot pledge or mortgage corporate property for antecedent debts. *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731.

A general manager of a mining company has no power to mortgage all its personal property. *Danglade & Robinson Min. Co. v. Mexico-Joplin Land Co.*, — Mo. App. —, 190 S. W. 35.

³³ *T. E. Wells & Co. v. Sharp*, 208 Fed. 393, 398.

³⁴ *Trent v. Sherlock*, 24 Mont. 255, 61 Pac. 650, aff'd on rehearing 26 Mont. 85, 66 Pac. 700.

³⁵ *El Fresno Irrigated Land Co. v.*

Bank of Washington, — Tex. Civ. App. —, 182 S. W. 701.

³⁶ *Whitwell v. Warner*, 20 Vt. 425.

³⁷ *Edenborn v. Blacksher*, 137 La. 894, 69 So. 737.

³⁸ Where the directors of a corporation, which owned a sawmill and store and a portion of the town site at the place where they were situated, which was at a distance from the office of the company and the residence of the directors and other officers, appointed a general manager, "with full power to manage and conduct the business of the corporation," and such manager conducted the business for two years, buying logs and manufacturing them into lumber, which he sold, hiring and discharging men, selling town lots, and receiving and disbursing the proceeds of the business, it was held that he had authority to execute a mortgage on behalf of the company on the town lots and logs and lumber at the mill, to secure the payment of indebtedness contracted in the management of the business. *Thayer v. Nehalem Mill Co.*, 31 Ore. 437, 51 Pac. 202.

³⁹ *American Nat. Bank v. Wheeler-*

Thus, one acting as general manager, where in fact the corporation and where he has conducted and managed the business from its inception as if he owned it individually, without objection from the persons holding the small amount of outstanding stock, may bind the company by a mortgage.⁴⁰ So where the articles of incorporation do not provide for any board of directors, but commit the entire management of the business to three executive officers, and the company never had a meeting nor adopted by-laws nor had an election, such officers may execute a mortgage.⁴¹ Moreover, if there is power to borrow money on the part of a general manager, it would seem that he may pledge personal property of the corporation as collateral for the loan.⁴² Furthermore, it was said in an early California case "the result of the cases seems to be, that where the management of the affairs of a corporation is intrusted to a general managing agent, he has power to assign the choses in action of the corporation to its creditors, either in payment of, or as security for the payment of, a precedent debt of the corporation, without express authority from the board of directors, and an assignment so made is valid. The presumption is that the assignment was made by one having competent authority."⁴³

Of course, authority may be expressly given to execute mortgages and pledge property in the course of business, or in a particular

Adams Auto Co., 31 S. D. 524, 141 N. W. 396.

Where the stockholders of a corporation, by their direction or acquiescence, invest the executive officers with the powers and functions of the board of directors as a continuous and permanent arrangement, the board being entirely inactive, and the officers performing all its duties, a mortgage on the property of the corporation, executed in its behalf by such officers, is valid, although not authorized by any vote of the stockholders or directors. *Cunningham v. German Ins. Bank*, 101 Fed. 977.

Where the corporation is without a board of directors, or where the board of directors while existing nominally are wholly inactive, and the active charge of the corporate affairs is in the hands of an officer, and, either by

direct act or by acquiescence, the stockholders have authorized such officer to exercise the functions of the board of directors, such officer may execute a mortgage on the personal property of the corporation for the benefit of the corporation which will be binding upon it. *Garmany v. Lawton*, 124 Ga. 876, 110 Am. St. Rep. 207, 53 S. E. 669.

⁴⁰ *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 95 Fed. 23.

⁴¹ *Bell & Coggeshall Co. v. Kentucky Glass-Works Co.*, 20 Ky. L. Rep. 1684, 50 S. W. 2, modifying 20 Ky. L. Rep. 1089, 48 S. W. 440.

⁴² *Fay v. Noble*, 12 Cush. (Mass.) 1.

⁴³ *McKiernan v. Lenzen*, 56 Cal. 61, 64, quoted and followed in *Dollar v. International Banking Corporation*, 13 Cal. App. 331, 109 Pac. 499.

instance.⁴⁴ For instance, authority conferred by the directors on the president to manage the finances and prudential affairs of the company according to his best judgment, and to execute any contract or instrument deemed by him necessary or prudent in the conduct of the company's affairs, empowers him to mortgage all the personal property of the corporation.⁴⁵

§ 2122. Leases and contracts of hire. Generally, the general manager has authority to lease or hire property for use in connection with the business.⁴⁶ For instance, he may rent necessary premises for the offices or other business purposes of the corporation.⁴⁷ And an officer in charge of one department of a business has authority to lease room necessary for storage for property under his control.⁴⁸ Likewise, the superintendent of a taxicab company which occupies a building with its automobiles, who has authority to employ and discharge men and is in active charge of the building, has apparent power to lease a shop in the building for trimming and painting, under an agreement to do all the company's work at a certain per cent. less than the other shops and to pay a small cash rental.⁴⁹ So the general manager of a water transportation company may hire or charter vessels in the usual course of business.⁵⁰ A manager may hire a typewriting ma-

⁴⁴ A vote of the directors authorizing execution of a chattel mortgage on all the corporate property to secure certain creditors, reserving to the company the right to sell its goods and manufactures in the ordinary course of business, does not authorize a mortgage giving the trustee power to take possession if he should deem himself insecure, to continue the business of the company, to buy new stock and materials, to complete manufactures, to dispose of the property, and out of the proceeds to pay certain debts and turn over the surplus to the corporation. *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645.

⁴⁵ *National State Bank of Terre Haute v. Sandford Fork & Tool Co.*, 157 Ind. 10, 60 N. E. 699.

⁴⁶ See *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 451, 69 S. E. 734.

He may, it seems, lease real estate, in case of a railroad company. *West*

v. Washington R. Co., 49 Ore. 436, 90 Pac. 666.

⁴⁷ *Phillips & Butterff Mfg. Co. v. Whitney*, 109 Ala. 645, 20 So. 333; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 252, 19 So. 318; *Singer Mfg. Co. v. McLean*, 105 Ala. 316, 16 So. 912; *Hawley v. Gray Bros. Artificial Stone Paving Co.*, 106 Cal. 337, 39 Pac. 609; *William Wicke Co. v. Kaldenberg Mfg. Co.*, 21 N. Y. Misc. 79, 46 N. Y. Supp. 937; *Baltimore & P. Steamboat Co. v. McCutcheon*, 13 Pa. St. 13.

⁴⁸ *Drew v. Billings-Drew Co.*, 132 Mich. 65, 92 N. W. 774, 9 Det. L. N. 513.

⁴⁹ *Slocum v. Seattle Taxicab Co.*, 67 Wash. 220, 39 L. R. A. (N. S.) 435, 121 Pac. 67.

⁵⁰ *Tennessee River Transp. Co. v. Kavanaugh*, 101 Ala. 1, 13 So. 283.

The general agent of a steamship company, having no vessels of its own,

chine for the office.⁵¹ But a superintendent has no power to hire a horse and buggy for his employees, where not necessary or beneficial in the transaction of the corporate business because the company had horses and conveyances of its own, and where the company was not in the habit of furnishing conveyances for its employees.⁵²

Likewise, the manager may, in a proper case, lease property belonging to the corporation.⁵³ Thus, he has authority to re-rent, in the name of the company, the office which he occupies as agent.⁵⁴ On the other hand, the manager of a mining company cannot lease its mining property.⁵⁵ So it has been held that a general manager cannot agree to pay to a lessee a specified sum to surrender his rights under the lease;⁵⁶ but it is held that one who is both secretary and treasurer of a hotel company, and who leased its property, collected the rent, etc., has apparent authority to effectuate a surrender of the lease.⁵⁷

§ 2123. Insurance. Undoubtedly the general manager may insure the corporate property. So he may agree to insure property left in the possession of the corporation to be worked upon and returned.⁵⁸

who has been allowed to charter vessels in the past, has implied power to charter vessels in the course of its business. *Prentice v. United States & C. A. Steamship Co.*, 58 Fed. 702.

⁵¹ *In re All Star Feature Corporation*, 232 Fed. 1004; *Phillips v. International Text Book Co.*, 26 Pa. Super. Ct. 230.

⁵² *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 So. 425.

⁵³ But the general agent of a corporation, having charge of its lands and buildings, cannot, by virtue of a special vote authorizing him to enter and hold certain land, make a lease of the same, after his entry for condition broken, in order to try the title thereto. *Gillis v. Bailey*, 17 N. H. 18.

⁵⁴ *Park v. Kansas City Southern R. Co.*, 58 Pa. Super. Ct. 419.

⁵⁵ *Franklin v. Havalena Min. Co.*, 16 Ariz. 200, 141 Pac. 727.

⁵⁶ *Conqueror Gold Mining & Milling Co. v. Ashton*, 39 Colo. 133, 90 Pac. 1124.

⁵⁷ *Commercial Hotel Co. v. Brill*, 123 Wis. 638, 101 N. W. 1101.

⁵⁸ "At this day the use of insurance to protect property against fire is so common that it cannot be considered as being beyond the scope of an agreement for the storage and safe-keeping of property left to be worked upon. The danger of fire was only incidental, and the procuring of insurance is the modern and most effective way of guarding against that risk. If there was an agreement, made by Raeder, to procure insurance, it would be as much in the course of the business and as much an incident thereof as the protection of the material against the weather or against robbery"; and hence where certain books which the plaintiff delivered to a book binding corporation to be bound were destroyed by fire, plaintiff was permitted to show in an action for damages that the manager had agreed to insure the books against fire. *Pauksztis v. Raeder Blank Book, Lithographing & Printing Co.*, 212 Pa. 403, 61 Atl. 901.

§ 2124. Gambling contracts. The general manager has no power to enter into gambling contracts. Thus, he cannot speculate on the Chicago Board of Trade, where the corporation is organized to buy grain and live stock direct from producers and ship to the general markets and to operate grain elevators incidental thereto.⁵⁹

§ 2125. Rewards. The general manager or superintendent of a railroad company—and the same would seem to be true of other corporations—may offer a reward for the apprehension and conviction of persons obstructing its track, or committing other offenses against its property.⁶⁰ And the president or other general managing officer of a bank has authority to offer a reward for the apprehension of a defaulting cashier or teller.⁶¹

§ 2126. Guaranty or indemnity. If the corporation itself has power to execute a guaranty, it seems that its general manager has such power in order to further the best interests of the company.⁶² Thus, he may guaranty payment of the price on the purchase of a liquor business by a third person, in order to sell the beer of his brewing company.⁶³ But a sales manager of an electric company, a foreign corporation, has no power to execute an indemnity bond.⁶⁴

§ 2127. Granting licenses. A general manager has no implied authority to grant an easement or give a license in the company's land.⁶⁵

⁵⁹ *Farmers' Co-op. Shipping Ass'n v. George A. Adams Grain Co.*, 84 Neb. 752, 122 N. W. 55.

General manager of grain elevator company cannot speculate in grain on the Chicago exchange. *Strawn Farmers' Elevator Co. v. West*, 189 Ill. App. 213.

⁶⁰ *Central Railroad & Banking Co. v. Cheatham*, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. 828.

⁶¹ *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154, aff'd 66 Ill. App. 577.

⁶² *Constantine v. Kalamazoo Beet Sugar Co.*, 132 Mich. 480, 93 N. W. 1088, 9 Det. L. N. 672; *Hall v. Ochs*, 34 N. Y. App. Div. 103, 54 N. Y. Supp. 4. See *Chicago & M. Tel. Co. v. Type Tel. Co.*, 137 Ill. App. 131, aff'd 236 Ill. 476, 86 N. E. 107.

A beet sugar manufacturing corporation entered into a contract with the assignors of the plaintiff for the raising of a certain amount of sugar beets, which defendant was to use at its plant. It became doubtful whether the raising of a crop would be profitable to the party who had contracted to raise same. The manager of the corporation thereon agreed to indemnify plaintiff if he would agree not to abandon the crop. This act was held to be within the power of the manager, although by a divided court. *Constantine v. Kalamazoo Beet Sugar Co.*, 132 Mich. 480, 93 N. W. 1088.

⁶³ *Hagerstown Brewing Co. v. Gates*, 117 Md. 348, 83 Atl. 570.

⁶⁴ *Portland v. American Surety Co.*, 79 Ore. 38, 154 Pac. 121, 153 Pac. 786.

⁶⁵ *Butte & B. Consolidated Min. Co.*

Thus, a general manager cannot grant a permit to third persons to mine on land leased by the corporation.⁶⁶ But where a part of the business of a corporation was “‘to acquire, sell, and deal in patents and patent rights upon inventions,’” its president and general manager may grant a license to use one of its patents, especially where he is in fact the corporation.⁶⁷

§ 2128. Opening bank accounts. Where the general manager of a corporation is authorized by the board of directors to draw checks on any banks in which the corporation has deposits, he will be deemed to possess power to open up accounts in more than one bank.⁶⁸

§ 2129. Releases or modification of contracts. The general manager or agent of a corporation has no implied authority to release debtors of the corporation without consideration, or to surrender or release a pledge or mortgage without payment.⁶⁹ Thus, a general manager has no authority, after a note is due, to promise the maker that he would look to the payee (indorser) for a settlement and would give the maker no further trouble.⁷⁰ On the other hand, he may release or discharge a mortgage when it has been satisfied.⁷¹

A superintendent authorized “to buy and sell material, and to make all contracts for the same,” has power to release a contract which he has power to make.⁷² A general manager having control of the business of the corporation, with authority to sell goods and to make contracts in the course of the company’s business, has authority to modify or release a contract, or waive performance;⁷³ and it has been

v. Montana Ore Purchasing Co. (Mont.), 55 Pac. 112.

⁶⁶ **Integrity Mining & Milling Co. v. Moore**, 130 Mo. App. 627, 109 S. W. 1057.

⁶⁷ **Bijur Motor Lighting Co. v. Eclipse Mach. Co.**, 237 Fed. 89.

⁶⁸ **Cook v. American Tubing & Webbing Co.**, 28 R. I. 41, 9 L. R. A. (N. S.) 193, 65 Atl. 641.

⁶⁹ **Potts v. Wallace**, 146 U. S. 689, 36 L. Ed. 1135; **Moshannon Land & Lumber Co. v. Sloan**, 109 Pa. St. 532.

⁷⁰ **Muller v. Swanton**, 140 Cal. 249, 73 Pac. 994.

⁷¹ **Hilton v. Advance Thresher Co.**, 8 S. D. 412, 66 N. W. 816.

⁷² **Indianapolis Rolling Mill v. St.**

Louis, Ft. S. & W. R. R., 120 U. S. 256, 30 L. Ed. 639.

⁷³ **Indianapolis Rolling Mill v. St. Louis, Ft. S. & W. R. R.**, 120 U. S. 256, 30 L. Ed. 639, aff’g 26 Fed. 140; **Burley v. Hitt**, 54 Mo. App. 272; **Nichols v. Scranton Steel Co.**, 137 N. Y. 471, 33 N. E. 561. See also **Louisville & N. R. Co. v. Dickey**, 24 Ky. L. Rep. 1710, 72 S. W. 332, and generally 1 **Mechem, Agency** (2nd Ed.), §§ 990, 991.

He may modify an existing contract. **Thomas & Moran v. Kanawha Valley Traction Co.**, 73 W. Va. 374, 80 S. E. 476.

A president or other officer of a corporation having authority to sell

held that he may waive a mechanic's lien for goods sold by him,⁷⁴ although it has also been held that he cannot waive a provision in a contract giving a right to a forfeiture.⁷⁵

A manager or superintendent cannot release or change the terms of a written contract made by the board of directors or trustees.⁷⁶ Thus, he has no power to alter the provisions of a formal agreement under seal entered into by the corporation itself.⁷⁷ So the superintendent of the water plant of a waterworks company has no power to modify the franchise and contract made between the company and the city.⁷⁸ And power expressly conferred on the superintendent of a mining company to make leases does not include power to modify a lease by a change in the terms thereof.⁷⁹

§ 2130. Payments. The general manager of a corporation ordinarily has authority to pay its debts,⁸⁰ and to collect debts due to it.⁸¹

stock for it, and having made a contract to sell the same, has authority, as part of the same transaction, to substitute a new agreement giving the purchaser an option. *White v. Taylor*, 113 Mich. 543, 71 N. W. 871.

An officer authorized to contract for the construction of a railroad has authority to extend the time of performance to a contractor whom he has employed. *Hudson River & W. County Midland R. Co. v. Hanfield*, 36 N. Y. App. Div. 605, 55 N. Y. Supp. 877.

⁷⁴ *Badger Lumber Co. v. Ballentine*, 54 Mo. App. 172, and see generally 1 *Mechem, Agency* (2nd Ed.), § 990.

⁷⁵ *Farmers Pawnee Canal Co. v. Pawnee Water Storage Co.*, 47 Colo. 239, 107 Pac. 286.

⁷⁶ *Boynton v. Lynn Gas Light Co.*, 124 Mass. 197; *Lonkey v. Succor Mill & Mining Co.*, 10 Nev. 17.

⁷⁷ *Mausert v. Christian Feigenspan*, 68 N. J. Eq. 671, 64 Atl. 801, 63 Atl. 610.

⁷⁸ *Illinois Trust & Savings Bank v. Burlington*, 79 Kan. 797, 101 Pac. 649.

⁷⁹ *Aliunde Consol. Min. Co. v. Arnold*, 16 Colo. App. 542, 67 Pac. 28.

⁸⁰ *Seeley v. San Jose Independent Mill & Lumber Co.*, 50 Cal. 22; *Mc-*

Kiernan v. Lenzen, 56 Cal. 61; *Bates v. Keith Iron Co.*, 7 Mete. (Mass.) 224; *Mulcrone v. American Lumber Co.*, 55 Mich. 622, 22 N. W. 67; *Africa v. Duluth News Tribune Co.*, 82 Minn. 283, 83 Am. St. Rep. 424, 84 N. W. 1019.

See generally 1 *Mechem, Agency* (2nd Ed.), § 1008.

He is presumed to have authority to pay debts. *Mann v. W. A. Gordon Co.*, 77 Ore. 457, 151 Pac. 704.

He may give a bill of sale of property in payment of a debt. *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87, 67 N. Y. Supp. 10.

⁸¹ *Frost v. Domestic Sew. Mach. Co.*, 133 Mass. 563; *Perry v. Sumrall Lumber Co.*, 95 Miss. 691, 49 So. 263; *Craig Medicine Co. v. Merchants' Bank*, 59 Hun (N. Y.) 561, 14 N. Y. Supp. 16.

See generally 1 *Mechem, Agency* (2nd Ed.), § 996.

Tender may be made to the superintendent and general manager of a corporation where the contract was made with him, and with him only, as representing the corporation. *Birmingham Paint & Roofing Co. v. Crampton* (Ala.), 39 So. 1020.

Where it appeared that an agent of

Power to make sales includes power to accept things other than money in payment.⁸² He may accept notes in payment,⁸³ but not notes known to be worthless;⁸⁴ and power to sell goods manufactured by the company includes power to accept in part payment a debt due from an officer of the selling corporation.⁸⁵ So he may determine the application of payments where the corporation is financially embarrassed.⁸⁶ On the other hand, a statement of a managing agent to the maker of a note that the payee will be looked to for payment and that the maker will not be troubled is not binding on the corporation.⁸⁷ So the fact that he has power to purchase supplies does not include authority to make an agreement that payment for an article purchased shall be postponed for a period of eighteen months, that the obligation shall bear interest beyond the legal rate, and that in the event that the obligation shall not be met at maturity the obligee shall be entitled to an additional sum should he make collection through an attorney.⁸⁸

§ 2131. Compromise and settlement. A general manager may make a settlement of a claim.⁸⁹ Where the president and secretary were allowed to perform all the duties in the management of the corporation, the secretary, in the absence of the president from the state, may

a corporation authorized to publish a newspaper had no authority to bind it to pay money, his duties being confined to the question of circulation and the collection of debts in a certain city with no express power to accept anything but money in settlement of such debts, it was held that an acceptance by him in satisfaction of a debt of certain real estate subject to mortgage with the proviso that the corporation become liable for the payment of such mortgage was not binding on the corporation. *Bristol Sav. Bank v. Judd*, 116 Iowa 26, 89 N. W. 93.

⁸² "It would be a novel proposition indeed, to say that, while a business manager or a corporation might have power to make sales of the corporation's products, yet he would have no power to accept in payment therefor anything other than cash. Transactions of corporations are not always

conducted upon a cash basis; exchanges are frequently made, other goods are taken in payment, or partial payment, for goods sold." *Valley Lumber Co. v. McGilvery*, 16 Idaho 338, 101 Pac. 94.

⁸³ *American Car & Foundry Co. v. Alexandria Water Co.*, 218 Pa. 542, 67 Atl. 861.

⁸⁴ *National Hollow Brake Beam Co. v. Chicago Ry. Equipment Co.*, 226 Ill. 28, 80 N. E. 556, rev'g 123 Ill. App. 533.

⁸⁵ *Valley Lumber Co. v. McGilvery*, 16 Idaho 338, 101 Pac. 94.

⁸⁶ *Ray v. Borgfeldt*, 169 Cal. 253, 146 Pac. 679.

⁸⁷ *Muller v. Swanton*, 140 Cal. 249, 73 Pac. 994.

⁸⁸ *Sanford Cattle Co. v. Williams*, 18 Colo. App. 378, 71 Pac. 889.

⁸⁹ *Bauer v. Northwest Blowpipe Co.*, 75 Ore. 1, 146 Pac. 129.

settle a judgment against the corporation for a smaller sum, pending an appeal and an action against the corporation and its stockholders for discovery of assets, and the corporation cannot escape liability although later on the same day the appellate court reversed the judgment, thereby absolving the corporation from all liability.⁹⁰

§ 2132. Assignment for benefit of creditors. Ordinarily, the general manager of a corporation has no authority to make an assignment for the benefit of creditors;⁹¹ but the powers conferred upon him may be broad enough to include such authority. It has been held that he has such power where he is authorized by the directors "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interests of the company, and to use the corporate seal for such purpose," etc.⁹² So where a corporation held no meetings, and permitted an agent to manage the business in every particular, it was held that he had authority to execute such an assignment.⁹³

§ 2133. Preferring creditors. A general manager cannot prefer certain creditors where the corporation is financially embarrassed.⁹⁴ For instance, if he knows the corporation to be insolvent, he has no power to transfer the bulk of its property to a creditor in payment of a pre-existing debt.⁹⁵ So he has no authority to transfer all the assets of the corporation to a creditor in payment of his claim.⁹⁶

§ 2134. Arrests. A traveling passenger agent assisting a conductor in running an excursion train has apparent authority to cause the arrest of a passenger on proper provocation.⁹⁷ This question will be noticed more fully in a subsequent chapter relating to torts.

⁹⁰ *Nelson-Bethel Clothing Co. v. Pitts*, 141 Ky. 242, 132 S. W. 430.

⁹¹ See *Norton v. Alabama Nat. Bank*, 102 Ala. 420, 14 So. 872; *Hadden v. Linville*, 86 Md. 210, 38 Atl. 37; *Cupit v. Park City Bank*, 20 Utah 292, 58 Pac. 839.

⁹² *Huse v. Ames*, 104 Mo. 91, 15 S. W. 965.

⁹³ *Conely v. Collins*, 119 Mich. 519, 44 L. R. A. 844, 78 N. W. 555.

⁹⁴ *Dooley v. Pease*, 79 Fed. 860; *Wisconsin Marine & Fire Ins. Co.'s*

Bank v. Lehigh & F. Coal Co., 64 Fed. 497.

⁹⁵ *Dooley v. Hadden*, 179 U. S. 646, 45 L. Ed. 357, rev'g 93 Fed. 728, which aff'd 92 Fed. 274, which rev'd 84 Fed. 80.

⁹⁶ *Hadden v. Linville*, 86 Md. 210, 38 Atl. 37; *First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co.*, 116 N. C. 827, 21 S. E. 948.

⁹⁷ *Berry v. Carolina, C. & O. Ry.*, 155 N. C. 287, 71 S. W. 322.

§ 2135. Signing petitions. In Nebraska, it is held that a general manager of a stock yards company has no power to sign a petition for paving a city street upon which the property of the corporation abuts; the court saying that "the act of signing the name of a corporation to a petition for the opening of a highway over its real property, or the paving of a street abutting thereon, whereby a special tax will be assessed and become a charge against the property of the corporation, is one which falls within the managing powers of the board of directors, who are by law and by the articles of incorporation in this case made the managing agents of the corporation; and authority to perform such an act must come from them."⁹⁸ In Kansas, it is held that he will be presumed to have authority to sign a petition for a municipal improvement, in behalf of the corporation, at least where he had previously signed similar petitions and the company had paid out large sums for the improvements petitioned for.⁹⁹

§ 2136. Institution of legal proceedings and incidental matters. A general manager has implied authority to institute necessary legal proceedings in the usual course of business,¹ and to bind the corporation by the execution of an appeal bond.² So he may presumably sign a bond necessary to the issuance of a writ of certiorari.³ But a mere superintendent, not charged with the general management of the corporation, has no authority to institute suits.⁴ It has been held that even a general manager has no authority to confess judgment,⁵ but this is not necessarily so in all cases.⁶

⁹⁸ *Trephagen v. South Omaha*, 69 Neb. 577, 583, 111 Am. St. Rep. 570, 96 N. W. 248.

If a municipality sues to collect a special tax for a public improvement, it has the burden of showing that the general manager who signed the petition for the improvement was authorized so to do. *Trephagen v. South Omaha*, 69 Neb. 577, 111 Am. St. Rep. 570, 96 N. W. 248.

⁹⁹ *Kansas City v. Cullinan*, 65 Kan. 68, 68 Pac. 1099.

The general manager of a town site company will be presumed to have authority to sign a petition for paving a public street as the representative of the company, although the granting of the petition may involve the corporation in the payment of taxes, where

the manager has previously signed such petitions, and upon the granting thereof the corporation has paid large amounts in taxes without objection. *Kansas City v. Cullinan*, 65 Kan. 68, 68 Pac. 1099.

¹ *Frost v. Domestic Sew. Mach. Co.*, 133 Mass. 563. Compare *Pinkerton v. Gilbert*, 22 Ill. App. 568.

² *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

³ *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S. E. 1037.

⁴ *Pinkerton v. Gilbert*, 22 Ill. App. 568.

⁵ *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

⁶ *Gilman v. Heitman*, 137 Iowa 336, 113 N. W. 932, and see § 2055, *supra*,

XX. POWERS OF CASHIERS

§ 2137. Cashiers of corporations other than banks. There is a marked distinction between the cashier of a bank and the cashier of other corporations, so far as his powers are concerned. The cashier of a bank is a high executive officer, while the cashier in corporations other than banks "is nothing generally beyond a head bookkeeper."⁷ A cashier of a corporation other than a bank has no authority to bind it by contracts unless such power is given by the charter, by-laws, or usage, or by the directors.⁸ The cashier of the local office of an insurance company has no authority to extend the time of payment of premiums.⁹ The cashier of a waterworks company has been held, where his authority was more or less expressly restricted, to have no authority to indorse commercial paper in the name of the corporation.¹⁰ But a cashier of a lumber company has apparent authority to apply a payment by a contractor in part to reduce his account for lumber.¹¹

§ 2138. Cashiers of banks—In general. The powers of a cashier of a bank are very broad. There is no other corresponding officer in other corporations except perhaps, in many respects, a general manager. He is the officer who is present and in charge of the bank, and the person who those dealing with the bank assume is the manager.¹² He is "the chief executive officer, through whom the whole financial operations of the bank are conducted."¹³ The powers of cashiers have been extensively stated and discussed in the several leading textbooks on the law relating to banks and banking,¹⁴ and it

relating to powers of president in regard to confession of judgment.

⁷ *Knoxville Water Co. v. East Tennessee Nat. Bank*, 123 Tenn. 364, 131 S. W. 447.

But a mere bookkeeper, although given power to receive money when the superintendent is not in the office, is not a cashier. *Van Damm v. New York Cent. Storage Co.* (N. Y. Misc.), 132 N. Y. Supp. 394.

⁸ *Delta Lumber Co. v. Williams*, 73 Mich. 86, 40 N. W. 940.

⁹ *New York Life Ins. Co. v. O'Dom*, 100 Miss. 219, Ann. Cas. 1914 A 583, 56 So. 379.

¹⁰ "When a corporation, other than a bank, designates one of its office men

as 'cashier,' it does not thereby in any sense hold out such an employee to the world as a managing agent, with authority to indorse and dispose of its commercial paper." *Knoxville Water Co. v. East Tennessee Nat. Bank*, 123 Tenn. 364, 131 S. W. 447.

¹¹ *Julius Seidel Lumber Co. v. Weaver*, — Mo. App. —, 184 S. W. 484.

¹² See *Security Sav. Bank of Wellman v. Smith* (Iowa), 119 N. W. 726.

¹³ 1 *Morse, Banks and Banking* (5th Ed.), § 152, discussing his powers, in general, at length.

¹⁴ See 1 *Morse, Banks and Banking* (5th Ed.), §§ 152-176; 1 *Bolles, Banking*, pp. 311-379.

is not the intention in this connection to state or discuss in detail the rules relating particularly to this class of corporations and the powers of its officers peculiar thereto. At the same time, in order to round out this chapter, it is deemed advisable to state generally the powers of a cashier of a bank.

The cashier of a bank seldom, if ever, has all of his powers expressly defined by the charter or by-laws. By custom, he is the general agent of the bank in dealings with customers in money, notes, and bills, and has charge, as general managing officer, of all its ordinary business. And his implied authority, therefore, extends to all matters which relate to the usual business of such corporations.¹⁵ "The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged."¹⁶ What is said in a late Wisconsin case in regard to a particular cashier well illustrates the position held by him and his relative powers, at least in most banks outside of large cities, where Justice Dodge stated that in the particular case "the cashier was the chief executive officer,

15 United States. *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008; *Fleckner v. Bank of United States*, 8 Wheat. 338, 5 L. Ed. 631.

Alabama. *Everett v. United States*, 6 Port. 166, 30 Am. Dec. 584.

Georgia. *Merchants' Bank of Macon v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Illinois. *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334.

Michigan. *Peninsular Bank v. Hammer*, 14 Mich. 208.

Mississippi. *State v. Commercial Bank of Manchester*, 6 Smedes & M. 218, 45 Am. Dec. 280.

Missouri. *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165.

New Hampshire. *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753.

New York. *Coats v. Donnell*, 94 N. Y. 168,

Pennsylvania. *Lloyd v. West Branch Bank*, 15 Pa. St. 172, 53 Am. Dec. 581.

16 Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 650, 19 L. Ed. 1008.

A bank is bound by the act of its cashier within the apparent scope of his authority where the party with whom he deals is without notice of a limitation placed thereon. "The cashier of a bank is an executive officer, through whom the whole financial operations are conducted. Where one deals with the cashier of a bank in good faith, and without any notice of want of authority on his part, and the act done is within the apparent scope of his authority, the party so dealing may enforce the contract against the bank." *First Nat. Bank of Greenville v. Greenville Oil & Cotton Co.*; 24 Tex. Civ. App. 645, 60 S. W. 828,

with no active superior, except the board of directors, who acted, as do many such boards, only to direct upon doubtful questions specifically submitted to them. In all ordinary business the cashier was as completely the corporation as can well be conceived."¹⁷

It must not be supposed, however, that the cashier of a bank has the power to do every act which is within the powers of the bank. His implied authority is restricted to the usual business of the bank, and does not extend to unusual or extraordinary transactions. For these, special authority from the directors is necessary,¹⁸ or else they must be ratified,¹⁹ or the corporation must be estopped, as it may be, by having clothed the cashier with apparent authority beyond that implied from his office.²⁰ And, of course, the cashier has no implied authority to exceed the powers conferred upon the bank by its charter, unless the directors have habitually allowed him to do so.²¹

The term "ordinary business," it has been said, does not include "a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary";²² and it was held that a cashier has no power to make a special contract with the government for the transfer of money, or other contracts not within the usual business of the bank.²³

¹⁷ *Arnold v. National Bank of Wau-paca*, 126 Wis. 362, 3 L. R. A. (N. S.) 580, 105 N. W. 828.

¹⁸ *United States. United States v. City Bank of Columbus*, 21 How. 356, 16 L. Ed. 130.

Iowa. Schneitman v. Noble, 75 Iowa 120, 9 Am. St. Rep. 467, 39 N. W. 224.

Massachusetts. Foster v. Essex Bank, 17 Mass. 505, 9 Am. Dec. 168; *Salem Bank v. Gloucester Bank*, 17 Mass. 28, 9 Am. Dec. 111.

Mississippi. State v. Commercial Bank of Manchester, 6 Smedes & M. 218, 45 Am. Dec. 280.

Nebraska. Bank of Commerce v. Hart, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

Pennsylvania. Lloyd v. West Branch Bank, 15 Pa. St. 172, 53 Am. Dec. 581.

A bank will not be deemed bound by an act of its cashier in excess of his usual authority in the absence of ratification or estoppel. *Bullard Bros. v. Bank of Madison*, 121 Ga. 527, 49 S. E. 615.

¹⁹ See *infra*, this chapter.

²⁰ *German Nat. Bank v. Grinstead* (Ky.), 52 S. W. 951.

²¹ See § 1910, *supra*.

²² *United States v. City Bank of Columbus*, 21 How. (U. S.) 356, 16 L. Ed. 130.

²³ *United States v. City Bank of Columbus*, 21 How. (U. S.) 356, 16 L. Ed. 130.

The powers of the cashier of a bank may be limited, of course, by express provision in the charter of the bank,²⁴ or in its by-laws, but limitations in the by-laws will not be binding upon persons dealing with him in ignorance of them, and in reliance upon his apparent authority.²⁵

Contracts and other acts of a cashier on behalf of the bank, when not within his implied powers merely by virtue of his office, may be binding because of express authority from the directors, or because of an implied authority by reason of their having acquiesced.²⁶ A cashier may be vested with the powers of a general manager.²⁷ If the directors of a bank intrust the entire management to the cashier, neither the bank nor its receiver can be heard to deny the authority of the cashier to do any acts which it or its directors might lawfully authorize him to do.²⁸ And unauthorized contracts or acts may be expressly or impliedly ratified by the directors. Generally, if they know of a transaction on the part of the cashier, and accept the benefit of it, or fail to repudiate it, a ratification will be implied.²⁹

The cashier cannot delegate his powers to another,³⁰ and the general authority of the cashier to transact business for the bank ceases after the bank has failed.³¹

§ 2139. — Acts done outside of bank or of banking hours. Indorsements and other acts of a cashier within the scope of his express

²⁴ *State v. Commercial Bank of Manchester*, 6 Smedes & M. (Miss.) 218, 45 Am. Dec. 280, 285.

A provision in the charter of a bank that all contracts should be signed by its president and countersigned by its cashier was held not to be applicable to such dealings and transactions as are usually and necessarily performed by the cashier alone, or some other agent. *Carey v. McDougald*, 7 Ga. 84; *Northern Bank of Kentucky v. Johnson*, 5 Cold. (Tenn.) 94.

²⁵ See §§ 502, 1931, *supra*.

²⁶ *Kelsey v. National Bank of Crawford County*, 69 Pa. St. 426 (offer of a reward with the knowledge of the directors).

²⁷ *Metzger v. Southern Bank*, 98 Miss. 108, 54 So. 241.

²⁸ *Davenport v. Stone*, 104 Mich. 521, 53 Am. St. Rep. 467, 62 N. W. 722.

²⁹ *United States. Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49.

Illinois. Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

Maine. Medomak Bank v. Curtis, 24 Me. 36.

Mississippi. Payne v. Commercial Bank of Natchez, 6 Smedes & M. 24.

Pennsylvania. Kelsey v. National Bank of Crawford County, 69 Pa. St. 426; *Bank of Pennsylvania v. Reed*, 1 Watts & S. 101.

Tennessee. First Nat. Bank of Nashville v. Shook, 100 Tenn. 436, 45 S. W. 338.

³⁰ *United States Nat. Bank of Vale v. First Trust & Savings Bank of Brogan*, 60 Ore. 266, 271, 119 Pac. 343.

See also § 1960, *supra*.

³¹ *Casale v. Guion*, 132 N. Y. App. Div. 889, 116 N. Y. Supp. 294.

or implied authority are none the less binding on the bank because they are done outside of the regular banking hours, or elsewhere than at the bank.³² Thus, it has been held that an indorsement on the street after banking hours binds the bank.³³

§ 2140. — Acceptance of deposits and repayment. The cashier of a bank, in the absence of restrictions of which persons dealing with the bank have notice, or are chargeable with notice, has implied authority to receive deposits and pay out the same in the usual course on checks, drafts, etc.,³⁴ to receive and keep special deposits, when

³² *Bissell v. First Nat. Bank of Franklin*, 69 Pa. St. 415; *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis. 663, 7 Am. Rep. 107. See also *Citizens' Bank of Senath v. Douglass*, 178 Mo. App. 664, 161 S. W. 601.

This question is discussed at length in 1 *Morse, Banks and Banking* (5th Ed.), § 168.

³³ *Bissell v. First Nat. Bank*, 69 Pa. St. 415.

³⁴ *United States v. United States City Bank of Columbus*, 21 How. 356, 16 L. Ed. 130; *United States Bank v. Bank of Georgia*, 10 Wheat. 333, 6 L. Ed. 334.

Georgia. Merchants' Bank of Macon v. Rawls, 7 Ga. 191, 50 Am. Dec. 394; *Merchants' Bank of Macon v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Illinois. State Bank v. Kain, 1 Ill. 75.

Maryland. Merchants' Bank v. Marine Bank, 3 Gill 96, 43 Am. Dec. 300.

Massachusetts. Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

Mississippi. State v. Commercial Bank of Manchester, 6 Smedes & M. 218, 45 Am. Dec. 280.

Missouri. Musgrove v. Macon County Bank of Macon, 187 Mo. App. 483, 174 S. W. 171.

New Hampshire. Town of Concord v. Concord Bank, 16 N. H. 26.

South Carolina. Simmons Hardware Co. v. Bank of Greenwood, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502.

But he cannot, unless authorized, pay depositors by assigning to them notes belonging to the corporation, for such a mode of paying depositors is not usual. *Schneitman v. Noble*, 75 Iowa 120, 9 Am. St. Rep. 467, 39 N. W. 224.

A cashier has implied authority to credit a customer with the proceeds of a draft presented to the bank. *German Nat. Bank v. Grinstead (Ky.)*, 52 S. W. 951.

The cashier of a bank has implied authority to transmit money for the bank, and the bank may be held liable for his acts in connection therewith. *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428, 102 Am. St. Rep. 248, 69 N. E. 185.

In receiving money paid on a lease and depositing same in the bank subject to his check, the presumption is that the cashier of the bank is acting in his official capacity. *Knapp v. Saunders*, 15 S. D. 464, 90 N. W. 137.

It may be for the jury to decide whether a cashier, in certain transactions between a depositor and himself, acted as such cashier or merely personally. *Lemon v. Sigourney Sav. Bank*, 131 Iowa 79, 108 N. W. 104.

A bank may be permitted to sue in its own name on a note payable to

such deposits are within the powers conferred upon the bank, or if the bank habitually receives them, but not otherwise,³⁵ and to issue certificates of deposit.³⁶ However, it is not within the implied power of the cashier to pay his personal obligations by crediting the amount thereof upon the pass book of a party to whom he is indebted.³⁷

§ 2141. — Interest on deposits. The cashier has no power to promise to pay usurious interest on a deposit.³⁸

§ 2142. — Certification of checks. The cashier has power to certify checks³⁹ other than his own check.⁴⁰ As said in the leading textbook on the law of banking, "by the universal usage of banks the certification of checks has become a part of the ordinary daily routine of banking business and is therefore inherent in the cashier's office, being a matter of execution requiring no great discretion."⁴¹

the order of its cashier, at the bank, where the note was in fact the property of the bank and the cashier acted for the bank in the transaction in which the note was given, although he had not indorsed the note to the bank. *First Nat. Bank of Hancock v. Johnson*, 133 Mich. 700, 103 Am. St. Rep. 468, 95 N. W. 975.

35 Georgia. *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369.

Illinois. *First Nat. Bank of Monmouth v. Dunbar*, 118 Ill. 625, 9 N. E. 186, aff'g 19 Ill. App. 558.

Massachusetts. *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168.

New York. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

Pennsylvania. *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106, 21 Am. Rep. 49; *Lloyd v. West Branch Bank*, 15 Pa. St. 172, 53 Am. Dec. 581.

However, an agreement that a stock of goods should be stored in the back end of a bank building is not such a transaction as comes within the meaning of the term "special de-

posit." *American Nat. Bank v. E. W. Adams & Co.*, 44 Okla. 129, L. R. A. 1915 B 542 with note, 143 Pac. 508.

36 Crystal Plate Glass Co. v. First Nat. Bank, 6 Mont. 303, 12 Pac. 678.

The authority of the cashier of a bank with respect to issuing certificates of deposit may be shown by the custom of the bank with reference thereto. *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257.

37 Van Buren County Sav. Bank v. Stirling Woolen Mills Co., 125 Iowa 645, 101 N. W. 477, 94 N. W. 945.

38 Hanson v. Heard, 69 N. H. 190, 38 Atl. 788.

39 Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96, 11 Am. Rep. 667; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Citizens' Sav. Bank v. Blakesley*, 42 Ohio St. 645. Compare *Mussey v. Eagle Bank*, 9 Metc. (Mass.) 306.

40 Claflin v. Farmers' & Citizens' Bank of Long Island, 25 N. Y. 293.

41 1 Morse, Banks and Banking (5th Ed.), § 155.

§ 2143. — Executing, accepting, etc., negotiable instruments.

Among the powers ordinarily inhering in the office of cashier is that of issuing and signing drafts drawn upon funds of his bank on deposit with a correspondent bank; but a cashier, as such, has no implied power to draw such drafts in his own favor, or in favor of a creditor in payment of his own debts, and a person who accepts a draft payable to the cashier himself or used to pay his individual indebtedness is put on notice that the fiduciary is discharging his own obligation with the funds of the bank.⁴² The cashier has power to draw, accept or indorse bills or drafts in the usual course of business,⁴³ to indorse for collection notes and other paper discounted by it, or deposited for collection, or as collateral,⁴⁴ or to receive commercial paper for collection.⁴⁵ However, he has no power to accept a draft to be drawn at a future day,⁴⁶ to accept a worthless check and charge the bank therewith,⁴⁷ to bind the bank by note, bill or indorsement for the mere accommodation of another, although the bill or note may be binding as against the bank in the hands of a bona fide purchaser,⁴⁸ to certify his own check,⁴⁹ or indorse his own note,⁵⁰ or to issue drafts

⁴² *Pemiscot County Bank v. Wilson-Ward Co.*, 135 Tenn. 426, 186 S. W. 598; *Pemiscot County Bank v. Central State Nat. Bank*, 132 Tenn. 152, 177 S. W. 74.

⁴³ *United States. Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326, 5 L. Ed. 100.

Georgia. Merchants' Bank of Macon v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

New Hampshire. Preston v. Cutter, 64 N. H. 461, 13 Atl. 874.

New York. City Bank of New Haven v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

Pennsylvania. Bissell v. First Nat. Bank of Franklin, 69 Pa. St. 415.

Tennessee. Northern Bank of Kentucky v. Johnson, 5, Cold. 94.

He may indorse paper after banking hours. *Bissell v. First Nat. Bank of Franklin*, 69 Pa. St. 415.

⁴⁴ *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Potter v. Merchants'*

Bank of Albany, 28 N. Y. 641, 86 Am. Dec. 273.

⁴⁵ *National Pahquisque Bank v. First Nat. Bank of Bethel*, 36 Conn. 325, 4 Am. Rep. 80; *Hanson v. Heard*, 69 N. H. 190, 38 Atl. 788.

⁴⁶ *Flannagan v. California Nat. Bank*, 56 Fed. 959, 23 L. R. A. 836.

⁴⁷ *Hier v. Miller*, 68 Kan. 258, 63 L. R. A. 952, 75 Pac. 77.

⁴⁸ *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557, 24 L. Ed. 490; *Faneuil Hall Bank v. Bank of Brighton*, 16 Gray (Mass.) 534; *City Bank of New Haven v. Perkins*, 29 N. Y. 554, 86 Am. Dec. 332; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis. 663, 7 Am. Rep. 107.

⁴⁹ *Claffin v. Farmers' & Citizens' Bank of Long Island*, 25 N. Y. 293.

⁵⁰ *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557, 24 L. Ed. 490.

of the bank for his personal use.⁵¹ But by long-continued course of business it may be presumed that the cashier of a bank has power to issue a cashier's draft payable to his individual creditor.⁵²

§ 2144. — Renewal of notes and extending time of payment. The cashier of a bank has power to renew notes, or extend the time of payment, it has been held,⁵³ at least where he practically controls all the business of the bank,⁵⁴ as where the president is in a foreign country and the cashier is running the bank in his absence.⁵⁵ However, where the extension of time will release other parties to the bill or note, it is held, according to the better line of authority, that the extension is beyond the powers of the cashier.⁵⁶ Thus, the indorser of a note held by a bank is not released from liability by the act of the cashier in receiving money for interest in advance on the note and agreeing to extend the time of payment, unless such act is expressly authorized or ratified by the bank, since a cashier has no implied authority to release the bank's security.⁵⁷

§ 2145. — Borrowing money. The cashier has power to borrow money when necessary in the usual course of business.⁵⁸ This question was involved in some doubt at one time, at least in case of national banks, but "it is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use."⁵⁹

⁵¹ *Mendel v. Boyd*, 71 Neb. 657, 99 N. W. 493.

⁵² *Campbell v. National Broadway Bank*, 130 Fed. 699.

⁵³ *Citizens' Bank of Senath v. Douglass*, 178 Mo. App. 664, 161 S. W. 601; *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602.

⁵⁴ *Citizens' Bank of Senath v. Douglass*, 178 Mo. App. 664, 161 S. W. 601.

⁵⁵ *Bank of Commerce v. Bright*, 77 Fed. 949.

⁵⁶ *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164, 10 L. R. A. (N. S.) 129, 66 Atl. 47.

⁵⁷ *Bank of Ravenswood v. Wetzel*, 58 W. Va. 1, 70 L. R. A. 305, 6 Ann. Cas. 48, 50 S. E. 886.

⁵⁸ *Illinois. Crain v. First Nat.*

Bank of Jacksonville, 114 Ill. 516, 2 N. E. 486.

Kentucky. *Citizens' Bank v. Weakley*, 126 Ky. 169, 11 L. R. A. (N. S.) 598, 128 Am. St. Rep. 282, 103 S. W. 249.

Missouri. *Union Nat. Bank of Kansas City v. Lyons*, 220 Mo. 538, 119 S. W. 540; *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165.

New York. *Coats v. Donnell*, 94 N. Y. 168; *Barnes v. Ontario Bank*, 19 N. Y. 152.

North Dakota. *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736, overruling *First Nat. Bank of Corunna v. Michigan City Bank*, 8 N. D. 608, 80 N. W. 766.

⁵⁹ *Cherry v. City Nat. Bank of*

Of course, as said by Justice Goss in a North Dakota decision, evidence of usage of the parties or community in the particular case might change the rule, and "other circumstances, such as the amount of the loan taken in connection with the capitalization and assets of the bank and banking usage of the locality" may be considered in determining whether the loan was made in the ordinary course of business.⁶⁰

§ 2146. — Purchases and sales, including transfers of commercial paper. The cashier has power to buy and sell notes and bills of exchange when such transactions are within the powers and usual business of the bank;⁶¹ to sell and transfer, and to indorse for such purpose, and so as to render the bank liable as indorser, negotiable paper, stock and other securities held by the bank,⁶² although the contrary

Kansas City, Missouri, 144 Fed. 587, 590.

The case of *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470, tending to support a contrary rule, is in effect overruled by *Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. Ed. 920, and *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 627, 44 L. Ed. 611.

⁶⁰ *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736, explaining early decisions in North Dakota.

⁶¹ *Wild v. Bank of Passamaquoddy*, 3 Mason 505, Fed. Cas. No. 17,646; *Drudge v. Citizens Bank of Akron*, — Ind. App. —, 113 N. E. 440.

⁶² *United States. Fleckner v. Bank of United States*, 8 Wheat. 338, 5 L. Ed. 631; *Wild v. Bank of Passamaquoddy*, 3 Mason 505, Fed. Cas. No. 17,646; *Lafayette Bank v. State Bank of Illinois*, 4 McLean 208, Fed. Cas. No. 7,987.

Alabama. Everett v. United States, 6 Port. 166, 30 Am. Dec. 584.

Arkansas. Auten v. Manistee Nat. Bank, 67 Ark. 243, 47 L. R. A. 329, 54 S. W. 337.

Georgia. Carey v. McDougald, 7 Ga. 84.

Indiana. Hawkins v. Fourth Nat.

Bank, 150 Ind. 117, 49 N. E. 957; *State Bank v. Wheeler*, 21 Ind. 90.

Maine. Farrar v. Gilman, 19 Me. 440, 36 Am. Dec. 766.

Michigan. Peninsular Bank v. Hanmer, 14 Mich. 208; *Kimball v. Cleveland*, 4 Mich. 606.

Mississippi. Holt v. Bacon, 25 Miss. 567; *Harper v. Calhoun*, 8 How. 203; *Crocket v. Young*, 1 Smedes & M. 241.

New Hampshire. Preston v. Cutter, 64 N. H. 461, 13 Atl. 874. Compare *Elliot v. Abbot*, 12 N. H. 549, 37 Am. Dec. 227.

New York. City Bank of New Haven v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

Ohio. Sturges v. Bank of Circleville, 11 Ohio St. 153, 78 Am. Dec. 296.

Pennsylvania. Bissell v. First Nat. Bank of Franklin, 69 Pa. St. 415.

Tennessee. Maxwell v. Planters' Bank, 10 Humph. 507.

Vermont. Keith v. Goodwin, 31 Vt. 268, 73 Am. Dec. 345.

West Virginia. Smith v. Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Contra, United States Bank v. Fleckner, 8 Mart. (La.) 309, 13 Am. Dec. 287.

has been held with respect to his powers in regard to non-negotiable paper.⁶³

On the other hand, as a general rule, the cashier of a bank has no implied power to sell the real estate of the bank, or purchase real estate,⁶⁴ to sell the safe of the bank⁶⁵ or the like. So he has no power to transfer notes of the corporation in payment of a deposit.⁶⁶ In Missouri, by statute, the cashier of a bank cannot assign a note belonging to his bank without a resolution duly passed authorizing such transfer; and this statute applies to a note held as collateral as well as to any other asset of the bank.⁶⁷

§ 2147. — Assignment for benefit of creditors. The cashier cannot make an assignment for benefit of creditors, or at least he cannot

"The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case it is incumbent on the bank to show, that it has interposed a restriction, and that such restriction is known to those with whom it is in the habit of doing business." Mr. Justice Story, in *Wild v. Bank of Passamaquoddy*, 3 Mason 505, Fed. Cas. No. 17,646.

He may sell and transfer stock pledged to the bank. *Matthews v. Massachusetts Nat. Bank*, Holmes 396, Fed. Cas. No. 9,286.

But the cashier has no authority to transfer notes to a depositor in payment of his deposit. *Schneitman v. Noble*, 75 Iowa 120, 9 Am. St. Rep. 467, 39 N. W. 224.

⁶³ *Holt v. Bacon*, 25 Miss. 567;

Barrick v. Austin, 21 Barb. (N. Y.) 241.

⁶⁴ But the directors may confer such authority upon the cashier, either expressly or by allowing him to exercise it. *Steinke v. Yetzer*, 108 Iowa 512, 79 N. W. 286.

Authority to employ a broker to sell the lands of a national bank has been held to be within the scope of authority of the cashier where he is the active executive officer of the bank and intrusted with authority to sell its lands to meet its obligations. The cashier, further, is acting within the scope of his authority in designating the lands to be sold, and a mistake by him in designating such lands renders the bank liable. *Arnold v. National Bank of Wau-paca*, 126 Wis. 362, 3 L. R. A. (N. S.) 580, 105 N. W. 828.

The cashier may accept and record a deed. *Hall v. Farmers' & Merchants' Bank*, 145 Mo. 418, 46 S. W. 1000.

⁶⁵ *Asher v. Sutton*, 31 Kan. 286, 1 Pac. 535.

⁶⁶ *Schneitman v. Noble*, 75 Iowa 120, 9 Am. St. Rep. 467, 39 N. W. 224. See also *Lamb v. Cecil*, 25 W. Va. 288, 28 W. Va. 653.

⁶⁷ *Miles v. Macon County Bank of Macon*, 187 Mo. App. 230, 238, 173 S. W. 713.

make an assignment for the benefit of a part of the creditors to the exclusion of others.⁶⁸

§ 2148. — Purchase and sales of shares of stock or acceptance thereof in payment. The cashier has no power to buy stock in other corporations, or to take stock in payment of a debt, unless such a transaction is authorized by the charter, and expressly or impliedly by the directors.⁶⁹ However, if the bank has bought stock pledged to it, to protect itself, the cashier has power to sell such stock.⁷⁰

§ 2149. — Pledge or mortgage. The cashier has power to pledge the assets of the bank as security for money which he has authority to borrow, or for other valid debts incurred by him.⁷¹ But he has no power to mortgage the real or personal property of the bank.⁷² Moreover, it has been held that neither the cashier nor the bank itself can pledge assets of the bank to secure deposits.⁷³

Loaning money and taking collateral security therefor and returning the collateral when the debt secured thereby is paid, is within the power of the cashier as an everyday occurrence in the banking business.⁷⁴

§ 2150. — Leases. The cashier of a bank has no power to lease real estate belonging to the bank,⁷⁵ or to lease premises of others for the bank,⁷⁶ or to accept the surrender of a leasehold term.⁷⁷ So he cannot agree to an alteration of a written lease executed by the bank.⁷⁸

⁶⁸ *Ledgerwood v. Dashiell*, — Tex. Civ. App. —, 177 S. W. 1010.

⁶⁹ *Bank of Commerce v. Hart*, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

⁷⁰ *McBoyle v. Union Nat. Bank*, 162 Cal. 277, 122 Pac. 458.

⁷¹ *Citizens' Bank v. Weakley*, 126 Ky. 169, 11 L. R. A. (N. S.) 598, 128 Am. St. Rep. 282, 103 S. W. 249; *Sloan v. Kansas City State Bank*, 158 Mo. 439, 57 S. W. 1014; *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165; *Coats v. Donnell*, 94 N. Y. 168; *Barnes v. Ontario Bank*, 19 N. Y. 152.

⁷² *Bank of Gloster v. Hindman*, 95 Miss. 742, Ann. Cas. 1912 A 93, 50 So. 65; *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

⁷³ *Commercial Banking & Trust Co. v. Citizens' Trust & Guaranty Co. of West Virginia*, 153 Ky. 566, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915 C 166 with note, 156 S. W. 160.

⁷⁴ *Bank of Houston v. Kirkman*, 156 Mo. App. 309, 319, 137 S. W. 38.

⁷⁵ *Spongberg v. First Nat. Bank of Montpelier*, 18 Idaho 524, 31 L. R. A. (N. S.) 736, Ann. Cas. 1912 A 95, 110 Pac. 716; *People's Bank v. Bennett*, 159 Mo. App. 1, 139 S. W. 219.

⁷⁶ *People's Bank v. Bennett*, 159 Mo. App. 1, 139 S. W. 219.

⁷⁷ *People's Bank v. Bennett*, 159 Mo. App. 1, 139 S. W. 219.

⁷⁸ *Dycus v. Traders' Bank & Trust Co.*, 52 Tex. Civ. App. 175, 113 S. W. 329.

§ 2151. — Contracts of employment. It is within the power of the cashier to bind the corporation, by agreement to pay a commission for finding a purchaser for certain real property upon which the bank holds a mortgage.⁷⁹ The power of a cashier to employ an agent to find a customer for certain lands is not affected by the fact that he acts on the mistaken supposition that the bank had title to the lands.⁸⁰

§ 2152. — Guaranty. The cashier has authority to guaranty a note or priority of a mortgage transferred by him for the bank.⁸¹ But the act of a cashier of a bank in attempting to bind it as surety in an action between third parties is not an act within the apparent scope of the cashier's duties.⁸² So he cannot guaranty the payment of a loan to a third person.⁸³ As said by Justice Thayer, in regard to an ultra vires guaranty, "when the transaction in which a bank is for the time being engaged is known to the person dealing with it to be outside the legitimate sphere of its operations, no reason is perceived why a person dealing with the cashier under such circumstances should be allowed to indulge in any presumptions as to the cashier's authority. He is advised by the very nature of the transaction that all acts done and performed in relation thereto are beyond the power of the corporation, and, if he expects to hold the corporation liable on any contract or obligation entered into by the cashier or other officer in the course of that transaction, he should at least see to it that such contract or obligation is approved by the board of directors or other governing body."⁸⁴

§ 2153. — Assumption of payment of debt of third person. The cashier has no power to bind the bank by assuming payment of, or pledging the bank's credit for, another's debt.⁸⁵

⁷⁹ First Nat. Bank of Flatonia v. Ratliff, 33 Tex. Civ. App. 279, 76 S. W. 591.

⁸⁰ Arnold v. National Bank of Waupaca, 126 Wis. 362, 3 L. R. A. (N. S.) 580, 105 N. W. 828.

⁸¹ Peninsular Bank v. Hanmer, 14 Mich. 208; Sturges v. Bank of Circleville, 11 Ohio St. 153, 78 Am. Dec. 296.

⁸² Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville, 69 Neb. 220, 95 N. W. 819. Compare Crowder State Bank v.

Aetna Powder Co., 41 Okla. 394, L. R. A. 1917 A 1021, 138 Pac. 392.

⁸³ Third Nat. Bank of St. Louis v. St. Charles Sav. Bank, 244 Mo. 554, 149 S. W. 495.

⁸⁴ Farmers' & Merchants' Nat. Bank v. Smith, 77 Fed. 129, 136.

⁸⁵ Fort Dearborn Nat. Bank of Chicago v. Seymour, 71 Minn. 81, 73 N. W. 724.

It is beyond the implied authority of the cashier of the bank to bind it on an undertaking in replevin where the bank is without interest

§ 2154. — Releases. The cashier of a bank, unless specially empowered to do so, has no authority to release, otherwise than in the due course of business and on payment, the makers of notes or other debtors of the bank, or to release sureties or indorsers.⁸⁶ Thus, a cashier cannot accept a note signed by two persons only, in discharge of a note upon which another person was also bound, so as to release the latter from his debt to the bank.⁸⁷ He cannot agree, on accepting or discounting a bill or note, that an indorser or other signer shall not be held liable.⁸⁸ So he cannot bind the bank by an agreement with indorsers on a note that each indorser shall be liable only for a certain proportion of the debt.⁸⁹ However, he has power to release a debt and mortgage in accordance with the custom of the bank.⁹⁰ And he has power to agree with the sureties on a note payable at the bank, to proceed to make the debt out of land owned by the maker, if possible.⁹¹

in the action in which the undertaking is given. *Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank of Rushville*, 62 Neb. 472, 87 N. W. 156.

86 United States. *Sandy River Bank v. Merchants' & Mechanics' Bank*, 1 Biss. 146, Fed. Cas. No. 12,309.

Maryland. *Ecker v. First Nat. Bank of New Windsor*, 59 Md. 291.

Massachusetts. *Dedham Inst. for Savings v. Slack*, 6 Cush. 408.

Michigan. *Gallery v. National Exch. Bank*, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193.

Mississippi. *Payne v. Commercial Bank of Natchez*, 6 Smedes & M. 24.

Nebraska. *Bank of Commerce v. Hart*, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

New Hampshire. *Cocheco Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67.

Pennsylvania. *Allen v. First Nat. Bank*, 127 Pa. St. 51, 14 Am. St. Rep. 829, 17 Atl. 886; *Bank of Pennsylvania v. Reed*, 1 Watts & S. 101.

Virginia. *Hodge's Ex'r v. First Nat. Bank of Richmond*, 22 Gratt. 51.

Compare *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334.

87 Ecker v. First Nat. Bank, 59 Md. 291.

88 United States. *Bank of Metropolis v. Jones*, 8 Pet. 12, 8 L. Ed. 850; *Bank of United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 316.

Dakota. *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367.

Montana. *State Bank of Moore v. Forsyth*, 41 Mont. 249, 28 L. R. A. (N. S.) 501, 108 Pac. 914.

Nebraska. See *Packers Nat. Bank v. Rushart*, 98 Neb. 354, 152 N. W. 789.

North Carolina. *First Nat. Bank of Lumberton v. Lennon*, 170 N. C. 10, 86 S. E. 715.

Oklahoma. *Gillis v. First Nat. Bank of Frederick*, 148 Pac. 994.

Pennsylvania. *Allen v. First Nat. Bank*, 127 Pa. St. 51, 14 Am. St. Rep. 829, 17 Atl. 886.

89 First Nat. Bank of New Martinsville v. Lowther-Kaufman Oil & Coal Co., 66 W. Va. 505, 28 L. R. A. (N. S.) 511, 66 S. E. 713.

90 Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

91 Security Sav. Bank of Wellman v. Smith (Iowa), 119 N. W. 726.

§ 2155. Compromises. It is generally held that the cashier has no power to compromise claims,⁹² although there is some authority to the contrary.⁹³

§ 2156. — Accepting payments. Of course the cashier, at least at the bank and during banking hours, may accept payments,⁹⁴ and may agree to apply the payments to a certain debt.⁹⁵ However, he has inherent power to accept cash only in payment.⁹⁶

§ 2157. — Collections and legal proceedings to enforce. The cashier has power to collect debts due the bank, and take all necessary or usual steps for such purpose,⁹⁷ including the indorsement of paper for collection,⁹⁸ the institution of suits,⁹⁹ and the employment of an attorney.¹ So a bank is bound by the acts of its cashier in connection with presenting a claim of the bank in bankruptcy proceedings.² A cashier, holding a mortgage as trustee for the bank, may, after condition broken, maintain replevin for the chattels as provided for in the mortgage.³ But it is held that a cashier cannot bind the bank by execution of a bond to indemnify the sheriff for levying an execution on a judgment in favor of the bank.⁴

⁹² *Citizens' Bank of Tifton v. Timmons*, 15 Ga. App. 815, 84 S. E. 232; *Farmers' & Mechanics' Bank v. Clancy*, 163 Mich. 586, 128 N. W. 752; *Bank of Commerce v. Hart*, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

⁹³ *Chemical Nat. Bank of New York v. Kohner*, 85 N. Y. 189.

⁹⁴ *Drudge v. Citizens' Bank of Akron*, — Ind. App. —, 113 N. E. 440.

⁹⁵ *Stebbins v. Lardner*, 2 S. D. 127, 48 N. W. 847.

⁹⁶ *Bank of Commerce v. Hart*, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479, 55 N. W. 631.

He cannot bind the bank by an agreement to accept in payment of a note a verbal assignment of an interest in another note previously pledged to another bank as collateral. *Piedmont Bank of Morganton v. Wilson*, 124 N. C. 561, 32 S. E. 889.

But it has been held that a cashier of a bank has authority to take a

book account in payment of a note. *Santa Fe Exch. Bank v. Dick*, 73 Mo. App. 354.

⁹⁷ *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298; *Town of Concord v. Concord Bank*, 16 N. H. 26; *Eastman v. Coos Bank*, 1 N. H. 23; *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9.

⁹⁸ See § 2146; *supra*.

⁹⁹ *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298; *Battersbee v. Calkins*, 128 Mich. 569, 87 N. W. 760.

¹ *Western Bank of Missouri v. Gilstrap*, 45 Mo. 419; *Potter v. New York Infant Asylum*, 44 Hun (N. Y.) 367; *Root v. Olcott*, 42 Hun (N. Y.) 536; *Mumford v. Hawkins*, 5 Den. (N. Y.) 355.

² *First Nat. Bank of Waterloo v. Exchange Nat. Bank of Seneca Falls* (N. Y. Misc.), 153 N. Y. Supp. 818.

³ *Donnell v. Miller*, 152 Mo. App. 217, 132 S. W. 1194.

⁴ *Watson v. Bennett*, 12 Barb. (N. Y.) 196.

§ 2158. — Defending suits. It has been held that it is not within the implied powers of a cashier to appear and defend suits against the bank,⁵ or to waive service of process.⁶

XXI. ADMISSIONS, DECLARATIONS AND REPRESENTATIONS OF OFFICERS
AND AGENTS

§ 2159. Scope of subdivision. It is not within the scope of this work to consider in detail questions of evidence relating to declarations and admissions, as to which reference should be made to standard textbooks on the law of evidence, nor to state fully the rules as to declarations or admissions by agents in general, as to which reference should be made not only to works on evidence but also to works on the law of agency. However, a brief statement of the general rules which govern, and their application to corporate officers and agents, will be noted herein.

§ 2160. General rules—Statement of rule. The rules governing the effect of admissions, declarations and representations by corporate officers and agents are the same as in the case of the admissions, etc., of the agents of individuals.⁷

Declarations or admissions of an officer or agent of a corporation are not binding upon it, nor admissible in evidence against it for any purpose, unless they were made by the officer or agent in the course of a transaction on behalf of the corporation, and within the scope of his authority, or unless they were expressly authorized by the corporation, or have since been ratified by it.⁸ However, the declara-

⁵ Branch Bank at Mobile v. Poe, 1 Ala. 396.

⁶ State v. Citizens' Sav. Bank, 31 La. Ann. 836.

⁷ Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229.

⁸ United States. Holmes v. Montauk Steamboat Co., 93 Fed. 731; Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. 437; Goddard v. Creffield Mills, 75 Fed. 818; Germania Safety Vault & Trust Co. v. Boynton, 71 Fed. 797; Tuthill Spring Co. v. Shaver Wagon Co., 35 Fed. 644.

Alabama. D. J. Meador & Son v. Standard Oil Co., 72 So. 34; Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 So. 48; Sullivan v. Louisville

& N. R. Co., 128 Ala. 77, 30 So. 528; Garner v. Hall, 122 Ala. 221, 25 So. 187; Brush Elec. Light & Power Co. of Montgomery v. City Council of Montgomery, 114 Ala. 433, 21 So. 960; Terry v. Birmingham Nat. Bank, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. 299; Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600, 5 So. 353; Mobile & G. R. Co. v. Cogsbill, 85 Ala. 456, 5 So. 188; Henry v. Northern Bank, 63 Ala. 527; Hall v. Mobile & M. Ry. Co., 58 Ala. 10.

Arizona. Franklin v. Havalena Min. Co., 18 Ariz. 201, 157 Pac. 986.

Arkansas. Pacific Mut. Life Ins. Co. v. Walker, 67 Ark. 147, 53 S. W. 675.

California. Love v. Anchor Raisin

tions of an officer of the corporation, although not admissible as an

Vineyard Co., 45 Pac. 1044; Stockwell v. Barnum, 7 Cal. App. 413, 94 Pac. 400.

Colorado. Extension Gold Mining & Milling Co. v. Skinner, 28 Colo. 237, 64 Pac. 198; National Fire Ins. Co. v. Denver Consol. Elec. Co., 16 Colo. App. 86, 63 Pac. 949.

Connecticut. Western Realty & Investment Co. v. Haase, 75 Conn. 436, 53 Atl. 861; Fairfield County Turnpike Co. v. Thorp, 13 Conn. 173; Hartford Bridge Co. v. Granger, 4 Conn. 142.

Delaware. Lieberman v. First Nat. Bank of Wilmington, 8 Del. Ch. 229, 40 Atl. 382.

Georgia. Florida Midland & G. R. Co. v. Varnedoe, 81 Ga. 175, 7 S. E. 129; Evans v. Atlanta & W. P. R. Co., 56 Ga. 498; Seaboard Air-Line Ry. v. Sikes, 4 Ga. App. 7, 60 S. E. 868.

Idaho. Hilbert v. Spokane International R. Co., 20 Idaho 54, 116 Pac. 1116.

Illinois. Wheeler v. Home Savings & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28; Chicago & E. I. R. Co. v. Hay, 119 Ill. 493, 10 N. E. 29; Grayville & M. R. Co. v. Burns, 92 Ill. 302; Collins Ice-Cream Co. v. Normandie, 121 Ill. App. 140; Delaware & H. Canal Co. v. Mitchell, 92 Ill. App. 577; Chicago & St. L. R. Co. v. Ashling, 34 Ill. App. 99.

Indiana. Chicago, St. L. & P. R. Co. v. Wolcott, 141 Ind. 267, 50 Am. St. Rep. 320, 39 N. E. 451.

Iowa. Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa 188, 93 N. W. 297; Boddy v. Henry, 113 Iowa 462, 53 L. R. A. 769, 85 N. W. 771; Lee v. Marion Sav. Bank, 108 Iowa 716, 78 N. W. 692; First Nat. Bank of Dubuque v. Booth, 102 Iowa 333, 71 N. W. 238; Empire Mill

Co. v. Lovell, 77 Iowa 100, 14 Am. St. Rep. 272, 41 N. W. 583; Sweatland v. Illinois & M. Tel. Co., 27 Iowa 433, 1 Am. Rep. 285.

Kansas. Atchison, T. & S. F. R. Co. v. Osborn, 58 Kan. 768, 51 Pac. 286; Acme Harvester Co. v. Madden, 4 Kan. App. 598, 46 Pac. 319.

Kentucky. Chesapeake & O. Ry. Co. v. Smith, 101 Ky. 104, 39 S. W. 832; Louisville, H. & St. L. Ry. Co. v. Beauchamp, 21 Ky. L. Rep. 1476, 55 S. W. 716; Graddy v. Western U. Tel. Co., 19 Ky. L. Rep. 1455, 43 S. W. 468.

Louisiana. New Orleans, O. & G. W. R. Co. v. Williams, 16 La. Ann. 315; Hill v. New Orleans, O. & G. W. R. Co., 11 La. Ann. 292.

Maine. Ruby v. Abyssinian Religious Soc. of Portland, 15 Me. 306; Polleys v. Ocean Ins. Co., 14 Me. 141.

Maryland. Merchants' Bank v. Marine Bank, 3 Gill 96, 43 Am. Dec. 300; City Bank of Baltimore v. Bate-man, 7 Harr. & J 104.

Massachusetts. Murphy v. Fred T. Ley & Co., 210 Mass. 371, 96 N. E. 1030; Gilmore v. Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623; Tripp v. New Metallic Packing Co., 137 Mass. 499; Robinson v. Fitchburg & W. R. Co., 7 Gray 92; Stiles v. Western R. Corporation, 8 Mete. 44, 41 Am. Dec. 486.

Michigan. Mott v. Detroit, G. H. & M. Ry. Co., 120 Mich. 127, 79 N. W. 3; Kalamazoo Novelty Mfg. Co. v. McAlister, 36 Mich. 327; Peek v. Detroit Novelty Works, 29 Mich. 313.

Minnesota. Whitney v. Wagener, 84 Minn. 211, 87 Am. St. Rep. 351, 87 N. W. 602; Parker v. Winona & St. P. R. Co., 83 Minn. 212, 86 N. W. 2; Gray v. Minnesota Tribune Co., 81 Minn. 333, 84 N. W. 113; Reem v. St. Paul City Ry. Co., 77

incident of the litigated act, may be admissible on other grounds if

Minn. 503, 80 N. W. 638, 778; *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691, 51 N. W. 605.

Missouri. *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923; *Kearney Bank v. Froman*, 129 Mo. 427, 50 Am. St. Rep. 456, 31 S. W. 769; *Hannibal & St. J. R. Co. v. Green*, 68 Mo. 169; *Malecek v. Tower Grove & L. Ry. Co.*, 57 Mo. 17; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Gregmore Orchard Co. v. Gilmour*, 159 Mo. App. 204, 140 S. W. 763.

Nebraska. *Grant v. Cropsey*, 8 Neb. 205; *Kennedy v. Otoe County Nat. Bank*, 7 Neb. 59.

New Hampshire. *Nebonne v. Concord R. R.*, 67 N. H. 531, 38 Atl. 17; *Low v. Connecticut & P. Rivers R. Co.*, 45 N. H. 370; *Pemigewasset Bank v. Rogers*, 18 N. H. 255.

New Jersey. *Ashmore v. P. Steam Towing & Transportation Co.*, 38 N. J. L. 13.

New York. *Cobb v. United Engineering & Contracting Co.*, 191 N. Y. 475, 84 N. E. 395; *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751, rev'g 29 App. Div. 466, 51 N. Y. Supp. 724; *Merchants' Nat. Bank of Gardner v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910; *Johnson v. Union Switch & Signal Co.*, 129 N. Y. 653, 29 N. E. 964, 27 Jones & S. 169; *Johnson v. Shelter Island Grove & Camp-Meeting Ass'n*, 122 N. Y. 330, 25 N. E. 484, 47 Hun 374; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Johnson v. Buffalo Homeopathic Hospital*, 53 App. Div. 513, 65 N. Y. Supp. 1087; *Mutual Life Ins. Co. v. Robinson*, 24 App. Div. 570, 49 N. Y. Supp. 887; *Cosgray v. New England Piano Co.*, 22 App. Div. 455, 48 N. Y. Supp. 7; *Harvey v. West-Side El. Ry. Co.*, 13 Hun 392; *East River*

Bank v. Hoyt, 41 Barb. 441; *Sharp v. City of New York*, 40 Barb. 256; *Soper v. Buffalo & R. R. Co.*, 19 Barb. 310.

North Carolina. *Sternberg v. Crohon & Roden Co.*, 172 N. C. 731, 90 S. E. 935; *Younce v. Broad River Lumber Co.*, 155 N. C. 239, Ann. Cas. 1912 C 107, 71 S. E. 329; *Pinchback v. Bessemer Min. & Mfg. Co.*, 137 N. C. 171, 49 S. E. 106; *Rumbough v. Southern Improvement Co.*, 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. 536; *Smith v. North Carolina R. Co.*, 68 N. C. 107.

Oregon. *Harding v. Oregon-Idaho Co.*, 57 Ore. 34, 110 Pac. 412; *First Nat. Bank v. Linn County Bank*, 30 Ore. 296, 47 Pac. 614.

Pennsylvania. *Lombard & S. St. Passenger Ry. Co. v. Christian*, 124 Pa. St. 114, 16 Atl. 628; *Johnston v. Elizabeth Building & Loan Ass'n*, 104 Pa. St. 394; *Hanover Water Co. v. Ashland Iron Co.*, 84 Pa. St. 279; *Huntingdon & B. T. Mountain Railroad & Coal Co. v. Decker*, 82 Pa. St. 119; *Stoystown & G. Turnpike-Road Co. v. Craver*, 45 Pa. St. 386; *Stewart v. Huntingdon Bank*, 11 Serg. & R. 267, 14 Am. Dec. 628; *Magill v. Kauffman*, 4 Serg. & R. 317, 8 Am. Dec. 713; *McMillan v. Carson Hill Union Min. Co.*, 12 Phila. 404, 35 Leg. Int. 163; *Jones v. Yoder Land Co.*, 16 Pa. Co. Ct. 652.

Tennessee. *Sewanee Min. Co. v. McMahon*, 1 Head 582; *Jones v. Planters' Bank*, 9 Heisk. 455.

Texas. *Commercial Nat. Bank v. First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601; *Southwestern Telegraph & Telephone Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686; *Blain v. Pacific Exp. Co.*, 69 Tex. 74, 6 S. W. 679; *East Line & R. River R. Co. v. Garrett*, 52 Tex. 133; *Henderson v. San An-*

the officer had authority to speak for the corporation.⁹ So statements may be admissible to contradict a witness although not admissible to bind the corporation.¹⁰

On the other hand, declarations or admissions of officers or agents are admissible in evidence against the corporation for any purpose for which, and under the same circumstances under which, declarations or admissions of a natural person are admissible against him, if they were expressly authorized by the corporation or its authorized officers, or if they have been ratified, or if, although neither expressly authorized nor ratified, they were made by the officer or agent in the course of a transaction on behalf of the corporation, and within the scope of his general authority.¹¹ "While corporations can only speak

tonio & M. Gulf R. Co., 17 Tex. 560, 67 Am. Dec. 675; **Cannel Coal Co. v. Luna**,—Tex. Civ. App.—, 144 S. W. 721; **Pacific Exp. Co. v. Lothrop**, 20 Tex. Civ. App. 339, 49 S. W. 898.

Vermont. **Hardwick Sav. Bank & Trust Co. v. Drenan**, 72 Vt. 438, 46 Atl. 645.

Washington. **Cosh-Murray Co. v. Adair**, 9 Wash. 686, 38 Pac. 749.

Wisconsin. **Consolidated Milling Co. v. Fogo**, 104 Wis. 92, 80 N. W. 103.

That declarations and admissions as to past transactions are generally inadmissible, see § 2162, *infra*.

Rule applied to statements by director, auditor, and vice president to assessor as to value of real estate. **Brackett v. Com.**, 223 Mass. 119, 127, 111 N. E. 1036.

⁹ **O'Toole v. Post Prtg. & Pub. Co.**, 179 Pa. St. 271, 36 Atl. 288.

¹⁰ See **Momence Stone Co. v. Groves**, 197 Ill. 88, 64 N. E. 335, *aff'g* 100 Ill. App. 98; **Tyler v. Old Colony R. Co.**, 157 Mass. 336, 32 N. E. 227.

¹¹ **United States.** **Dubuque & S. City R. Co. v. Pierson**, 70 Fed. 303.

Alabama. **Louisville & N. R. Co. v. Hill**, 115 Ala. 334, 22 So. 163.

California. **Hawley v. Gray Bros. Artificial Stone Paving Co.**, 106 Cal. 337, 39 Pac. 609; **Bullock v. Consum-**

ers' Lumber Co., 31 Pac. 367; **People v. Stockton & C. R. Co.**, 49 Cal. 414.

Colorado. **Webb v. Smith**, 6 Colo. 365; **Union Gold Min. Co. v. Rocky Mountain Nat. Bank**, 2 Colo. 248.

Connecticut. **Toll Bridge Co. v. Betsworth**, 30 Conn. 390; **Norwich & W. R. Co. v. Cahill**, 18 Conn. 484.

Georgia. **Fulton Building & Loan Ass'n v. Greenlea**, 103 Ga. 376, 29 S. E. 932; **Louisville & N. R. Co. v. Tift**, 100 Ga. 86, 27 S. E. 765; **Planters' Rice Mill Co. v. Olmstead**, 78 Ga. 586, 3 S. E. 647; **Dobbins v. Pyrolusite Manganese Co.**, 75 Ga. 450; **Imboden v. Etowah & B. B. Hydraulic Hose Min. Co.**, 70 Ga. 86.

Illinois. **Consolidated Ice Mach. Co. v. Keifer**, 134 Ill. 481, 10 L. R. A. 696, 23 Am. St. Rep. 688, 25 N. E. 799, *aff'g* 26 Ill. App. 466; **Chicago, B. & Q. R. Co. v. Coleman**, 18 Ill. 297, 68 Am. Dec. 544; **Vincent v. Soper Lumber Co.**, 113 Ill. App. 463.

Indiana. **Wabash R. Co. v. Kelley**, 153 Ind. 119, 54 N. E. 752, 52 N. E. 152; **Adams Exp. Co. v. Harris**, 120 Ind. 73, 7 L. R. A. 214, 16 Am. St. Rep. 315, 21 N. E. 340.

Iowa. **Black v. Des Moines Mfg. & Supply Co.**, 77 N. W. 504.

Kansas. **J. I. Case Plow Works v. Pulsifer**, 79 Kan. 176, 98 Pac. 787; **Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.**, 59 Kan. 111, 52

through agents, nevertheless the corporation is bound by the declaration of an agent precisely as a natural person would be bound, that is, by the declaration of its agent made while acting within the scope

Pac. 71; *Water Power Co. v. Brown*, 23 Kan. 676.

Massachusetts. *Buffum v. York Mfg. Co.*, 175 Mass. 471, 56 N. E. 599; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358, 54 N. E. 883; *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Lane v. Boston & A. R. Co.*, 112 Mass. 455; *Morse v. Connecticut River R. Co.*, 6 Gray 450.

Michigan. *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143.

Missouri. *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Minea v. St. Louis Coöperation Co.*, 179 Mo. App. 705, 162 S. W. 741; *Pitts v. D. M. Steele Mercantile Co.*, 75 Mo. App. 221.

New Hampshire. *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67.

New Jersey. *Agricultural Ins. Co. of Watertown v. Potts*, 55 N. J. L. 158, 39 Am. St. Rep. 637, 26 Atl. 27, 537; *Morris & E. R. Co. v. Green*, 15 N. J. Eq. 469.

New York. *Hall v. Herter Bros.*, 157 N. Y. 694, 51 N. E. 1091, aff'g 90 Hun 280, 35 N. Y. Supp. 769; *Davidge v. Guardian Trust Co. of New York*, 136 App. Div. 78, 120 N. Y. Supp. 628; *Meislahn v. Irving Nat. Bank*, 62 App. Div. 231, 70 N. Y. Supp. 988; *Steinbach v. Prudential Ins. Co.*, 62 App. Div. 133, 70 N. Y. Supp. 809; *Vaughn Mach. Co. v. Quintard*, 37 App. Div. 368, 55 N. Y. Supp. 1114; *Spelman v. Fisher Iron Co.*, 56 Barb. 151.

North Carolina. *Styles v. Whiting Mfg. Co.*, 164 N. C. 376, 80 S. E. 417; *Kivett v. Western U. Tel. Co.*, 156 N. C. 296, 72 S. E. 388; *Gazzam v. German Union Fire Ins. Co.*, 155 N. C. 330, Ann. Cas. 1912 C 362, 71 S. E. 434.

North Dakota. *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736; *O. S. Paulson Mercantile Co. v. Seaver*, 8 N. D. 215, 77 N. W. 1001.

Ohio. *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 78 Am. Dec. 296.

Pennsylvania. *O'Toole v. Post Prtg. & Pub. Co.*, 179 Pa. St. 271, 36 Atl. 288; *Sidney School Furniture Co. v. Warsaw School-District*, 122 Pa. St. 494, 9 Am. St. Rep. 124, 15 Atl. 881; *Kilpatrick v. Home Building & Loan Ass'n*, 119 Pa. St. 30, 12 Atl. 754; *Custar v. Titusville Gas & Water Co.*, 63 Pa. St. 385; *Sterling v. Marietta & S. Trading Co.*, 11 Serg. & R. 179; *Magill v. Kauffman*, 4 Serg. & R. 317, 8 Am. Dec. 713; *Bank of Northern Liberties v. Davis*, 6 Watts & S. 289.

South Carolina. *Crawford v. Southern Ry. Co.*, 56 S. C. 136, 34 S. E. 80; *Beckham v. Southern Ry. Co.*, 50 S. C. 25, 27 S. E. 611; *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502.

Tennessee. *Ward, Courtney & Co. v. Tennessee Coal, Iron & Railroad Co.*, 57 S. W. 193.

Texas. *Houston, E. & W. T. Ry. Co. v. Campbell*, 91 Tex. 551, 43 L. R. A. 225, 45 S. W. 2; *International & G. N. R. Co. v. Telephone & Telegraph Co.*, 69 Tex. 277, 5 Am. St. Rep. 45, 5 S. W. 517; *International*

of the agent's authority to act and as a part of some authorized transaction with third persons."¹²

"It is true that declarations of officers of a corporation within the scope of their authority are admissible in evidence against the corporation," said the court in a Minnesota case, "if otherwise material and relevant. The rule rests, however, on the doctrine of agency; for such officers are mere agents, and their declarations are binding upon the corporation only when made in the course of or connected with the performance of authorized duties of such officers."¹³

"The mere fact," said the Minnesota court, "that one is a director, president, secretary, or other officer of a corporation, does not make all his acts or declarations, even though relating to the affairs of the corporation, binding upon the latter. Such persons are mere agents, and their declarations are binding upon the corporation only when made in the course of the performance of their authorized duties as

& G. N. R. Co. v. Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189.

Utah. Myers v. San Pedro, L. A. & S. L. R. Co., 39 Utah 198, 116 Pac. 1119.

Virginia. White Hall Co. v. Hall, 102 Va. 284, 46 S. E. 290.

Washington. Hall v. Union Cent. Life Ins. Co., 23 Wash. 610, 51 L. R. A. 288, 83 Am. St. Rep. 844, 63 Pac. 505.

West Virginia. Coyle v. Baltimore & Ohio R. Co., 11 W. Va. 94.

Wisconsin. McGowan v. Supreme Court I. O. F., 104 Wis. 173, 80 N. W. 603.

England. Kirkstall Brewery Co. v. Furness Ry. Co., L. R. 9 Q. B. 468; National Exch. Co. v. Drew, 2 Macq. H. L. Cas. 103.

Admissions or declarations are admissible in evidence where made by corporate officers or agents with reference to matters entrusted to them and within the scope of their authority. Weiss v. Haight & Freese Co., 148 Fed. 399; Huse v. St. Louis Belting & Supply Co., 121 Mo. App. 89, 97 S. W. 990; Western Cottage Piano & Organ Co. v. Anderson, 97 Tex. 432, 79 S. W. 516 (Tex. Civ.

App.), 76 S. W. 945; Lynchburg Tel. Co. v. Booker, 103 Va. 594, 50 S. E. 148; White Hall Co. v. Hall, 102 Va. 284, 46 S. E. 290.

Declarations of the soliciting agent of an insurance company made while writing a policy will be deemed those of the corporation. Nute v. Hartford Fire Ins. Co., 109 Mo. App. 585, 83 S. W. 83.

Representations by a physician employed by a railroad may be binding on it. International & G. N. R. Co. v. Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189.

¹² Franklin v. Havalena Min. Co., 18 Ariz. 201, 157 Pac. 986.

¹³ Whitney v. Wagener, 84 Minn. 211, 87 Am. St. Rep. 351, 87 N. W. 602.

Declarations of the officers of a corporation which has succeeded to the property of another corporation do not estop the corporation whose property has been so transferred from claiming exemption from taxation on the ground of its character and purposes. Michigan Sanitarium & Benevolent Ass'n v. Battle Creek, 138 Mich. 676, 101 N. W. 855.

agents, so that the declarations constitute a part of their conduct as agents,—a part of the *res gestae*.”¹⁴ Moreover, representations by corporate officers or agents, in direct contradiction to by-laws made by reference a part of the contract in relation to which the representations are made, or clearly contradictory to the wording of the contract itself, do not operate as an estoppel against the corporation, in the absence of fraud.¹⁵

Death of the officer or agent does not render his declarations or admissions inadmissible.¹⁶

§ 2161. — Elements making declarations or admissions binding.

The rules governing all agents, whether agents of corporations or of individuals or of others, which are too well settled to admit of argument, and which, if kept in mind, will settle most questions arising as to admissions and declarations of corporate officers and agents, are as follows:

1. The fact of agency must be established before the declarations can be proved,¹⁷ and by evidence other than the declarations of the alleged agent.¹⁸ Declarations or admissions of an officer or agent, not known to and acquiesced in by the corporation, are not admissible against the corporation to prove his authority.¹⁹

2. The statements must be made during the time the person making them was an officer or agent, and before his powers were termi-

¹⁴ *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691, 51 N. W. 605.

¹⁵ *Noah v. German-American Bldg. Ass'n*, 31 Ind. App. 504, 68 N. E. 615.

“Oral or printed statements made by the officers or agents of a building and loan association in direct contradiction of the by-laws, when the by-laws are made a part of the contract by reference thereto, or when such declarations or statements are in direct contradiction of the plain language of the contract itself, whether relied upon by the person to whom made or not, cannot be made the basis of an estoppel, unless such representations are fraudulently made.” *Noah v. German-American Bldg. Ass'n*, 31 Ind. App. 504, 68 N. E. 615.

¹⁶ *Bank of Commerce of Chanute*

v. Sams, 96 Kan. 437, 152 Pac. 28.

¹⁷ See 2 *Mechem, Agency* (2nd Ed.), § 1774; 1 *Clark & Skyles, Agency*, §§ 465-467.

¹⁸ See 2 *Mechem, Agency* (2nd Ed.), § 1775; 1 *Clark & Skyles, Agency*, §§ 465, 466.

¹⁹ *Arkansas. City Elec. St. Ry. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 31 L. R. A. 535, 54 Am. St. Rep. 282, 34 S. W. 89.

Colorado. Extension Gold Mining & Milling Co. v. Skinner, 28 Colo. 237, 64 Pac. 198.

Iowa. Heusinkveld v. St. Paul Fire & Marine Ins. Co., 106 Iowa 229, 76 N. W. 696.

Massachusetts. Gould v. Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50.

Michigan. Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253, 47 N. W. 104.

nated.²⁰ Thus, a defaulting bank officer will not be deemed a representative of the bank upon his return and entry into negotiations with it for restoration of the funds converted by him. Representations made by such officer, therefore, with regard to matters affecting the interests of the bank are not binding upon it.²¹

3. The admission, declaration or representation must have been made in regard to a matter within the scope of the authority of the officer or agent.²² However, when a corporation ratifies a contract made by an officer without authority, it ratifies the same in toto, and is bound, therefore, by declarations which he may have made during the negotiations, if otherwise binding.²³ Thus, a corporation which either expressly or impliedly ratifies an act of a corporate officer or agent is chargeable with his false representations in connection therewith.²⁴

4. It must further appear that the officer or agent, at the time he made the statement, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with the business then pending. They must be made officially and not as individuals, or as Professor Mechem puts it they must be such as "can fairly be regarded as incident to the act authorized to be done. If there was no occasion to say anything, or anything of the sort in question, there can be no foundation for their admissibility."²⁵

²⁰ Johnson v. McLain Inv. Co., 79 Kan. 423, 131 Am. St. Rep. 304, 100 Pac. 52; Hudson Milling Co. v. Higgins, 85 N. J. L. 268, 88 Atl. 1079.

²¹ Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Neb. 163, 57 L. R. A. 811, 88 N. W. 186.

²² 1 Clark & Skyles, Agency, §§466, 467.

"If, therefore, the statements, representations or admissions offered in evidence were made by one who either had no authority at all, or had no authority to represent the principal at the time or the place or respecting the matters concerning which they were made, they are not admissible against the principal." 2 Mechem, Agency (2nd Ed.), § 1783.

"While corporations can act only through agents, and their declarations are considered the same as in cases

of admissions of private persons, the same rules apply to both and it is indispensable that the statement, to be binding, must be within the scope of the agent's authority and in the execution of his agency." Anderson v. Great Northern R. Co., 126 Minn. 352, 148 N. W. 462.

²³ Balfour v. Fresno Canal & Irrigation Co., 123 Cal. 395, 55 Pac. 1062.

²⁴ "But if through any instrumentality he chose to employ, whether corporate or personal, frauds conceived by him were committed solely in furtherance of his own purposes, and for his own profit directly or indirectly, * * * the company should not be held responsible." Ginn v. Almy, 212 Mass. 486, 99 N. E. 276.

²⁵ 2 Mechem, Agency (2nd Ed.), § 1783.

Statements of officers of a corporation made in a casual conversation²⁶ or in an affidavit procured by a third person for his own purposes,²⁷ are not binding on the corporation.

5. It follows from what has just been said that the statements must either be contemporaneous, or practically so, with the act to which they relate, or while the officer or agent is actually engaged in the performance of the transaction. It is well settled that declarations or admissions as to past events are not admissible.²⁸ The rule as to the time of the statement, as affecting its admissibility in evidence, arises most often in tort cases, and it is often difficult to determine just what lapse of time will bar a statement as not part of the *res gestae*. This is not a question of corporation law, however, but reference should be made to standard textbooks on the law of evidence and of agency. However, in passing, a general view of the situation is obtained from the following statement in a well known work on the law of agency: "Some of the courts have applied the above rule strictly, holding that admissions and declarations of an agent, to be admissible as part of the *res gestae*, must be made contemporaneously with the act of the agent, and that they are inadmissible if made either before or after the act, however little time may intervene. * * * This view, however, is not taken by all the courts. On the contrary, the tendency of the cases is to the effect that an agent's declaration is admissible against the principal, although made after the act to which it relates if, under the peculiar circumstances of the case, it appears that it was the result of the act alone and spontaneous, and not the result also of reflection on the part of the agent. The cases in which this view has been held have generally been cases in which it was sought to hold the principal liable in tort."²⁹ This must be kept in mind, however: statements as to past events may be admissible and binding where the making of them by a particular agent or officer, in response to questions, is a part of his duty, as in case of lost baggage where inquiry is made of the baggage master.³⁰ In such cases the duties are continuing ones.

²⁶ McCoy v. City Nat. Bank of Duluth, 128 Minn. 455, 151 N. W. 178.

²⁷ McCoy v. City Nat. Bank of Duluth, 128 Minn. 455, 151 N. W. 178.

²⁸ 1 Clark & Skyles, Agency, § 469, and see § 2162, *infra*.

²⁹ 1 Clark & Skyles, Agency, § 469.

Ordinarily, declarations of a corporate agent or officer, made some time after an accident, to show the

cause of the accident and the negligence of the corporation, or either, are not admissible, where not a part of an official act or act within the scope of the agency. Stone v. Van Noy R. News Co., 153 Ky. 240, 244, 154 S. W. 1092; Layzell v. J. H. Somers Coal Co., 156 Mich. 268, 120 N. W. 996, 117 N. W. 179.

³⁰ See § 2166, *infra*.

6. The statements must be of such a nature as to be part of the transaction. They must naturally accompany the act, or must be of such a nature as to unfold its character or quality.³¹

7. The admission or declaration must be one of fact as distinguished from a mere expression of an opinion.³² Thus the expression of a personal opinion by the general solicitor of an insurance company is not admissible as against the company.³³

8. The statement of an officer or agent is not binding on the corporation where made in his own interest and against the interest of the principal, where he is known by the other party to be acting for himself or to have an adverse interest to that of the corporation. Representations, declarations or admissions of an officer of a corporation, made in his own interest, and against the interests of the corporation, cannot be treated by the person to whom they are made as the representations of the corporation.³⁴ For example, where an officer or agent of a corporation, in pledging the stock of the corporation for a loan to himself personally, makes declarations or representations as to its genuineness, the declarations or representations are not binding upon or admissible against the corporation, although it would be otherwise if, having authority to do so, he pledged the stock for a debt of the corporation.³⁵ The same principle applies to, and renders inadmissible against a corporation, declarations of its manager as to the existence of a debt from it to him;³⁶ or declarations of the officers

³¹ 1 Clark & Skyles, Agency, § 470.

³² Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106; Lane v. Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282; Wood River Bank v. Kelley, 29 Neb. 590, 46 N. W. 86.

³³ New York Life Ins. Co. v. Rankin, 162 Fed. 103.

³⁴ Moores v. Citizens' Nat. Bank of Piqua, 111 U. S. 156, 28 L. Ed. 385; Wheeler v. Home Savings & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28; Farrington v. South Boston R. Co., 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109; State Sav. Bank of Ionia v. Montgomery, 126 Mich. 327, 85 N. W. 879.

In an action by the assignee of a note given by a corporation to its president, declarations of the presi-

dent as to the amount due at the time of the transfer are not admissible against the corporation. Love v. Anchor Raisin Vineyard Co. (Cal.), 45 Pac. 1044.

³⁵ Manhattan Life Ins. Co. v. Forty-Second & G. St. Ferry R. Co., 139 N. Y. 146, 34 N. E. 776.

³⁶ Wheeler v. Home Savings & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28.

Declarations or representations by the manager of a corporation as to the existence of a debt from it to him, of which declarations or representations the corporation had no notice, will not estop it. Wheeler v. Home Savings & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, rev'g 85 Ill. App. 28.

as to their authority to use bonds of the company for their own individual purposes.³⁷

§ 2162. — Statements as to past events. Officers of a corporation occupy the same position as mere agents of the corporation so far as making their declarations inadmissible where made after the transaction involved.³⁸

An officer or agent of a corporation, having authority to transact a particular business, or to superintend and manage generally the current business and dealings of the corporation, has, from such authority alone, no implied or incidental power to bind the corporation by declarations or admissions as to past events. The declarations or admissions are not admissible in evidence against the corporation unless they were made in the course of the transaction, so as to constitute part of the *res gestae*.³⁹ In other words, the declaration or

³⁷ *Germania Safety Vault & Trust Co. v. Boynton*, 71 Fed. 797.

³⁸ *McEntyre v. Levi Cotton Mills Co.*, 132 N. C. 598, 44 S. E. 109.

³⁹ *United States. Holmes v. Montauk Steamboat Co.*, 93 Fed. 731; *Goddard v. Crefield Mills*, 75 Fed. 818.

Alabama. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87, 9 So. 299; *Western U. Tel. Co. v. Way*, 83 Ala. 542, 554, 4 So. 844; *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 117, 47 Am. Rep. 403.

Illinois. *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645, 49 N. E. 215, rev'g 69 Ill. App. 145; *Delaware & H. Canal Co. v. Mitchell*, 92 Ill. App. 577; *Cleveland, C., C. & St. L. R. Co. v. Jenkins*, 75 Ill. App. 17; *Union Nat. Bank v. Post*, 64 Ill. App. 404.

Iowa. *Lee v. Marion Sav. Bank*, 108 Iowa 716, 78 N. W. 692; *Schoep v. Bankers' Alliance Ins. Co.*, 104 Iowa 354, 73 N. W. 825; *First Nat. Bank of Dubuque v. Booth*, 102 Iowa 333, 71 N. W. 238; *Empire Mill Co. v. Lovell*, 77 Iowa 100, 14 Am. St. Rep. 272, 41 N. W. 583; *Sweatland v. Illinois & M. Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285.

Kansas. *Atchison, T. & S. F. R. Co. v. Osborn*, 58 Kan. 768, 51 Pac. 286;

Acme Harvester Co. v. Madden, 4 Kan. App. 598, 46 Pac. 319.

Kentucky. *Castleman-Blakemore Co. v. Brucker*, 167 Ky. 269, 180 S. W. 360; *Louisville & N. R. Co. v. Owens*, 164 Ky. 557, 175 S. W. 1039; *Graddy v. Western U. Tel. Co.*, 19 Ky. L. Rep. 1455, 43 S. W. 468; *East Tennessee Tel. Co. v. Simm's Adm'r*, 18 Ky. L. Rep. 761, 38 S. W. 131, 36 S. W. 171.

Massachusetts. *Gilmore v. Mittineague Paper Co.*, 169 Mass. 471, 48 N. E. 623.

Michigan. *Mott v. Detroit, G. H. & M. Ry. Co.*, 120 Mich. 127, 79 N. W. 3; *Maxson v. Michigan Cent. R. Co.*, 117 Mich. 218, 75 N. W. 459; *Andrews v. Tamarack Min. Co.*, 114 Mich. 375, 72 N. W. 242.

Minnesota. *Jackson v. Mutual Ben. Life Ins. Co.*, 79 Minn. 43, 82 N. W. 366, 81 N. W. 545; *Reém v. St. Paul City Ry. Co.*, 77 Minn. 503, 80 N. W. 638, 778; *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691, 51 N. W. 605.

Missouri. *Carson v. St. Joseph Stock Yards Co.*, 167 Mo. App. 443, 151 S. W. 752; *Wright Inv. Co. v. Fillingham*, 85 Mo. App. 534; *National Bank of Commerce v. Fitze*, 76 Mo. App. 356.

statement of the agent must be (1) contemporaneous with or (2) in the course of the business or transaction and in relation thereto, and within the scope of the agency.⁴⁰ It is elementary that an agent cannot bind his principal by declarations which are merely historical, and which have no connection with any transaction then being conducted by him with authority for his principal.⁴¹ "The principle of the exclusion [of such evidence] is the same as obtains in the ordinary relation of principal and agent. The statements of the latter are inadmissible to affect the former, unless in respect to a transaction in which he is authorized to appear for the principal, and he has no authority to bind his principal by any statements as to by-gone transactions. Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties."⁴²

New Hampshire. *Wilson v. Grand Trunk Ry. Co.*, 97 Atl. 981; *Nebonne v. Concord R. R.*, 67 N. H. 531, 38 Atl. 17; *Pemigewassett Bank v. Rogers*, 18 N. H. 255.

New York. *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751, rev'g 29 App. Div. 466, 51 N. Y. Supp. 724; *Merchants' Nat. Bank of Gardner v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Cosgray v. New England Piano Co.*, 22 App. Div. 455, 48 N. Y. Supp. 7; *Morris v. Brooklyn Heights R. Co.*, 20 App. Div. 557, 47 N. Y. Supp. 242; *Congdon & Aylesworth Co. v. Sheehan*, 11 App. Div. 456, 42 N. Y. Supp. 255.

North Carolina. *Darlington v. Western U. Tel. Co.*, 127 N. C. 448, 37 S. E. 479; *Rumbough v. Southern Improvement Co.*, 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. 536; *Smith v. North Carolina R. Co.*, 68 N. C. 107.

Oregon. *First Nat. Bank v. Linn County Bank*, 30 Ore. 296, 47 Pac. 614.

Pennsylvania. *Huntingdon & B. T. Mountain Railroad & Coal Co. v. Decker*, 82 Pa. St. 123; *Pennsylvania*

R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229; *Sterling v. Marietta & S. Trading Co.*, 11 Serg. & R. 179; *Magill v. Kauffman*, 4 Serg. & R. 317, 8 Am. Dec. 713; *Bank of Northern Liberties v. Davis*, 6 Watts & S. 289.

South Carolina. *State Bank v. Johnson*, 1 Mill 404, 12 Am. Dec. 645.

Texas. *Southwestern Telegraph & Telephone Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686.

Vermont. *Hardwick Sav. Bank & Trust Co. v. Drenan*, 72 Vt. 438, 48 Atl. 645.

A corporate agent cannot bind the corporation by an admission that it had previously made a contract. *Druecker v. Sandusky Portland Cement Co.*, 93 Ill. App. 406; *Delaware & H. Canal Co. v. Mitchell*, 92 Ill. App. 577.

⁴⁰ *Utah Foundry & Machine Co. v. Utah Gas & Coke Co.*, 42 Utah 533, 131 Pac. 1173.

⁴¹ *State Bank of Brocton v. Brocton Fruit Juice Co.*, 208 N. Y. 492, 102 N. E. 591, applying rule to declarations of president as to why mortgage had not been recorded.

⁴² *Merchants' Nat. Bank of Gardner v. Clark*, 139 N. Y. 314, 319, 36

On the other hand, statements as to past events are admissible against the corporation for the purpose of showing or tending to show knowledge.⁴³

§ 2163. — Statements on witness stand. While giving testimony in court, an officer or agent of a corporation is technically not acting in its behalf. Testimony given on a trial by an officer or agent of a corporation, therefore, is not admissible in a subsequent trial as a declaration of corporate officers or agents. "We know of no authority whatever," said the court, "for holding a principal bound by the declarations of his agent, while made on the witness stand."⁴⁴

§ 2164. — Application of rules. These rules apply, for example, when it is sought to prove an oral or written statement or other act of an officer or agent as an admission of the corporation, for the purpose of establishing a contract liability on its part,⁴⁵ or a liability for negligence,⁴⁶ or for the purpose of showing a recognition by the cor-

Am. St. Rep. 710, 712, 34 N. E. 910.

But in an action against a newspaper corporation for libel, declarations of defendant's agent, made some time after the publication, but when plaintiff demanded a retraction, are not inadmissible on the ground that they were not part of the *res gestae*, but are admissible on other grounds. *O'Toole v. Post Ptg. & Pub. Co.*, 179 Pa. St. 271, 36 Atl. 288.

⁴³ See *infra*, this chapter.

⁴⁴ *Vohs v. A. E. Shorthill Co.*, 124 Iowa 471, 476, 100 N. W. 495. To same effect, see *Rush v. Burns*, 152 Mo. 660, 54 S. W. 1103.

⁴⁵ *United States. Dubuque & S. City R. Co. v. Pierson*, 70 Fed. 303.

Alabama. *Henry v. Northern Bank*, 63 Ala. 527.

California. *Bullock v. Consumers' Lumber Co.*, 31 Pac. 367.

Connecticut. *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484; *Hartford Bridge Co. v. Granger*, 4 Conn. 142.

Georgia. *Dobbins v. Pyrolusite Manganese Co.*, 75 Ga. 450.

Illinois. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544.

Kansas. *Water Power Co. v. Brown*, 23 Kan. 676.

Massachusetts. *Tripp v. New Metallic Packing Co.*, 137 Mass. 499.

Michigan. *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143.

New Hampshire. *Low v. Connecticut & P. Rivers R. Co.*, 45 N. H. 370.

New York. *Johnson v. Union Switch & Signal Co.*, 129 N. Y. 653, 27 Jones & S. 169; *Johnson v. Buffalo Homeopathic Hospital*, 53 App. Div. 513, 65 N. Y. Supp. 1087; *Mutual Life Ins. Co. v. Robinson*, 24 App. Div. 570, 49 N. Y. Supp. 887.

⁴⁶ **Alabama.** *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 So. 353.

Illinois. *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L. R. A. 696, 23 Am. St. Rep. 688, 25 N. E. 799, *aff'g* 26 Ill. App. 466.

Kansas. *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111, 52 Pac. 71.

Kentucky. *Louisville, H. & St. L. Ry. Co. v. Beauchamp*, 55 S. W. 716; *Graddy v. Western U. Tel. Co.*, 19

poration of another's right or title to property,⁴⁷ or where it is sought to show a declaration or admission, in writing, oral or by conduct, for the purpose of showing knowledge on the part of the corporation of illegality in a contract between it and another,⁴⁸ for the purpose of showing that a note indorsed to the company, and on which it has brought suit, is not the property of the corporation, but has been indorsed to it merely in order that suit may be maintained thereon in a federal court,⁴⁹ for the purpose of establishing an estoppel against the corporation⁵⁰ in favor of one who has acted on the declaration or

Ky. L. Rep. 1455, 43 S. W. 468.

Louisiana. Hill v. New Orleans, O. & G. W. R. Co., 11 La. Ann. 292.

Massachusetts. Robinson v. Fitchburg & W. R. Co., 7 Gray 92.

Minnesota. Parker v. Winona & St. P. R. Co., 86 N. W. 2.

New York. First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181.

North Carolina. Darlington v. Western U. Tel. Co., 127 N. C. 448, 37 S. E. 479.

Pennsylvania. Lombard & S. St. Passenger Ry. Co. v. Christian, 124 Pa. St. 114, 16 Atl. 628.

South Carolina. Beckham v. Southern Ry. Co., 50 S. C. 25, 27 S. E. 611.

⁴⁷ Mobile & G. R. Co. v. Cogsbill, 85 Ala. 456, 5 So. 188; Hannibal & St. J. R. Co. v. Green, 68 Mo. 169.

In ejectment against a corporation for land claimed by plaintiff by adverse possession, plaintiff cannot prove that an officer of the company recognized his title by offering to purchase from him, unless it is shown that he had authority to purchase for the company. Mobile & G. R. Co. v. Cogsbill, 85 Ala. 456, 5 So. 188.

⁴⁸ Jones v. Planters' Bank, 9 Heisk. (Tenn.) 455.

⁴⁹ Tuthill Spring Co. v. Shaver Wagon Co., 35 Fed. 644.

⁵⁰ Alabama. Garner v. Hall, 122 Ala. 221, 25 So. 187.

Georgia. Fulton Building & Loan

Ass'n v. Greenlea, 103 Ga. 376, 29 S. E. 932; Planters' Rice Mill Co. v. Olmstead, 78 Ga. 586, 3 S. E. 647.

Illinois. Chicago & E. I. R. Co. v. Hay, 119 Ill. 493, 10 N. E. 29.

Michigan. Oakland County Sav. Bank v. State Bank of Carson City, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

Minnesota. Browning v. Hinkle, 48 Minn. 544, 31 Am. St. Rep. 691, 51 N. W. 605.

New Hampshire. Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67.

New York. Johnson v. Shelter Island Grove & Camp-Meeting Ass'n, 122 N. Y. 330, 25 N. E. 484; Spelman v. Fisher Iron Co., 56 Barb. 151.

Pennsylvania. Jones v. Yoder Land Co., 16 Pa. Co. Ct. 652.

South Carolina. Simmons Hardware Co. v. Bank of Greenwood, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502.

An agent of a corporation with whom another has had all his dealings in contracting with the corporation, and whose authority is not shown to be restricted, may estop the corporation from asserting that a subsequent transaction invalidates the contract by so acting as to bind himself by estoppel not to claim a forfeiture of the contract by reason of such subsequent transaction. Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

admission, or liability on an account stated,⁵¹ or for false representations,⁵² for the purpose of establishing, by admission or estoppel, the boundaries of land sold or leased by the corporation,⁵³ for the purpose of showing the amount due on a mortgage held by the corporation⁵⁴ or for the purpose of showing the authority of others to act for the corporation.⁵⁵

§ 2165. Reports of officers or agents. Reports of officers are sometimes admitted in evidence as admissions with great liberality.⁵⁶ But the general rule is that an official report, received by the corporation or board of directors from one acting as officer or agent, and accepted and adopted by them, is competent evidence against the corporation and those bound by its acts, without further proof of the appointment of the officer; but that a report to a corporation or board is not made admissible in evidence against it by the mere fact that it was received

A railroad company is not responsible for an error in a town plat whereon the location of its right of way is incorrectly represented, merely because those who prepared the plat were its engineer and local agent, in the absence of any proof that they were in that regard authorized to act for the company. *Hannibal & St. J. R. Co. v. Green*, 68 Mo. 169.

A railroad company in possession of a right of way under a contract with the owner of the land is not estopped from maintaining a bill for specific performance, and the execution of a deed in fulfilment of the contract, by the act of a mere employee, engaged in settling up right of way matters under the orders and supervision of his superior officers, who, in negotiating with the owner of such land, declared that the company made no claim to a right of way beyond a certain width. *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 493, 10 N. E. 29.

⁵¹ *Davis v. Georgetown Bridge Co.*, 1 Cranch C. C. (U. S.) 147, Fed. Cas. No. 3,637; *Missouri Pac. Ry. Co. v. B. F. Coombs & Bros. Commission Co.*, 71 Mo. App. 299; *Harvey v. West-Side El. Ry. Co.*, 13 Hun (N. Y.) 392.

⁵² *Planters' Rice Mill Co. v. Olmstead*, 78 Ga. 556, 3 S. E. 647; *Jones v. Yoder Land Co.*, 16 Pa. Co. Ct. 652; *East Line & R. River R. Co. v. Garrett*, 52 Tex. 133.

⁵³ *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305; *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491, 45 N. W. 351.

⁵⁴ *Fulton Building & Loan Ass'n v. Greenlea*, 103 Ga. 376, 29 S. E. 932; *Kilpatrick v. Home Building & Loan Ass'n*, 119 Pa. St. 30, 12 Atl. 754; *Johnston v. Elizabeth Building & Loan Ass'n*, 104 Pa. St. 394.

⁵⁵ *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248; *Florida Midland & G. R. Co. v. Varndoe*, 81 Ga. 175, 7 S. E. 129; *Rumbough v. Southern Improvement Co.*, 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. 536.

⁵⁶ *Hilbert v. Spokane International R. Co.*, 20 Idaho 54, 116 Pac. 1116; *Rogers v. Trustees of New York & Brooklyn Bridge*, 11 N. Y. App. Div. 141, 42 N. Y. Supp. 1046; *Lipscomb v. South Bound R. Co.*, 65 S. C. 148, 43 S. E. 388; *Virginia-Carolina Chemical Co. v. Knight*, 106 Va. 674, 679, 56 S. E. 725.

and accepted by it, except for the purpose of charging it with notice of the contents.⁵⁷ And it is held that "it can make no difference in the application of the rule whether the investigation and report are made before an accident has occurred, with a view of making repairs if necessary, improving the equipment or service, or preventing accident, or whether they occur after an accident with a view of ascertaining the circumstances or cause."⁵⁸ As said by the Kansas Supreme Court, in an able opinion by Justice Burch, the report "does not commit the company to its truth until it is taken up and adopted as the position of the company by some one having authority to bind it in such matters."⁵⁹ So it was stated in Georgia by Chief Justice Bleckley that "it surely cannot be sound law to hold that by collecting information, whether under general rules or special orders, and whether from its own officers, agents, and employees, or others, a corporation acquires and takes such information at the peril of having it treated as its own admissions, should litigation subsequently arise touching the subject-matter."⁶⁰ So it is said, in regard to a report of car inspectors, that "during an inspection only those declarations could bind the company which would illustrate, explain and characterize the work of making the inspection. After an inspection has been completed a narration of the things impressed upon the inspector's senses would fill none of the requirements of an admission; and the function of binding the company by admissions not having been delegated to the inspector, the making of the report itself, considered as a part of his business, could not include such a consequence."⁶¹ In Alabama, in referring to the report of the president of a corporation to its stockholders, the court said, with regard to extracts therefrom estimating as liabilities of the corporation, the claims in controversy, that such extracts "relate to matters and things done within the corporation, and in respect to which the members might well express their views, and the corporation retain a record of them, without contracting thereby liabilities to third persons."⁶² However, it has been held by

⁵⁷ Abbott's Trial Evidence, § 62, approved in *Carroll v. East Tennessee, V. & G. Ry. Co.*, 82 Ga. 452, 6 L. R. A. 214, 10 S. E. 163, and *Atchison, T. & S. F. R. Co. v. Burks*, 78 Kan. 515, 18 L. R. A. (N. S.) 231, 96 Pac. 950.

For approval of this view, see 2 *Mechem, Agency* (2nd Ed.), § 1784.

⁵⁸ *Atchison, T. & S. F. R. Co. v. Burks*, 78 Kan. 515, 18 L. R. A. (N. S.) 231, 96 Pac. 950.

⁵⁹ *Atchison, T. & S. F. R. Co. v. Burks*, 78 Kan. 515, 18 L. R. A. (N. S.) 231, 96 Pac. 950.

⁶⁰ *Carroll v. East Tennessee, V. & G. Ry. Co.*, 82 Ga. 452, 475, 6 L. R. A. 214, 10 S. E. 163.

⁶¹ *Atchison, T. & S. F. R. Co. v. Burks*, 78 Kan. 515, 18 L. R. A. (N. S.) 231, 96 Pac. 950.

⁶² *Hall v. Mobile & M. R. Co.*, 58 Ala. 10, 24.

the Supreme Court of the United States that "the reports made by the superintendent to the board of directors, in the course of his official duty, were competent evidence, as against the corporation, of the condition of the road";⁶³ but it is to be noted that in this case the report was made by the superintendent, and it has been said by the Kansas court that this case "probably does no more than carry out the doctrine * * * that when a report has been adopted and promulgated, as that of the corporation, it is admissible in evidence against it,"⁶⁴ and the case has been further distinguished by the Georgia court on the theory that even if the reports had not been printed and promulgated, "they would have tended to show that the company had notice of the condition of its road previously to the occurrence of the injury in controversy, and would have been admissible to charge the company with such notice, under the rule as above quoted from Abbott."⁶⁵ In some jurisdictions the position is taken that reports of the kind in question are confidential communications, and that such communications are not admissions, the rule of privilege being applied;⁶⁶ but the contrary is generally held.⁶⁷ In any event, a written report of a foreman of a switch engine to the train master of an accident which he did not witness, but which it was his duty to report, is not admissible to show the cause of the accident since a mere conclusion.⁶⁸

§ 2166. Authority implied from express authority conferred. As in case of other agents, authority to make representations or admissions may be implied from an express authority to do some act or to act in some capacity.⁶⁹ Thus it is said by the Supreme Court of the

⁶³ Vicksburg & M. R. R. Co. v. Putnam, 118 U. S. 545, 30 L. Ed. 257. See also La Abra Silver Min. Co. v. United States, 175 U. S. 423, 498, 44 L. Ed. 223.

⁶⁴ Atchison, T. & S. F. R. Co. v. Burks, 78 Kan. 515, 18 L. R. A. (N. S.) 231, 96 Pac. 950.

⁶⁵ Carroll v. East Tennessee, V. & G. Ry. Co., 82 Ga. 452, 475, 6 L. R. A. 214, 10 S. E. 163.

⁶⁶ Ex parte Schoepf, 74 Ohio St. 1, 16, 77 N. E. 276; Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 Pac. 202; In re Devela, L. R. 22 Ch. Div. 593.

⁶⁷ Atchison, T. & S. F. R. Co. v. Burks, 78 Kan. 515, 18 L. R. A. (N.

S.) 231, 96 Pac. 950; Virginia-Carolina Chemical Co. v. Knight, 106 Va. 674, 680, 56 S. E. 725.

⁶⁸ "He would have been a competent witness, provided he had been called, to prove what he saw, but his conclusions would have been incompetent from the witness stand, and no reason is perceived why they would be any more competent when stated in a letter, even though it be a report made in the line of his duty." Wabash R. Co. v. Farrell, 79 Ill. App. 508, 511.

⁶⁹ See 2 Mechem, Agency (2nd Ed.), § 1776, and also Ober v. Schenck, 23 Utah 614, 65 Pac. 1073.

United States that "the declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation."⁷⁰ Familiar examples are found in railroad companies where such positions as baggage master,⁷¹ ticket agent,⁷² station or freight agent,⁷³ conductor,⁷⁴ sleeping car porter,⁷⁵ etc.,⁷⁶ generally carry on their face the power to make statements binding on the company as to matters within their duties, in response to questions. So a telegraph operator may agree to notify the sender whether a telegram was delivered, and he binds the company by his statement that it was delivered.⁷⁷

§ 2167. Statements of particular officers or agents—In general.

The mere fact that one is a director or other officer of a corporation does not render his admissions or declarations admissible as against the corporation.⁷⁸ They must be within the scope of his authority and made in the course of the performance of corporate duties. The rule is well stated in a Minnesota case as follows: "The mere fact that one is a director, president, secretary, or other officer of a corporation, does not make all his acts or declarations, even though relating to the affairs of the corporation, binding upon the latter. Such persons are mere agents, and their declarations are binding upon the corporation only when made in the course of the performance of their authorized duties as agents, so that the declarations constitute a part of their conduct as agents, a part of the *res gestae* * * * There was no proof of authority on the part of any of the persons whose declarations are relied on, beyond the fact that they were officers or directors. Nor are the circumstances disclosed under which the representations were made. So far as appears, the statements were in no way connected or associated with the performance of any duty

⁷⁰ *Xenia Bank v. Stewart*, 114 U. S. 224, 29 L. Ed. 101.

⁷¹ *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450, statements in response to inquiry as to lost baggage; *Levi v. Missouri, K. & T. R. Co.*, 157 Mo. App. 536, 138 S. W. 699.

⁷² *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 298, 18 Am. Rep. 220.

⁷³ *Chicago & A. Ry. Co. v. Cox*, 145 Fed. 157.

⁷⁴ *St. Louis, I. M. & S. Ry. Co. v. Greenthal*, 77 Fed. 150.

⁷⁵ *Hill v. Pullman Co.*, 188 Fed. 497.

⁷⁶ *Seward v. Receivers of Seaboard Air Line Ry.*, 159 N. C. 241, 75 S. E. 34.

⁷⁷ *Western U. Tel. Co. v. Erwin*,—Tex. Civ. App.—, 147 S. W. 607.

⁷⁸ *Tompkins v. Fonda Glove Lining Co.*, 188 N. Y. 261, 80 N. E. 933.

devolving upon, or any power delegated to, the agents who made them." ⁷⁹

§ 2168. — Directors. The directors of a corporation, acting as a board, have the power to bind it by any declarations or admissions which are within their authority as the governing officers of the corporation. But the directors of a corporation have authority to bind it only when they act collectively as a board. Individual directors are not its agents, and it is well settled, therefore, that declarations and admissions of individual directors, when not acting as a board, are not binding on the corporation, nor admissible as evidence against it, ⁸⁰ unless they were acting at the time as its authorized agents, and within the scope of their authority. ⁸¹ Statements of a minority of

⁷⁹ *Browning v. Hinkle*, 48 Minn. 544, 548, 31 Am. St. Rep. 691, 51 N. W. 605.

⁸⁰ *Connecticut. Hartford Bridge Co. v. Granger*, 4 Conn. 142; *Hartford Bank v. Hart*, 3 Day 491, 3 Am. Dec. 274.

Georgia. Florida Midland & G. R. Co. v. Varnedoe, 81 Ga. 175, 7 S. E. 129.

Illinois. Grayville & M. R. Co. v. Burns, 92 Ill. 302.

Maine. Polleys v. Ocean Ins. Co., 14 Me. 141.

Massachusetts. Tripp v. New Metallic Packing Co., 137 Mass. 499.

Michigan. Peek v. Detroit Novelty Works, 29 Mich. 313.

Missouri. Kearney Bank v. Froman, 129 Mo. 427, 50 Am. St. Rep. 456, 31 S. W. 769.

New Hampshire. Pemigewasset Bank v. Rogers, 18 N. H. 255.

New York. Soper v. Buffalo & R. R. Co., 19 Barb. 310.

Pennsylvania. Stoystown & G. Turnpike-Road Co. v. Craver, 45 Pa. St. 386.

Tennessee. Jones v. Planters' Bank, 9 Heisk. 455.

Texas. East Line & R. River R. Co. v. Garrett, 52 Tex. 133.

Wisconsin. Milwaukee Brick & Ce-

ment Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838.

A director cannot, merely because of his office, bind the company by his admissions. *Farmers' Ginnery & Manufacturing Co. v. Thrasher*, 144 Ga. 598, 603, 87 S. E. 804.

In an action by a corporation for breach of a written contract to build a draw in a bridge, it was held that declarations of a director of the corporation, that it must furnish iron for the draw, were not admissible on an issue as to whether the defendant had built the bridge according to the contract, as the director had no authority to construe the contract. *Hartford Bridge Co. v. Granger*, 4 Conn. 142.

Where the directors of a corporation have referred proposals for a contract to an executive committee and superintendent to close such contract as they may deem most advantageous to the company, and they have not acted, declarations of a director, made immediately after adjournment of the meeting, that the proposals were accepted, do not bind the corporation. *Soper v. Buffalo & R. R. Co.*, 19 Barb. (N. Y.) 310.

⁸¹ *Bingel v. Brown*, 43 Colo. 281, 96 Pac. 449.

On an issue as to whether work

the directors of a corporation, admitting knowledge of illegality in a contract between the corporation and third persons, are not binding upon or admissible against the corporation, as the acts of a minority of directors are not the acts of the corporation.⁸²

§ 2169. — President. As already noted, while perhaps the majority of the states adhere to the rule that the president of a corporation has practically no power merely by virtue of his office, yet the tendency of the modern decisions in many jurisdictions is to consider the president as the head of the corporation and invested with power to transact its ordinary routine business, or at least to hold that there is a presumption in such cases that he has been invested with such authority.⁸³ It follows that whether statements made by the president are binding on the corporation often depends, at least to some extent, on the rule prevailing in the particular jurisdiction as to the inherent powers of a president. Generally, it is held that his admissions or declarations, although made on behalf of the corporation, are not binding upon it, or admissible in evidence against it, unless expressly authorized by the corporation, or made in the course of transactions within the scope of the authority conferred upon him, and a part of the *res gestae*.⁸⁴ He has “no incidental authority to

done by the plaintiff in repairing a railroad embankment was done as subcontractor under a person who had the contract from the company for construction of the embankment, or as an independent contractor with the company, evidence of statements made by a director of the company, who was a member of the building committee, in a conversation with the principal contractor, to the effect that the company did not expect the contractor to bear the expense of the repairs, was held admissible against the company as the declarations of its agent within the scope of his authority. *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484.

⁸² *Jones v. Planters' Bank*, 9 Heisk. (Tenn.) 455.

⁸³ See §§ 2010-2026, *supra*.

⁸⁴ *United States. Earle v. Munce*, 133 Fed. 1008; *Dubuque & Sioux City R. Co. v. Pierson*, 70 Fed. 303.

Alabama. *Garner v. Hall*, 122 Ala. 221; *Brush Elec. Light & Power Co. of Montgomery v. City Council of Montgomery*, 114 Ala. 433, 21 So. 960; *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 So. 353.

California. *Hawley v. Gray Bros. Artificial Stone Paving Co.*, 106 Cal. 337, 39 Pac. 609; *Bullock v. Consumers' Lumber Co.*, 31 Pac. 367.

Colorado. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248.

Georgia. *Childs v. Ponder*, 117 Ga. 553, 43 S. E. 986; *Dobbins v. Pyrolusite Manganese Co.*, 75 Ga. 450.

Massachusetts. *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305.

New York. *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Kaplan v. Friedman Const. Co.*, 148 App. Div. 14, 132 N. Y. Supp. 233; *Dunbar Box*

make any declarations, binding upon the" corporation, "in matters not within the scope of his ordinary duties";⁸⁵ nor has he power, merely by virtue of his office, to make statements binding on the corporation, where not connected with any act performed by him in behalf of the corporation.⁸⁶ Thus, he cannot bind the company by his admission of a debt where not made in the business out of which the debt grew.⁸⁷ So it has been held that a corporation is not estopped from enforcing the condition subsequent in its deed barring the maintenance of a saloon or brewery on the premises conveyed, by an ex parte waiver thereof by statements of the president without action on the part of directors.⁸⁸ He cannot toll the statute of limitations

& Lumber Co. v. Martin, 53 Misc. 312, 103 N. Y. Supp. 91; Rapp v. Hutchinson Stair Elevator Co., 87 N. Y. Supp. 459.

North Carolina. Lytton v. Marion Mfg. Co., 157 N. C. 331, Ann. Cas. 1913 C 358, 72 S. E. 1055, declaration of president that he expected employee to sue for injuries received and expected him to recover large damages; Rumbough v. Southern Improvement Co., 112 N. C. 751, 34 Am. St. Rep. 528, 17 S. E. 536.

Pennsylvania. Lombard & S. St. Passenger Ry. Co. v. Christian, 124 Pa. St. 114, 16 Atl. 628.

South Carolina. Marshall v. Columbia & E. C. Elec. St. R. Co., 73 S. C. 241, 53 S. E. 417.

Texas. Commercial Nat. Bank v. First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601.

Washington. Lewiston Water & Power Co. v. Brown, 42 Wash. 555, 85 Pac. 47.

"We know of no rule of law that will justify the admissions, or declarations, of the president of a bank as evidence to charge the bank with a liability, merely on the ground that he is president." Cunningham v. Cochran, 18 Ala. 479, 52 Am. Dec. 230.

In making representations relative to the financial responsibilities of indorsers of a note, the president of a

bank may be acting as an individual rather than as a representative of the bank. American Nat. Bank v. Warren Deposit Bank, 29 Ky. L. Rep. 195, 92 S. W. 585.

It would seem that president of a mining company cannot ordinarily bind it by admissions as to the boundaries of a claim. Overman Silver Min. Co. v. American Min. Co., 7 Nev. 312.

⁸⁵ First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 297, 19 Am. Rep. 181.

⁸⁶ Hilliard v. Upper Coos R. R., 77 N. H. 129, 88 Atl. 993.

Admissions as to corporate liability for an accident made by the president a day or two after the accident, at a casual meeting at a club, do not bind the corporation. Cobb v. United Engineering & Contracting Co., 191 N. Y. 475, 84 N. E. 395.

⁸⁷ Robins Min. Co. v. Murdock, 69 Kan. 596, 77 Pac. 596.

⁸⁸ "Where the grantor is a corporation * * * controlled and managed by a board of directors, informal statements published in the papers by its president cannot be held to govern its policy, or waive solemn reservations in its deeds of conveyance." Lewiston Water & Power Co. v. Brown, 42 Wash. 555, 559, 85 Pac. 47.

by admissions of corporate liability and a promise to pay, merely because of his office.⁸⁹

If the president, however, is intrusted with the general management of the corporation, or with the management of a particular transaction, or his authority by virtue of his office is recognized in the particular jurisdiction as extending to acts in the ordinary course of business, any admission or declaration by him within the scope of his authority is the admission or declaration of the corporation, provided it is a part of the *res gestae*.⁹⁰ Thus, it has been held that a state-

⁸⁹ *Hilliard v. Upper Coos R. R.*, 77 N. H. 129, 88 Atl. 993.

⁹⁰ *United States*. *Griffen v. Sprague Elec. Co.*, 115 Fed. 749, statements by son of president; *Tuthill Spring Co. v. Shaver Wagon Co.*, 35 Fed. 644.

Alabama. *Henry v. Northern Bank*, 63 Ala. 527.

Illinois. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297, 68 Am. Dec. 544; *Masonic Temple Safety Deposit Co. v. Langfelt*, 117 Ill. App. 652.

Massachusetts. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray 92.

Michigan. See *Keel v. Wilson Fruit Juice Co.*, 176 Mich. 345, 142 N. W. 346.

New Hampshire. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; *Low v. Connecticut & P. Rivers R. Co.*, 45 N. H. 370.

New Jersey. *Carey v. D. Wolff & Co.*, 72 N. J. L. 510, 63 Atl. 270.

New York. *Johnson v. Union Switch & Signal Co.*, 129 N. Y. 653, 29 N. E. 964, 27 Jones & S. 169; *Dunbar Box & Lumber Co. v. Martin*, 53 Misc. 312, 103 N. Y. Supp. 91; *Rapp v. Hutchinson Stair Elevator Co.*, 87 N. Y. Supp. 459.

North Carolina. *Ives v. Atlantic & N. C. R. Co.*, 142 N. C. 131, 115 Am. St. Rep. 732, 9 Ann. Cas. 188, 55 S. E. 74.

Pennsylvania. *Jones v. Yoder Land Co.*, 16 Pa. Co. Ct. 652; *McMillan v.*

Carson Hill Union Min. Co., 12 Phila. 404.

South Carolina. *Marshall v. Columbia & E. C. Elec. St. R. Co.*, 73 S. C. 241, 53 S. E. 417.

Texas. *Austin Elec. Ry. Co. v. Faust*, — Tex. Civ. App. —, 133 S. W. 449; *American Freehold Land Mortg. Co. v. Brown* (Tex. Civ. App.), 101 S. W. 856.

Virginia. *Merchant's Bank of Baltimore v. Goddin*, 76 Va. 503.

Washington. *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

Letters written by the president, bearing on the issues, are admissible where apparently within the scope of his duties. *Farmers' Oil & Guano Co. v. E. W. Rosenthal & Co.*, 10 Ga. App. 416, 73 S. E. 428.

Statements of the president of a water company, before the board of health, to explain the condition of the water supply and what was done to remedy it, prior to and at the time of an outbreak of typhoid, were held admissible in an action for sickness resulting from use of the water. *Jones v. Mt. Holly Water Co.*, 87 N. J. L. 106, 111, 93 Atl. 860.

Fraudulent representations of the president when making a corporate contract are binding on the corporation. *Lasier v. Appleton Land & Iron Co.*, 130 Mich. 588, 90 N. W. 322, 9 Det. L. N. 168.

Answers in writing by the president of a corporation at the request of a

ment by the president that the corporation had not assumed certain contracts of an individual, made in his official capacity, in the conduct of the corporate business, being in regard to a matter which naturally would be within his personal knowledge, was admissible against the corporation.⁹¹ So statements by the president of a water company to an applicant for water as to the conditions upon which it would be furnished him are binding upon the company, where it is not claimed but that he was acting in accord with the wishes of the board of directors.⁹² And letters written by the corporation, in the course of correspondence with regard to a contract, although not written by the president but by his clerk, are admissible as admissions where the president failed to repudiate the letter when brought to his notice.⁹³ So in jurisdictions where the president of a corporation has power to bind it by a contract, it has been held that he may bind it by an admission of corporate ownership of certain property inflicting injury on plaintiff.⁹⁴ Of course, if the entire management of the business relations between a corporation and a third person is turned over to its president, his declarations in regard thereto are binding on the company.⁹⁵ Thus, an admission by the president while in charge of the business of the corporation to which the admission pertained, and in the course of negotiation of such business, is binding on the corporation.⁹⁶

The admission of the president of the board of trustees, made at a meeting of the board, that at a former meeting of the board it had passed a resolution recognizing a certain indebtedness, is not binding because not a part of the *res gestae*.⁹⁷

bonding company regarding earlier conduct of an employee whom the corporation is seeking to have bonded are to be viewed in the light of representations rather than warranties. *Fidelity & Deposit Co. v. Guthrie Nat. Bank*, 17 Okla. 397, 87 Pac. 300.

A report and statement of a corporation made to Dun & Co., as to assets of the corporation, and placed on file, is *prima facie* evidence that the statements purporting to have been made by the president were in fact made by him. *Davis v. Louisville Trust Co.*, 181 Fed. 10, 30 L. R. A. (N. S.) 1011.

⁹¹ *Garfield & P. Coal Co. v. Penn-*

sylvania Coal & Coke Co., 199 Mass. 22, 42, 84 N. E. 1020.

⁹² *Lowe v. Yolo County Consol. Water Co.*, 157 Cal. 503, 108 Pac. 297.

⁹³ *Cedar Rapids Auto & Supply Co. v. Thomas Jeffrey & Co.*, 139 Iowa 7, 116 N. W. 1054.

⁹⁴ *Quinn v. North Sand Co.* (N. Y. Misc.), 140 N. Y. Supp. 390.

⁹⁵ *Head & Dowst Co. v. New England Breeders' Club*, 75 N. H. 449, 75 Atl. 982.

⁹⁶ *Itasca Cedar & Tie Co. v. McKinley*, 124 Minn. 183, 189, 144 N. W. 768, 1135.

⁹⁷ *Childs v. Ponder*, 117 Ga. 553, 45 S. E. 986.

§ 2170. — **Vice president.** The vice president of a corporation, where the president is in attendance, has practically no power unless expressly conferred upon him by the by-laws or otherwise, or unless he has been permitted to exercise certain authority so as to create apparent power.⁹⁸ It follows that ordinarily his declarations or admissions do not bind the corporation.⁹⁹ Thus, his statement that an agent of the company had authority to borrow money on its behalf is not binding on the company merely because of his office.¹ So his admissions as to the ownership of property causing the injury sued for, where not connected with the *res gestae*, are not admissible.² And the vice president of a company, by whom the deceased was employed, cannot bind the company by signing a certificate, some time after the death, stating that his death was not due to excessive use of liquor, in order to assist in the collection of a policy of insurance on his life.³ Likewise, admissions by the vice president as to the payment of a debt to the corporation are not admissible against the company where he took no part in the matter.⁴ Moreover, there is no presumption of law, it has been held, that a vice president and director of a bank, by reason of his official relation to the bank, has any power to bind the bank by his admissions.⁵

But while generally a corporation is not bound by the declarations or admissions of its vice president, yet, in the absence of the president and while acting in his stead in the business of the corporation, he may bind the corporation by his admissions and declarations,⁶ at least to the same extent that the president could have done. And if the vice president acts as agent in making loans for the corporation, he may bind it by declarations as to the application of payments on one of the notes given for the loan.⁷

⁹⁸ See §§ 2063-2070, *supra*.

⁹⁹ *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971; *Utica City Nat. Bank v. Tallman*, 63 N. Y. App. Div. 480, 71 N. Y. Supp. 861.

His declaration that the corporation was to pay the obligations of another company is not binding. *Central Elec. Co. v. Sprague Elec. Co.*, 120 Fed. 925.

¹ *Underwood v. Germania Life Ins. Co.*, 152 N. C. 274, 67 S. E. 587.

² *Patterson v. White Star Towing Co.*, 85 N. Y. Supp. 359.

³ *Parker v. C. A. Smith Lumber & Manufacturing Co.*, 70 Ore. 41, 138 Pac. 1061.

⁴ *Eagle Brewing Co. v. Colaluca*, 38 R. I. 224, 94 Atl. 680.

⁵ *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

⁶ *Vincent v. Soper Lumber Co.*, 113 Ill. App. 463.

⁷ *National Bank of Commerce of San Diego v. Schirm*, 3 Cal. App. 696, 86 Pac. 981.

§ 2171. — **Secretary or treasurer.** The powers of a secretary⁸ or treasurer⁹ of a corporation are very limited, except in so far as expressly conferred upon them by by-laws, resolution of the directors or otherwise. It follows that, unless their powers are considerably extended by such by-laws or otherwise, their representations and admissions are ordinarily not binding on the corporation because not within the scope of their powers.¹⁰ Thus it has been held that the mere fact that a person is secretary and treasurer of a corporation does not make his admission of payment evidence against the corporation,¹¹ although it would seem that under some circumstances the treasurer should be deemed to have power to bind the company by admissions as to payments. So a secretary of a building and loan association cannot bind the company by a statement to a member that the latter was through with his payments.¹² And a statement by the secretary of a corporation, in response to a question of a prospective purchaser of a part of a lease and bond owned by the corporation as to whether there had been a meeting of the directors ordered to pass on said lease and bond, where the secretary had no knowledge that the questioner contemplated a purchase, has been held not binding on the company because a mere casual conversation.¹³ Likewise, declarations of the secretary as to the amount due on a mortgage held by the corporation are not admissible in a suit on the mortgage, unless it is shown that he had authority to bind the corporation by such

⁸ See §§ 2071-2086, *supra*, and see also *Chicago v. Stein*, 252 Ill. 409, Ann. Cas. 1912 D 294, 96 N. E. 886, and *Taylor v. Sutherlin-Meade Tobacco Co.*, 107 Va. 787, 14 L. R. A. (N. S.) 1135, 60 S. E. 132.

⁹ See §§ 2087-2095, *supra*.

¹⁰ *Colorado. Extension Gold Mining & Milling Co. v. Skinner*, 64 Pac. 198.

Illinois. Sears v. Illinois Wesleyan University, 28 Ill. 183.

Massachusetts. Tripp v. New Metallic Packing Co., 137 Mass. 499.

New York. Harvey v. West Side El. Ry. Co., 13 Hun 392. See also *Rider & Driver Pub. Co. v. Rough Rider Horseshoe Co.*, 84 App. Div. 283, 82 N. Y. Supp. 765.

Pennsylvania. Johnston v. Elizabeth Building & Loan Ass'n, 104 Pa. St. 394.

South Dakota. Roberts v. Minneapolis Threshing Mach. Co., 8 S. D. 579, 585, 59 Am. St. Rep. 777, 67 N. W. 607.

Vermont. Hardwick Sav. Bank & Trust Co. v. Drenan, 72 Vt. 438, 48 Atl. 645.

The treasurer of a corporation cannot, unless authorized, bind the corporation by an admission that the condition of a contract upon which money is to become payable by the corporation has been performed. *Tripp v. New Metallic Packing Co.*, 137 Mass. 499.

¹¹ *Blanchard-Carlisle Co. v. Garritson*, 43 Ind. App. 303, 87 N. E. 151.

¹² *Haspel v. McLaughlin-Lyons*, 38 Pa. Super. Ct. 334.

¹³ *Franklin v. Havalena Min. Co.*, 18 Ariz. 201, 157 Pac. 986.

admissions, it not being sufficient to show that as secretary he had charge of the books and accounts of the corporation.¹⁴ Moreover, the secretary or treasurer cannot bind the corporation by his declarations or admissions unless they accompany the doing of some authorized act.¹⁵ Thus, the declarations of a treasurer made at a time when not acting for the corporation in connection with the transactions concerning which the declarations were made, are not admissible.¹⁶

On the other hand, declarations made in the course of business intrusted to the secretary or treasurer and in respect thereto are binding.¹⁷ Thus one or both may be intrusted either with the general management of the business or with the management of a particular part of it, and in such a case their declarations or admissions, within the scope of their authority, are binding.¹⁸ And admissions relating to the bookkeeping of the corporation, which was a matter clearly within the duties of the secretary, made by him, are admissible against the company.¹⁹ So a corporation may be deemed bound by a sworn appraisal of the value of its capital stock made by its treasurer and secretary for taxation purposes.²⁰

§ 2172. — General manager. The general manager or superintendent of a corporation may bind it by admissions within the scope of his general authority, or by declarations made in the course of any transaction which is within his authority.²¹ Mr. Justice Harlan, in

¹⁴ Johnston v. Elizabeth Building & Loan Ass'n, 104 Pa. St. 394.

¹⁵ In re Coventry Evans Furniture Co., 166 Fed. 516.

¹⁶ Stanton v. Baird Lumber Co., 132 Ala. 635, 32 So. 299.

¹⁷ Fowles v. Aetna Loan Co., 86 Mo. App. 103.

¹⁸ Davis v. Georgetown Bridge Co., 1 Cranch C. C. (U. S.) 147, Fed. Cas. No. 3,637; Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Electric Light Co., 162 N. Y. 67, 56 N. E. 505, aff'g 12 N. Y. App. Div. 199, 42 N. Y. Supp. 781; Kilpatrick v. Home Building & Loan Ass'n, 119 Pa. St. 30, 12 Atl. 754; Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 45, 43 S. E. 295. See also Ring v. Long Island Real Estate Exch. & Inv. Co., 93 N. Y. App. Div. 442,

87 N. Y. Supp. 682, aff'd without opinion in 184 N. Y. 553, 76 N. E. 1107.

¹⁹ Smith v. Sinbad Development Co., 11 Cal. App. 253, 104 Pac. 706.

²⁰ People v. Miller, 90 N. Y. App. Div. 588, 86 N. Y. Supp. 420.

²¹ Alabama. Home Ice Factory v. Howells Min. Co., 157 Ala. 603, 48 So. 117.

Arkansas. Choctaw, O. & G. R. Co. v. Rolfe, 76 Ark. 220, 88 S. W. 870.

California. Bullock v. Consumers' Lumber Co., 31 Pac. 367.

Georgia. Planters' Rice Mill Co. v. Olmstead, 78 Ga. 586, 3 S. E. 647; Tifton, T. & G. R. Co. v. Butler, 4 Ga. App. 191, 60 S. E. 1087.

Maryland. Pennsylvania R. Co. v. Orem Fruit & Produce Co., 111 Md. 356, 73 Atl. 571.

considering statements and reports by superintendents of a mine, states the rule as follows: "The superintendents placed at the mines were its representatives in charge of the company's property. What they did at the locality of the property in and about its management were the acts of the company, so far as those acts were within the scope of the business intrusted to them. So what they said while engaged in managing and with reference to the management of the property, particularly what they reported to their principal in respect to the condition of the property and their acts in the course of the business, constitute part of the *res gestae* of the controversy between the parties."²² A general manager may admit or deny the justness

Massachusetts. *McGenness v. Adriatic Mills*, 116 Mass. 177.

Michigan. *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143.

Missouri. *Roth v. Continental Wire Co.*, 94 Mo. App. 236, 68 S. W. 594.

New Jersey. *Hill v. Adams Exp. Co.*, 77 N. J. L. 19, 71 Atl. 683.

New York. *Interboro Brewing Co. v. Independent Consumers' Ice Co.*, 93 Misc. 24, 156 N. Y. Supp. 410; *Spelman v. Fisher Iron Co.*, 56 Barb. 151.

South Carolina. *People's Oil & Fertilizer Co. v. Charleston & W. C. Ry.*, 83 S. C. 530, 65 S. E. 733.

Texas. *Cleghon v. Barstow Irrigation Co.*, 41 Tex. Civ. App. 531, 93 S. W. 1020.

Virginia. *Lynchburg Tel. Co. v. Booker*, 103 Va. 594, 50 S. E. 148.

Washington. *Harvey v. Sparks Bros.*, 45 Wash. 578, 88 Pac. 1108.

See generally 2 *Mechem, Agency* (2nd Ed.), § 1780.

Admissions by general sales manager of automobile company that an automobile sold by it would not develop the horse power represented to the purchaser were held admissible against the corporation in *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863.

A corporation may be deemed bound by the statements of its general manager with respect to corporate affairs. *Carey v. D. Wolff & Co.*, 72 N. J. L. 510, 63 Atl. 270; *Chilcott v.*

Washington State Colonization Co., 45 Wash. 148, 88 Pac. 113.

His declarations made at the time of an act on behalf of the corporation are admissible. *Western Investment & Land Co. v. First Nat. Bank of Denver*, 23 Colo. App. 143, 128 Pac. 476.

The president and managing agent of a corporation, authorized to manage its business, have authority to bind it by admissions in regard to the fulfillment of contracts, so as to render such admissions competent evidence against it. *Bullock v. Consumers' Lumber Co. (Cal.)*, 31 Pac. 367.

By failure of the general manager of a corporation to assert ownership, in behalf of the corporation, of certain lumber, which in fact belonged to it, while with his full knowledge the lumber was assessed as the property of the president and sold for failure to pay the assessment, the corporation was held estopped to assert claim to the lumber as against a purchaser thereof at the tax sale. *Wisconsin Oak Lumber Co. v. Laursen*, 126 Wis. 484, 105 N. W. 906.

That declarations, in Georgia, need not be part of *res gestae*, see *Citizens' Bank of Tifton v. Timmons*, 15 Ga. App. 815, 84 S. E. 232.

²² *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 498, 44 L. Ed. 223.

of an account when presented to him for payment.²³ So admissions and representations of the general manager concerning the authority of a corporate agent to make contracts are within the scope of his authority.²⁴ And what was said by a general manager during the progress of negotiations for the purchase of goods for the corporation binds the company.²⁵ His declarations that a particular servant is incompetent are admissible not only to show the knowledge of the corporation of such incompetency but also to itself show the incompetency.²⁶ His declaration that a debt would be paid by the company, made in the discharge of his duty, is admissible to show a recognition of the claim,²⁷ and his statements to a creditor of the seller of property to the corporation that such property was still the property of the seller are admissible against the corporation.²⁸ And it has been held that the fact that one has been held out by a company as its sales manager is sufficient to make his admission as to the liability of the company to pay a commission evidence against the company without further evidence as to his duties as sales manager.²⁹ So the admission of a foreman in charge of a department, of knowledge of the condition of an appliance in use in such department, made in connection with the business, is admissible to show the knowledge of the corporation;³⁰ and in one case the statements of the general manager of a railroad as to the condition of the road were held admissible where made upon being informed of a wreck by an agent of the road.³¹ Moreover, on the theory that the manager of a company was upon the scene of an accident in the discharge of duties devolving upon him, his statement after the accident, in response to a question, that the wire with which the injured person came in contact belonged to his company was held admissible "not as a part of the *res gestae* but because made by an officer in the performance of his duty."³² Statements by a general manager that he had agreed with one who was acting both for himself and for another to whom the statements were

²³ *Booker-Jones Oil Co. v. National Refining Co.*, — Tex. Civ. App. —, 132 S. W. 815.

²⁴ *Wales-Riggs Plantations v. Caston*, 105 Ark. 641, 152 S. W. 282.

²⁵ *Gerlach Mercantile Co. v. Hughes-Bozarth-Anderson Co.*, — Tex. Civ. App. —, 189 S. W. 784.

²⁶ *Borderland Coal Co. v. Kerns*, 171 Ky. 626, 188 S. W. 783.

²⁷ *Pitts v. D. M. Steele Mercantile Co.*, 75 Mo. App. 221.

²⁸ *O. S. Paulson Mercantile Co. v. Seaver*, 8 N. D. 215, 77 N. W. 1001.

²⁹ *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395, 404, 75 N. E. 695.

³⁰ *Cudahy Packing Co. v. Hays*, 74 Kan. 124, 85 Pac. 811.

³¹ *Krogg v. Atlanta & West Point R. Co.*, 77 Ga. 202, 213, 4 Am. St. Rep. 79.

³² *Lynchburg Tel. Co. v. Booker*, 103 Va. 594, 604, 50 S. E. 148.

made, on a certain sum as compensation for services rendered, have been held admissible.³³ Where a general manager with power to settle claims against the corporation represented pending negotiations, that if claimant would delay suing until the negotiations could be completed, the company would not take advantage of the statutory limitation for bringing actions, with the intent that the injured party should rely thereon and on which the injured party did rely in delaying the institution of action, the corporation cannot take advantage of the statute.³⁴

On the other hand, declarations or admissions by him, not expressly authorized by the directors, and not within the scope of his authority, are not binding on the corporation, although made on its behalf.³⁵ Thus, a superintendent of a mine has no authority to make any statements as to the location of a boundary line, and any such statements made by him are not binding on the corporation.³⁶ So the declaration of a general manager of a railroad company as to the purpose to which condemned land was to be put by the company has been held not admissible on the theory that "he was not an agent of the corporation for the purpose of making admissions."³⁷ So the superintendent of a coal company cannot, merely by virtue of his office, admit or create corporate liability for an accident.³⁸ Thus it has been said that the superintendent of a mine "had no more power to bind his employer, the defendant corporation, by admissions as to the cause of the accident, than had Smith, the man operating the lever and the brake. He was not the defendant corporation, and did not represent it for the purpose of making admissions as to the cause of the accident that had already occurred. If he made an admission as to such cause, he was not, in doing so, performing on behalf of the defendant corporation any duty by law imposed upon it, and was not,

³³ *Chileott v. Washington State Colonization Co.*, 45 Wash. 148, 88 Pac. 113.

³⁴ *Holman v. Omaha & C. B. Railroad & Bridge Co.*, 117 Iowa 268, 62 L. R. A. 395, 94 Am. St. Rep. 293, 90 N. W. 833.

³⁵ *California. Relley v. Campbell*, 134 Cal. 175, 66 Pac. 220.

Louisiana. Hill v. New Orleans, O. & G. W. R. Co., 11 La. Ann. 292.

Michigan. Hartford Iron Min. Co. v. Cambria Min. Co., 80 Mich. 491, 45 N. W. 351.

North Carolina. Smith v. North Carolina R. Co., 68 N. C. 107.

Texas. Blain v. Pacific Exp. Co., 69 Tex. 74, 6 S. W. 679.

Washington. Cosh-Murray Co. v. Adair, 9 Wash. 686, 38 Pac. 749.

³⁶ *Ferguson v. Basin Consol. Mines*, 152 Cal. 712, 93 Pac. 867.

³⁷ *Wellington v. Boston & M. R. R.*, 158 Mass. 185, 33 N. E. 393.

³⁸ *Northern Cent. Coal Co. v. Hughes*, 224 Fed. 57.

as to such admission, the representative of his employer.”³⁹ But it has been held that a statement by the general manager to an injured employee admitting the liability of the company for the injury and giving as a reason for not paying that all of the employees were insured, is admissible in an action to recover damages for the injuries.⁴⁰ His admissions are not binding where a mere narration of a past transaction, and having no reference to nor explaining or characterizing any act in which he was engaged, and where not a “spontaneous exclamation” within the exception to the rule of hearsay.⁴¹ So statements not made in any transaction in the line of his duty but occurring in a casual conversation are not binding on the company.⁴² So it has been held that he has no power to state at a bankruptcy sale that his corporation has no right or title to the property, so as to estop the corporation from thereafter asserting title to the property.⁴³ And it is held that an agent running the plant of a water company could not bind it by admissions to third persons made when a fire alarm was turned in, that he did not have a bit of water in the stand-pipe, on the theory that he was not acting as agent in any sense when he made the statements.⁴⁴

§ 2173. — Cashier. Declarations by the cashier of a bank within the scope of his authority may be binding upon it.⁴⁵ The cashier of a bank binds the bank by any admission or declaration which is within the general scope of his authority as the executive officer of the bank, but not by declarations or admissions not connected with

³⁹ *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700, 74 Pac. 307.

⁴⁰ *Egner v. Curtis, Towle & Paine Co.*, 96 Neb. 18, L. R. A. 1915 A 153, 146 N. W. 1032. See also *Anderson v. Duckworth*, 162 Mass. 251, 38 N. E. 510.

⁴¹ *Johnson v. McLain Inv. Co.*, 79 Kan. 423, 131 Am. St. Rep. 302 with note, 100 Pac. 52.

⁴² *Beunk v. Valley City Desk Co.*, 128 Mich. 562, 87 N. W. 793.

⁴³ *Asheville Supply & Foundry Co. v. Machin*, 150 N. C. 738, 64 S. E. 887.

⁴⁴ “If at the time Duvall had been doing something for the master, and there was a dispute as to what he did,

then his statements while doing the act would be competent against the master, as illustrating its character, on the ground of *re gestae*.” *Shelbyville Water & Light Co. v. McDade*, 122 Ky. 639, 647.

⁴⁵ *Alabama*. *First Nat. Bank of Lineville v. Alexander*, 161 Ala. 580, 50 So. 45.

Connecticut. *Munson v. DeTamble Motors Co.*, 88 Conn. 415, L. R. A. 1915 A 881, 91 Atl. 531.

Oregon. *Bank of Gresham v. Walch*, 76 Ore. 272, 147 Pac. 534.

South Dakota. *National Bank of Wheaton v. Elkins*, 159 N. W. 60.

Virginia. *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262.

the ordinary business of the bank, or, though connected with its business, not within the scope of his authority.⁴⁶ Admissions of the cashier of a bank that a note held by the bank was held only for collection are binding,⁴⁷ as are admissions of the cashier as to a certificate of deposit.⁴⁸ But the cashier's statement as to the deposit of a bond has been held not one made in the ordinary course of business and therefore inadmissible.⁴⁹ Declarations merely narrative of a past transaction, as for instance a statement by the cashier to a third person as to a receipt of money for deposit, are not admissible where the question at issue is the making of the deposit.⁵⁰ So statements by the cashier made when not transacting the business of the

46 United States. *United States v. City Bank of Columbus*, 21 How. 356, 16 L. Ed. 130; *Bank of Metropolis v. Jones*, 8 Pet. 12, 8 L. Ed. 850; *Fidelity & Deposit Co. of Maryland v. Courtney*, 103 Fed. 599.

Delaware. *Lieberman v. First Nat. Bank of Wilmington*, 8 Del. Ch. 229, 40 Atl. 382.

Iowa. *Harrison County v. State Sav. Bank*, 127 Iowa 242, 103 N. W. 121.

Massachusetts. *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111.

Michigan. *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453, holding that a bank was estopped to deny the truth of a statement by its cashier that it had no lien on certain stock.

Nebraska. *Grant v. Cropsey*, 8 Neb. 205; *Merchants' Bank of Lincoln v. Rudolf*, 5 Neb. 527.

New Hampshire. *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67; *Pemigewassett Bank v. Rogers*, 18 N. H. 255.

New York. *Gould v. Cayuga County Nat. Bank*, 56 How. Pr. 505.

Ohio. *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 78 Am. Dec. 296.

Pennsylvania. *Mapes v. Second*

Nat. Bank of Titusville, 80 Pa. St. 163; *Harrisburg Bank v. Tyler*, 3 Watts & S. 373.

Vermont. *Manufacturers' Bank of Troy v. Scofield*, 39 Vt. 590.

Wisconsin. *Consolidated Milling Co. v. Fogo*, 104 Wis. 92, 80 N. W. 103; *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis. 663, 7 Am. Rep. 107.

England. *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394.

See also *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502 (where a bank was held bound by the admission of its cashier that there were funds in the bank to pay a check); *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 96, 43 Am. Dec. 300 (where it was held that admissions by the cashier of a bank that forged bills were genuine, and promises to pay what the bank did not owe, were not binding on the bank).

47 Bank of Commerce of Chanute v. Sams, 96 Kan. 437, 152 Pac. 28; *Bank of Polk v. Wood*, — Mo. App. —, 186 S. W. 1186.

48 Maupin v. Mobridge State Bank, — S. D. —, 161 N. W. 332.

49 Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 So. 106.

50 Bank of Phoenix City v. Taylor, — Ala. —, 72 So. 264.

bank are not admissible against the bank.⁵¹ And casual declarations of the cashier after the purchase of a note, to show that he had notice of some infirmity in the note, are not admissible where not made in connection with the transaction of bank business.⁵² So a bank cannot be charged with representations made by its cashier in a transaction wherein his interests and those of the bank are adverse. Where, therefore, one gave notes for the accommodation of the cashier, payable to the bank, and later gave renewal notes upon the nonpayment of the original notes, upon action being brought on the renewal notes the bank was not chargeable with the representations made by the cashier with reference thereto.⁵³

Where certain representations are made by an assistant cashier with regard to the duties, accounts and general status of the defaulting president to secure a bond from a surety company, and the bond is issued by the company and accepted by the bank in reliance thereon, it is not open to the receiver of the bank appointed later, in bringing action on the bond, to raise question as to the authority of such bank officer to bind the bank by the said representations and still be allowed to have recovery on the bond written by the surety company on the strength thereof.⁵⁴

§ 2174. — Miscellaneous agents. Whether particular agents or employees of a corporation, such as conductors, motormen, engineers, station agents, telegraph dispatchers or operators, claim agents, and the like, may bind the corporation, depends of course upon the scope of their powers and duties and the *res gestae* rule.⁵⁵ No attempt is made in this connection to collect all the decisions in regard to such agents or employees, since outside of the scope of this work. However, a few illustrative cases are noted. A station or freight agent may make statements binding on the company as to matters within the scope of his duties, as for instance in regard to shipments,⁵⁶ but not

⁵¹ Lee v. Marion Sav. Bank, 108 Iowa 716, 78 N. W. 692.

⁵² First State Bank of Storden v. Pederson, 123 Minn. 374, 143 N. W. 980.

⁵³ State Sav. Bank of Ionia v. Montgomery, 126 Mich. 327, 85 N. W. 879.

⁵⁴ Willoughby v. Fidelity & Deposit Co., 16 Okla. 546, 7 L. R. A. (N. S.) 548, 8 Ann. Cas. 603, 85 Pac. 713.

⁵⁵ See Carpenter v. Chicago, R. I. & P. R. Co., 126 Iowa 94, 101 N. W. 758, train dispatcher and telegraph operator; Anderson v. Great Northern R. Co., 126 Minn. 352, 148 N. W. 462, claim agent.

⁵⁶ Central Railroad & Banking Co. v. Skellie, 86 Ga. 686, 12 S. E. 1017; Green v. Boston & L. R. Co., 128 Mass. 221; Prew v. South Dakota Cent. Ry. Co., — S. D. —, 156 N. W. 582.

where outside the scope of his powers and duties.⁵⁷ Thus, a station agent has no authority by virtue of his position to bind the railroad company by an admission as to its liability for damages caused by fire.⁵⁸ But where a person was unloading goods from a wagon into a railroad car at night, a statement by the station agent, in response to an inquiry, that there was no train coming and that he could go ahead with the work, was admissible as a declaration made in the course of the agent's duty.⁵⁹

Declarations of the conductor of a train are sometimes admissible where made while performing duties imposed upon him,⁶⁰ but not where outside of his duties⁶¹ nor generally where made after an accident, although within a very short time, as to the cause of the accident.⁶² Even a statement made by a street car conductor to an injured passenger while the latter was being removed from the car, as to the cause of the accident, has been held not admissible merely on the ground that the conductor was the agent and representative of the street car company and made the statement by authority to a passenger who had the right to demand the cause of injury.⁶³ Statements of a conductor as to the cause of an accident are admissible, however, it seems, although made a considerable time after the accident, where it was his duty to ascertain the cause of the accident and report to his superior officers, since in such a case the statements are made while in the discharge of his duties.⁶⁴

Ordinarily, a motorman of a street railway company is not the agent of the company for the purpose of making admissions,⁶⁵ and declarations made by him as to how an accident happened are almost

⁵⁷ *New York & B. Transp. Line v. Lewis Baer & Co.*, 118 Md. 73, 84 Atl. 251; *Boston & M. R. R. v. Ordway*, 140 Mass. 510, 5 N. E. 627.

⁵⁸ *Warner v. Maine Cent. R. Co.*, 111 Me. 149, 47 L. R. A. (N. S.) 830, 88 Atl. 403.

⁵⁹ *Chicago & A. Ry. Co. v. Cox*, 145 Fed. 157.

⁶⁰ *Chicago & A. R. Co. v. Gore*, 202 Ill. 188, 95 Am. St. Rep. 224, 66 N. E. 1063, aff'g 105 Ill. App. 16; *Beckham v. Southern Ry. Co.*, 50 S. C. 25, 27 S. E. 611; *Missouri, K. & T. R. Co. of Texas v. Russell*, 40 Tex. Civ. App. 114, 88 S. W. 379; *San Antonio & A.*

P. R. Co. v. Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

⁶¹ *St. Louis, I. M. & S. R. Co. v. Carlisle*, 34 Tex. Civ. App. 268, 78 S. W. 553; *Blunt v. Montpelier & W. River R. R.*, 89 Vt. 152, 94 Atl. 106.

⁶² *Blackman v. West Jersey & S. R. Co.*, 68 N. J. L. 1, 52 Atl. 370.

⁶³ *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26.

⁶⁴ *Callahan v. Chicago, B. & Q. R. Co.*, 47 Mont. 401, 412, 47 L. R. A. (N. S.) 587, 133 Pac. 687.

⁶⁵ *Morse v. Consolidated R. Co.*, 81 Conn. 395, 71 Atl. 553.

invariably excluded on the ground that they are a mere narration of a past event, although made shortly after the injury.⁶⁶

Evidence of a remark by the foreman of a wrecking crew of which plaintiff was a member when injured, that he expected the accident, was held admissible where it tended to show knowledge of the company of the defective machinery causing the injury.⁶⁷ So the declarations of a foreman as to the condition of the machinery injuring an employee have been held admissible.⁶⁸

A loose conversation concerning features of the business of an insurance company, with the general solicitor of the company, which had no necessary connection with the duties of its law officer and respecting which it is not otherwise shown that he had any authority to make admissions on its behalf, is not admissible against the company.⁶⁹

Where a railroad company was sued for delay in transporting cattle, declarations of the trainmen as to the cause of the delay were held admissible where within the line of their respective duties and made during the time they were charged with the duty of propelling the train.⁷⁰

In regard to statements made by soliciting agents, while in the transaction of their business and touching the business, it has been said that they are just as binding "as if those statements had been made by the highest officer of the company, or had been solemnly adopted by the directors or stockholders of the company and entered on the minutes of their meeting."⁷¹

§ 2175. Statements by stockholders or members. Since the stockholders or members of a corporation are not its agents, and have no power to bind it, merely by reason of their membership, the admissions or declarations of individual stockholders or members are not admissible against the corporation unless they are acting as its agents in the matter and are authorized to do so.⁷² "It is certainly true,"

⁶⁶ *Morse v. Consolidated R. Co.*, 81 Conn. 395, 71 Atl. 553; *Blue Ridge Light & Power Co. v. Price*, 108 Va. 652, 62 S. E. 938.

⁶⁷ *Missouri, O. & G. Ry. Co. v. Davis*, — Okla. —, 154 Pac. 503.

⁶⁸ *Lee Hong v. Schoenwald*, 86 Wash. 326, 150 Pac. 436.

⁶⁹ *New York Life Ins. Co. v. Rankin*, 162 Fed. 103.

⁷⁰ *Atchison, T. & S. F. R. Co. v.*

Consolidated Cattle Co., 59 Kan. 111, 52 Pac. 71.

⁷¹ *State v. Armour Packing Co.*, 173 Mo. 356, 382, 61 L. R. A. 464, 96 Am. St. Rep. 515, 73 S. W. 645.

⁷² *California. Dean v. Ross*, 105 Cal. 227, 38 Pac. 912; *Shay v. Tuolumne Water Co.*, 6 Cal. 73.

Connecticut. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n, 77 Conn. 83, 58 Atl. 467; *Fairfield*

said the court in a Connecticut case, "as a general proposition, that the admissions of individuals affecting the interests of a corporation of which they are members cannot have the effect of an admission by the corporations."⁷³ However, if the stockholder making the admissions owns all the stock of the company it is held that his admissions are binding on the corporation.⁷⁴

§ 2176. Effect of officer's declaration as against stockholders.

When declarations of an officer of a corporation are within the scope of his authority, so as to be binding upon and admissible against the corporation, they are clearly binding as against individual stockholders in so far as they are represented by the corporation; but they cannot affect the existing rights of nonassenting stockholders as creditors or mortgagees of the corporation, for in this respect they are not represented by the corporation, but are like any other creditor or mortgagee. Thus, it was held in a late Illinois case that representations, made by the president of a corporation while negotiating a sale of corporate bonds, that the mortgage securing them was a first lien on the property of the corporation, although made within the scope of his authority, were not admissible against a stockholder, not present when they were made, to affect his rights as mortgagee of the corporation under a prior mortgage, or the rights of his assignee.⁷⁵

County Turnpike Co. v. Thorp, 13 Conn. 173; **Hartford Bank v. Hart**, 3 Day 495, 3 Am. Dec. 274.

Georgia. **New Ebenezer Ass'n v. Gress Lumber Co.**, 89 Ga. 125, 14 S. E. 892; **Mitchell v. Rome R. Co.**, 17 Ga. 574.

Maine. **Ruby v. Abyssinian Religious Soc. of Portland**, 15 Me. 306; **Polleys v. Ocean Ins. Co.**, 14 Me. 141.

Ohio. **Hogg v. Zanesville Mfg. Co.**, Wright, 139.

⁷³ **Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n**, 77 Conn. 83, 58 Atl. 467.

⁷⁴ **Rutz v. Obear**, 15 Cal. App. 435, 115 Pac. 67.

⁷⁵ **Mullanphy Sav. Bank v. Schott**, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640, aff'g 34 Ill. App. 500.

[Chap. 42 is concluded in Vol. 4.]

